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Consequently I must hold that the decision of the learned Additional Judge of the District Court of Kyaukse, that the defendant-respondent was entitled to resist the plaintiff-appellant's suit for redemption, is correct. This appeal fails and is dismissed with costs, advocate's fee in this Court three gold mohurs.

### CIVIL REVISION.

*Before Mr. Justice Dunkley.*

1934  
 July 10.

### MAUNG BA KYAW AND ANOTHER v. NANIGRAM JAGANATH.\*

*Loan by registered instrument—Extension of time and mode of payment—Oral agreement—Admissibility of evidence of—Tender of debt—Stoppage of interest—Money at the disposal of creditor—Creditor's refusal to take proposed payment—Tender unnecessary.*

The time and mode of repayment of a loan are material and essential parts of the contract of loan, and an oral agreement altering the time and mode of repayment cannot be proved where all the terms of the loan are contained in a registered instrument.

*Abdulla Khan v. Husain*, 40 I.A. 31 ; *Sadar-ud-din Ahmad v. Chajju*, I.L.R. 31 All. 13 ; *Tika Ram v. Deputy Commissioner of Bara Banki*, 26 I.A. 97—*referred to*.

A proper tender of money due will stop the running of interest, but after such tender, whilst the debtor must be ready to pay the money whenever the creditor demands it, he is not bound to keep the tendered amount apart for the creditor to take it when he desires.

*Jagat Tarini Dasi v. Chaki*, I.L.R. 34 Cal. 305—*referred to*.

If a creditor unequivocally refuses a proposed payment of the amount due the debtor is not bound to make a formal tender thereof.

*Chatikani v. Zamindar of Tunj*, 50 I.A. 41—*referred to*.

*Hay* for the applicants.

*N. N. Burjorjee* for the respondent.

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\* Civil Revision No. 184 of 1934 from the judgment of the Small Cause Court, Rangoon, in Civil Regular No. 1409 of 1933.

DUNKLEY, J.—This suit was brought in the Small Cause Court of Rangoon for the recovery of two months' interest due on a registered mortgage deed for a principal sum of Rs. 50,000. The defence of the defendants-applicants was that they had made a valid tender of the whole amount remaining due on the mortgage, and that therefore, under the provisions of section 84 of the Transfer of Property Act, interest had ceased. They admitted their liability for one month's interest only. According to the terms of the registered deed, the amount due on the mortgage was repayable on the 3rd December 1932, and it has been held by the learned Second Judge of the Small Cause Court that on the 3rd January 1933 the defendants-applicants made a genuine tender to the plaintiff-respondent of the amount due on the mortgage, but the respondent refused to accept the amount.

The real case of the respondent rests upon an alleged verbal agreement, entered into between him and the applicants on the 26th November 1932, whereby the time of repayment was extended till the end of 1933 and the mode of repayment was to be by instalments of Rs. 2,500 a month. On behalf of the applicants it is urged that, because this agreement was not by a registered document, evidence thereof is inadmissible and it cannot be proved, and this contention must, in my opinion, prevail. The authorities quoted in support thereof are: *Tika Ram v. Deputy Commissioner of Bara Banki* (1); *Saiyid Abdullah Khan v. Saiyid Basharat Husain* (2) and *Sadar-ud-din Ahmad and others v. Chajju and others* (3). The learned Judge of the Small Cause Court admitted evidence of this agreement on the

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(1) (1899) 26 I.A. 97 at p. 100.

(2) (1912) 40 I.A. 31.

(3) (1908) I.L.R. 31 All. 13 at p. 16.

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ground that it was not a modification of the terms of the registered deed and that it referred to an agreement collateral to the transaction of mortgage. This is a contention which is, in my opinion, untenable, for the rate of interest and the time and mode of repayment of the principal are material and essential parts of a deed of mortgage. No alteration in these terms, as contained in the registered deed, can be validly made except by a registered document. Therefore oral evidence regarding this alleged agreement of the 26th November 1932 ought to have been excluded.

The learned Judge of the Small Cause Court has held that there was a valid and genuine tender of the amount due on the mortgage on the 3rd January 1933, but he has further held that it was not merely sufficient to tender the money but that the money must be put at the disposal of the mortgagee to take it whenever he desired. This seems to me to be putting the matter too high. No doubt it is correct that in order that a tender should operate to stop the running of interest there must be a continued readiness to pay the amount due on the mortgage. See *Jagat Tarini Dasi v. Naba Gopal Chaki* (1). But it is unnecessary to keep the money immediately at the disposal of the mortgagee provided that it can be found whenever the mortgagee sees fit to demand it, and it has been held by their Lordships of the Privy Council in *Chalikani Venkatarayanam and others v. Zamindar of Tuni and others* (2) that if a mortgagee unequivocally refuses a proposed payment of the amount due the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing

(1) (1907) I.L.R. 34 Cal. 305.

(2) (1922) 50 I.A. 41.

subsequently. It is quite clear that in this case there was such an unequivocal refusal by the respondent to accept the amount due on the mortgage.

It is plain from the correspondence and from the respondent's deposition in this case that even at the time that the case was brought he was, relying unreservedly upon the terms of the invalid agreement of the 26th November 1932, and would have refused payment of the whole amount due on the mortgage at any time, even while the present suit was going on. It has been urged on behalf of the respondent that the applicants' failure to pay into Court the one month's interest which was admittedly due when the suit was brought shows that there was no continuous readiness on the part of the applicants to pay the amount due on the mortgage. No doubt in a suit upon the mortgage, if the applicants desired to plead that interest had ceased to run because of a previous valid tender of the amount due, that plea would have to be accompanied by payment into Court, otherwise the tender would be ineffectual. See *Haji Abdul Rahman v. Haji Noor Mahomed* (1). But this suit was not a suit on the mortgage. It was a suit brought in the Small Cause Court for the recovery of interest only, and the payment of one month's interest into Court would not raise the inference of readiness to pay the whole amount due on the mortgage, nor would the failure to pay this amount into Court raise the contrary inference that the applicants were not prepared to pay. As a matter of fact, the correspondence between the parties shows that the applicants were continuously ready to discharge the mortgage until the respondent had in the most unequivocal terms declined to accept the

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(1) [1891] I.L.R. 16 Bom. 141.

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payment. On the 29th December a letter was sent to the advocate for the respondent stating that the applicants intended to pay the whole amount due on the mortgage on the 3rd of January, and tender was made in accordance with this letter. When that tender was refused a further letter was sent to the advocate for the respondent on the 4th January, in which it was stated in the plainest terms that as the tender made on the previous day had been refused the applicants were no longer liable to pay any further interest, and it was further requested that the respondent might be advised to receive payment on any day during the usual business hours. The reply to this letter was to the effect that the respondent was only ready and willing to accept payment of the accrued interest. On the 7th January a further letter was sent, in which an offer of payment of the whole amount due was again made and the respondent was requested to appoint time and place for payment thereof. The reply to this, on the same date, was as follows :

" My clients have been ready and willing and are ready and willing to accept payment of the Rs. 225 only for interest accrued due whenever the same is paid. They will not accept Rs. 30,000 being the principal sum of the registered mortgage, but they will accept part of the same by the instalments as agreed upon. I trust this will stop further correspondence."

Consequently it is clear that the applicants were ready and willing to pay the amount until they were convinced from the respondent's advocate's letter of the 7th January that acceptance thereof would be refused under any circumstances. I must therefore hold that there was a valid tender sufficient to cause interest on the mortgage to cease, and that therefore the suit of the respondent was wrongly brought.

He is, however, entitled to a decree for the admitted amount.

This application in revision is allowed, and instead of the decree of the Small Cause Court there will be a decree for a sum of Rs. 225. The defendants-applicants are entitled to their costs in both Courts, advocate's fee in this Court five gold mohurs.

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### APPELLATE CIVIL.

*Before the Hon'ble Mya Bu, Offg. Chief Justice, and Mr. Justice Baguley.*

ABDUL HAMID AND OTHERS

v.

ABDUL AZIZ AND ANOTHER.\*

1934  
 Aug. 27.

*Bengalee Mahomedan—Scheme of management of Mosque—Persons of mixed descent—Retention of Indian language, dress and customs—Adoption of Burmese language and customs of Zerbadis—Eligibility as trustee.*

The scheme for the management of the Bengalee Sunni Mosque of Bassein provided that of the six trustees three should be Bengalees, and that the remaining three should be taken from among the members of other communities who worshipped at the mosque. The committee of appointment was to consist of six Bengalee Sunni Mahomedan worshippers resident in Bassein, and the remaining five were to be members of other communities who worshipped at the said mosque. The first trustee appointed by the Court was a Bengalee Mahomedan born of a Burmese mother.

*Held*, that a Bengalee Mahomedan of mixed descent, as long as he retained the use of the Indian language, dress, and habits, and moved in the social circle of Indians of pure blood, belonged to the Bengalee Mahomedan community, and was eligible for election under the scheme. When a descendant of an Indian male parent adopted the Burmese language and dress, and the customs of a Zerbadi, and associated with Zerbadis, he ceased to be a member of the Bengalee Mahomedan community.

*Campagnac* for the appellants.

*Khan* for the respondents.

\* Civil First Appeal No. 61 of 1934 from the order of the District Court of Bassein in Civil Misc. No. 68 of 1932.