
(1914) 07 MAD CK 0004
In the Madras High Court

Thevaraya Reddy and Others

APPELLANT

Vs

Venkatachala Pandithan and Others

RESPONDENT

Date of Decision : 17-07-1914

Acts Referred:

Transfer of Property Act, 1882 — Section 83, 84

Citation : AIR 1915 Mad 256 : 25 Ind. Cas. 96 : (1914) 1 LW 595

Hon'ble Judges : Tyabji, J; Ayling, J

Bench : Division Bench

Judgement

Ayling, J.—The suit out of which this second appeal arises was brought to recover the amount due on a mortgage-bond (Exhibit A)

executed on 27th May 1895 by the defendants Nos. 1 and 2 (1st and 2nd appellants) in favour of the late Ramakrishna Pandithan, manager of the

family to which the plaintiff and the defendants Nos. 7 to 9 belong. After the mortgagee's death, as the appellants wished to discharge the

mortgage and as his legal representatives were disputing among themselves, the appellants paid the full amount due into Court on 1st October

1903 u/s 83 of the Transfer of Property Act. Notice appears to have been given as required by that section, but as the mortgagee's

representatives could not settle their disputes, the money remained in Court till about a year later when the appellants withdraw it. The present suit

was filed on 6th August 1910. The sole question is whether u/s 84 of the Transfer of Property Act, interest on the mortgage-debt ceases to run

from the date of the deposit in Court (1st October 1903) in spite of the subsequent withdrawal.

2. The lower Appellate Court differing from the District Munsif and relying on Krishnasami Chettiar v. Ramasami Cheitiar 8 Ind. Cas. 763 : 35 M.

44 : 9 M.L.T. 131 : (1910) M.W.N. 89 has held that it does not cease to run.

3. I have had the advantage of perusing the judgment of my learned brother and fully appreciate the cogency of much of the reasoning therein

contained. I am, however, regretfully constrained to differ as to the decision we should come to in this case.

4. I think we should follow the ruling in the reported case above quoted. I am unable to effectively distinguish between that case and the present

case, and the reasoning and conclusion of the two learned Judges in the reported case seem to me equally applicable to the one before us. Even if I

were satisfied (which I am not) that their view was wrong, I do not think it should be departed from without a reference to a Full Bench.

5. I would dismiss the second appeal with costs.

6. As regards the memorandum of objections, I see no reason why the plaintiff should not get his costs throughout and would allow the

memorandum of objections, and order accordingly.

Tyabji, J.

7. The only question of this second appeal is, whether the mortgagees when seeking to recover the mortgage-debt can claim interest on the

mortgage amount for any period after the 1st October 1903. On that date the mortgagors had deposited into Court the sum that was due for

principal and interest on the mortgage. The sum was not taken out of Court by the mortgagees and was withdrawn about a year later by the

mortgagors.

8. The decision of the case depends primarily upon Section 84 of the Transfer of Property Act.

9. The following words of Lord Dunedin express the well-recognised principle with so much clearness and authority that I will cite them at length,

before dealing with the section: "It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be

answered is always the question arising upon the very words of the Statute. It is often useful in, striving to test the facts of a particular case to

express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the

original words. Most of the erroneous arguments which are put before the Courts in this branch of the law will be found to depend on disregarding

this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a Judge in considering the facts of the case before

him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly

represented as resting upon authority, which would have little chance of being accepted if tried by the words of the Statute itself:" Plumb v.

Cobden Flour Mills Co. Limited (1914) A.C. 62 : 83 L.J.K.B. 197.

10. Section 84 of the Transfer of Property Act deals with two courses of action, the law relating to each of which may have to be kept distinct: (1)

tender and (2) deposit, in Court. The portion of the section now relevant is as follows:

11. When the mortgagor...has...deposited in Court u/s 83 the amount remaining due on the mortgage, interest on the principal money shall

cease...as soon as the mortgagor... has done all that has to be done by him to enable the mortgagee to take such amount out of Court.

12. It seems to me that the section is sufficiently clear. There seems to me to be, no necessity for referring to English decisions on the point. The

applicability of the section can be determined by findings on such issues as I shall indicate later. I observe, however, that several Indian decisions

have referred to English cases and English rules of law in this connection and in order to understand those Indian decisions and to determine how

far and to what effect they are binding on me, I shall have to refer to the English Law.

13. The lower Appellate Court has disallowed to the mortgagor, the benefit of this provision on the ground that Krishnasami Chettiar v. Ramasami

Chettiar 8 Ind. Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 lays down that Section 84 presupposes the continuance of the deposit

to justify the claim to the cessation of interest." The District Munsif in the Court of first instance, on the other hand, considered Velayuda Naicker

v. Hyder Hussan Khan Sahib (1877) 6 Otto U.S. 580 : 24 Law. Ed. 678 applicable and held that interest had ceased to run after the deposit.

14. Before dealing with the decided cases I must point out that in order that the view of the Subordinate Judge may be upheld one of two things

must on a consideration of the wording of the section have taken place: either " (1) that the mortgager has not deposited the amount in Court, or

(2) that he has not done all that had to be done by him to enable the mortgagee to take such amount out of Court.

15. These are the two conditions precedent to the applicability of Section 84. I will consider them separately. With reference to the first condition,

can it be said that when he has deposited the money and subsequently withdrawn it, he must in all circumstances be deemed not to have deposited

at all? It is true that a deposit may be made and withdrawn under such circumstances that the mortgagor is unable to avail himself of the

opportunity of taking the money out of Court. Had Section 84, therefore, contained only this first requirement for the cessation of interest there

might have been some temptation to read into this part of the section words implying that the deposit must be made under proper circumstances

and continued for a sufficient length of time, so that the mortgagee may be enabled to take such money out of Court. But the second condition

precedent contained in the section seems to me to take away any excuse that might have existed for falling into any such temptation, the portion of

Section 84 which requires the mortgagor to do all that has to be done by him makes it, in my opinion, unnecessary, even if it were otherwise

permissible, to put the strain of such a construction as I have alluded to on those words of the section in which the first condition precedent is

couched. Some observations of the learned Judges who decided Krishnasawmi Chettiar's case 8 Ind. Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 :

(1910) M.W.N. 89 touch this point. I shall consider them later.

16. The second condition mentioned above whether the mortgagor has done all that has to be done by him to enable the mortgagee to take the

amount deposited out of Court involves questions which cannot, in my opinion, be dealt with without a consideration of the circumstances in each

particular case. It is obvious that one of the things that has to be done by the mortgagor for enabling the mortgagee to take the money out of Court,

is to let the money remain in Court for a reasonable time after notice to the mortgagee. This may not be the only matter to be considered, but the

issue must, in my opinion, as I have already said, be worded and decided primarily with reference to the frame and the language of the section. The

Subordinate Judge not having done so, I should have felt no doubt as to the necessity of a finding on an issue so worded but for the contention of

the respondent that the non-continuance of the deposit is conclusive against the mortgagor irrespective of the finding that would be given on the

issue so framed. This contention is based on a sentence occurring in *Krishnasami Chettiar v. Ramasami Chettiar* 8 Ind. Cas. 763 : 35 M. 44 : 9

M.L.T. 131 : (1910) M.W.N. 89.

17. With reference to what I am about to say in a later portion of my judgment, I may add that the mortgagors in the case under appeal brought the

mortgage-money into Court without any delay after the plaint had been filed in the suit out of -which this appeal arises. The mortgagors also alleged

that they had tendered the money out of Court and had expressed their readiness and willingness to pay it in a written statement filed by them in a

partition suit, Original Suit No. 35, of 1908 on the file of the Subordinate Judge's Court at Trichinopoly. I must, therefore, in order to deal with the

contention of the respondents last referred to, consider *Krishnasami Chettiar's* case 8 Ind. Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 : (1910)

M.W.N. 89 and the principles on which the decision proceeds. As I have the misfortune to differ from my learned brother as to the effect and

binding force of that decision, it is necessary to examine the decision with some care. I think it also desirable to refer more fully to some rules of

English Law to which the judgment briefly alludes, not for the purpose of elucidating the meaning of Section 84 (which seems to me to be clear),

but for understanding the basis on which *Krishnasami Chettiar v. Ramasami Chettiar* 8 Ind. Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 : (1910)

M.W.N. 89 proceeds.

18. In *Krishnasami Chettiar v. Ramasami Chettiar* 8 Ind. Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 the mortgagor was the

plaintiff in a redemption suit. He did not bring into Court the mortgage amount at the time when he instituted the suit, but relied for cessation of

interest on the fact of a previous deposit without accounting for the money alleged to have been deposited. Upon the pleadings the High Court

assumed with the District Judge that the plaintiff had withdrawn the deposit on the mortgagee having refused to take the money. This statement in

the judgment of the High Court is made clear by the judgment under appeal of Mr. F. D. P. Oldfield, then District Judge. He says: "It is not clear

what happened to the money whether it remained in Court, or was drawn by

plaintiff. As, however, the present plaint contains no reference to any tender by payment into Court at its date or to the money being available for the 1st defendant in Court as equivalent to it, it must be assumed that it was not there and that no tender was made. A plea of tender before action must be accompanied by the payment into Court after action, otherwise the tender is ineffectual.

19. The last sentence of the District Judge's judgment which I have cited is taken verbatim from the head-note in Haji Abdul Rahman v. Haji Noor

Mahomed 16 B. 141 a decision of Telang, J., which, however, is not cited by the District Judge nor by the High Court. The District Judge's

remarks refer, I presume, to the allegations contained in paragraph 8 of the plaint which I find from the records to have been as follows: In spite of

the tender of the above mortgage amount to the defendant and the demand made on several occasions on the defendant, and in spite of (my)

having subsequently deposited the same in Miscellaneous Petition No. 840 of 1906 of this Court on 11th July 1906 u/s 83 of the Transfer of

Property Act, the said defendant objected to receive the said amount and deliver possession of the land to me. Therefore, the aforesaid petition

was dismissed on 27th July 1906 and it was also ordered that the said amount will not carry interest from the above date.

20. The view of the law as laid down in Haji Abdul Rahman v. Haji Noor Mahomed 16 B. 141 at pp. 149 by Telang, J., that a plea of tender

before action must be accompanied by a payment into Court after action is supported by the observations in Jagat Tarini Dasi v. Naba Gopal

Chaki 34 C. 305 : 5 Cri.L.J. 270, where it is said: Now it is well settled that while a tender does not extinguish the indebtedness, a valid tender,

which is kept good, stops the running of interest after the tender; see Gyles v. Hall (1726) 2 P. Wms. 878, Wallace v. M'Connell (1839) 13

P.U.S. 130 : 10 Law. Ed. 135, and Bissell v. Heyward (1877) 6 Otto U.S. 580 : 24 Law. Ed. 678," and assuming that the law as laid down in the

Transfer of Property Act is the same as the English Law--on which point I think it unnecessary to express any opinion--I think I cannot do better

than refer to the following exposition of the English Law by Lord, C.J. Wilde, delivering the considered judgment of the Court of the Common

Pleas in Dixon v. Clarke (1848) 5 C.B. 365 : 5 Dawl. & L. 155 : 16 L.J.C.P. 237 :

75 R.R. 747 : 136 E.R. 919: ""in actions of debt and assump

sit, the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (toujours prist) to perform entirely the

contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself

precluded a complete performance, by refusing to receive ""it. And, as, in ordinary easel; the debt is not discharged by such tender and refusal, the

plea must not only go on to allege that the defendant is still ready (uncore prist), but must be accompanied by a protest inouriam of the money

tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the unaore prist and

profert inouriam) yet he will answer the action in the sense that he will recover judgment for his costs of defence against the plaintiff,--in which

respect the plea of tender is essentially different from that of payment of money into Court. And, as the plea is thus to constitute an answer to the

action, it must, we conceive be deficient in none of the requisite qualities of a good plea in bar.

21. ""With respect to the averment of toujours prist, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can show that an

entire performance of the contract was demanded and refused at any time when, by the terms of it, he had a right to make such a demand, he will

avoid the plea. Hence, if a demand of the whole sum originally due is made and refused, a subsequent tender of part of it is bad, notwithstanding

that, by-part payment, or by other means, the debt may have bean reduced in the interim to the sum tendered. And this is the principle of the

decision of Cotton v. Goodwin 7 M.&W. 147 : 9 D.P.C. 763 : 10 L.J. Ex. 243. If, however, the demand were of a larger sum than that originally

due under the contract, a refusal to pay it would not falsify the toujours prist, even though the amount demanded wore made up of the sum due

under the contract, and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of Brandon v. Newington

3 Q.B. 915 : 3 G.& D 194 : 12 L.J.Q.B. 20 : 7 Jur. 60 : 114 E.R. 760 : 61 R.R. 436 and Hesketh v. Fawcett 11 M.&W. 356 : 12 L.J. Ex. 326 :

2 Dowl. N.S. 827 : 63 R.R. 629 which appear to overrule Tyler v. Bland 9 M.&W. 338 : 1 D 608 : 11 L.J.Ex. 257.

22. In *Kinnaird v. Trollops* 42 Ch.D. 610 : 58 L.J. Ch. 556 : 60 L.T. 892, Stirling, J., (as he then was) cites this passage and observes:

It, therefore, appears, that, if the plea of tender is to be successful at law, two matters are requisite--first, that the defendant must not only make

the tender, but must always be ready to perform entirely the contract on which the action is founded; and secondly, that the plea must be

accompanied by a payment into Court. ****It, therefore, appears at law that a plea of tender, to be successful, must be accompanied by a

payment into Court. No such payment has been made; and even if it be assumed in the defendant's favour that a formal offer of the money before

action brought was waived by the plaintiffs, still the summons of the 12th of November 1833 (which seeks a month for payment) cannot, I

conceive, be treated as equivalent to a plea of tender; and, even if it could, the defence would fail by reason of its not being followed, still less

accompanied, by a payment into Court.

23. The decisions, therefore, seem to lay down that the rule contained in the Transfer of Property Act, that interest shall cease on tender or

deposit, is itself suspended if it is proved by the mortgagee that after this tender or deposit the mortgagor was not always ready to pay, and such

absence of readiness may appear from such circumstance as his not bringing the money into Court when he sues, as in *Krishnaswami Chettiar v.*

Ramasami Chettiar 8 Ind. Cas. 763 : 35 M. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89, or is sued, as in *Kinnaird v. Trollope* 42 Ch.D. 610 : 58 L.J.

Ch. 556 : 60 L.T. 892, or failure to pay on a subsequent demand by the mortgagee, as suggested in *Velayuda Naick v. Ryder Hussain Khan Saib*

3 Ind. Cas. 729 : 33 M. 100 : 6 M.L.T. 262 : 19 M.L.J. 648. See also *Haji Abdul Rahman v. Haji Noor Mahomed* 16 B. 141.

24. If this is so, then the facts of the case in *Krishnaswami Chettiar v. Ramasami Chettiar* 8 Ind. Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 : (1910)

M.W.N. 89 being as I have stated, the rules of law applicable to them may be very different from those applicable to the facts now before us, In

the words of Lord Chancellor King, the contrary being proved that the mortgagor was not ready to pay it, therefore," the interest must run on:

Gyles v. Hall (1726) 2 P. Wms. 878. I may respectfully say that the fact in itself that the mortgagor did not bring the money into Court seems to

me, on the authorities to which I have referred, to supply a sufficient reason for coming to a different conclusion on the facts before the Court in

Krishnasanti Chettiar v. Ramasami Chettiar 8 Ind. Cas. 763 : 35 M. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89, from the conclusion to which I think

the law must bring us in the present case. But it must be conceded that some observations in Krishnasami Chettiar v. Ramasami Chettiar 8 Ind.

Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 support the contention of the respondents and I must now deal with those

observations.

25. The Judges of the High Court in Krishnasami Chettiar v. Ramasami Chettiar 8 Ind. Cas. 763 : 35 Ma. 44 : 9 M.L.T. 131 : (1910) M.W.N.

89, accept, the findings of fact above referred to and proceed to consider whether the mortgagor had done all that had to be done by him." They

point out that "neither Section 83 nor 84 states expressly what are all the things the mortgagor has to do;" and that though the mortgagor may be at

liberty to withdraw the money "even before the mortgagee appears to claim it," if he does so, he certainly cannot stop interest from running. After

this the judgment seems to me to proceed on a reasoning which, taking the words in themselves apart from the facts of the case, appears to be

inconsequential. For in considering what is included in that "all that has to be done by the mortgagor," it is apparently assumed that because the

bare deposit and the bare notice u/s 83 (without adding thereto the lapse of sufficient time to allow the mortgagee to take the amount deposited)

cannot constitute that "all", therefore, various other considerations become relevant. These considerations fall under five heads. In referring to them

I will adhere, as far as possible, to the language of the judgment, first, they say, that there is nothing in Section 83 to preclude the mortgagee

changing his mind after having once refused to take the money and applying for payment. Conceding without admitting that the mortgagee is at

liberty so to change his mind, is that any criterion for determining what has to be done by the mortgagor in order to enable the mortgagee to take

the amount out of Court? This concession would apparently place the mortgagor in a worse position if he deposits the money in Court than if he

tenders it out of Court. Secondly, they ask: Why should the mortgagor who has taken back the money and possibly made use of it or derived

some other benefit from it be entitled to the cessation of interest from the date of the original deposit?" This consideration may not perhaps be

available in interpreting an act of the Legislature. Assuming that it is available, is it not a sufficient answer that the mortgagor has to pay interest not

because he derives benefit from the mortgage-money, but either because he has agreed to pay interest or for some such reason or policy as

underlies the Interest Act or the Indian Trusts Act, Section 23; and that the interest ceases not because the mortgagor does not make use of the

money but for such reasons as are alluded to in the judgment of Wilde, C.J., above referred to and in the Indian Contract Act, Section 38?

Thirdly, they say that in the case of tender," as distinct from deposit, continued readiness to pay has been held in England to be necessary for the

cessation of interest." The danger of referring to English Law instead of our own Acts has frequently been adverted to. In regard to this particular

matter the Judges themselves seem to point to a distinction between deposit and tender. If the English Law of tender is to be relied upon for the

law of deposit, and it seems to me that if it can be relied upon at all it must be for the principles contained in it which with the necessary changes

would be applicable to both tender and deposit, then the observations of Wilde, C.J., in *Dixon v. Clark* (1848) 5 C.B. 365 : 5 D & L. 155 : 16

L.J.C.P. 237 : 75 R.R. 747 : 136 E.R. 919 clearly show that if the money has once been tendered and the debtor avers his continued readiness to

pay, evidencing that readiness by bringing the money into Court, the burden of proof is on the person who alleges that the mortgagor was not

always ready and willing, though the burden is not placed on the creditor at all unless at the time of suit the debtor has paid into Court. In

Krishnasami Chettyar v. Ramasami Chettyar 8 Ind. Cas. 763 : 35 M. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 the mortgagor did not bring the

money into Court: that fact, taken in conjunction with the findings, would have been sufficient, according to the decisions I have cited and in the

view of the law which was evidently taken in that case, viz., that English law would be referred to for interpreting the section of the Transfer of

Property Act to put the plaintiff out of Court. The fourth consideration contained in the judgment is to this effect: assuming that there is a departure

in India from the rule of English Law as to continued readiness after tender, still the decision in *Velayuda Naicker v. Hyder Mussan Sahib* 3 Ind.

Cas. 729 : 33 M. 100 : 6 M.L.T 262 : 19 M.L.J. 648 where this departure is suggested, itself contains the observation: It is not alleged in this case

that there was a subsequent demand by the mortgagee for the amount and that the mortgagor failed to pay." This would indicate that the

divergence between Indian and English Law is not so complete as to make an allegation of failure of readiness to pay irrelevant under the Indian

Law. I have already referred to the rule of English Law, that the effect of tender may be nullified by absence of continued readiness to pay. It may

be that the Transfer of Property Act, Section 83, does not preclude the incorporation therein of this rule of English Law. But if the observations in

Krishnaswami Chettiar v. Ramasami Chettiar 8 Ind. Cas. 763 : 35 M. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 are to be read in complete

detachment, restricted neither by reference to the facts of the case nor by a fuller consideration of the English Law to which the Judges briefly

allude, then the Transfer of Property Act would be much less favourable to the mortgagor after deposit than the English Law is after tender. For

under English Law once the mortgagor proves tender in the past and avers his present willingness to pay, his continued willingness to pay in the

interim is presumed and interest ceases to run from the date of the tender, unless the mortgagee alleges and proves that the mortgagor was at some

time in the interval unready or unwilling to pay, whereas according to the argument for the respondents though the appellants tendered the money

by depositing in Court and tendered it again in the written statement already referred to and though it is not found that after the deposit and tender

they were not ready or not willing to pay the money, still interest must continue to run. Assuming that Krishnasami Chettiar v. Mamasami Chettiar 8

Ind. Cas. 763 : 35 M. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 must be followed in regard to the point that the English Law is to be relied upon for

interpreting Section 84 of the Transfer of Property Act, I think that the English Law must be looked for in the English decisions and that it would be

wrong to take the brief reference to that law which was sufficient for the facts then before the Court as being conclusive for all subsequent cases.

Finally it is said in Krishnasami Chettiar v. Ramasami Chettiar 8 Ind. Cas. 763 : 35 M. 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 that if the law as

regards tender is different in India from that in England, less favourable to the mortgagee in India than in England, still the law is on a clearer footing

as regards deposit." The reasons for this last proposition are stated as follows:
"We cannot understand the words "has deposited in Court" to

include has deposited in Court and subsequently withdrawn." It is quite conceivable that tender may be complete even though after it is once

rejected there is no subsequent readiness to pay, but we cannot speak of a person having deposited in Court, if he has withdrawn his deposit.

With great respect I am unable to follow this reasoning. In the first place, it is not suggested in *Velayuda Naicker v. Hyder Hussan Khan* 3 Ind.

Cas. 729 : 33 M. 100 : 6 M.L.T 262 : 19 M.L.J. 648 that the Indian Law differs from the English Law in that in India tender may be complete

even though after it is once rejected there is no subsequent readiness to pay." For the English Law itself makes the tender prima facie complete,

unless the party impeaching its completeness shows an absence of readiness to pay. Secondly, with reference to the construction of the Act, the

alternative to the construction put upon it in *Krishnasami Chettiar v. Mamasami Chettiar* 8 Ind. Cas. 763 : 35 M. 44 : 9 M.L.T. 131 : (1910)

M.W.N. 89 is not that the words has deposited in Court" mean has deposited in Court and subsequently withdrawn." The construction that is

necessary for supporting the view apparently taken by the learned Judges is that "has deposited" means "has deposited and has allowed the deposit

to remain continuously in Court" presumably until it lapses to Government: see *Champat Singh v. Jangu Singh* 16 Ind. Cas. 830 : 17 Cri.L.J. 14 :

16 C.W.N. 793 : 12 M.L.T. 482 : 10 A.L.J. 379 : (1912) M.W.N. 1151 : 23 M.L.J. 738 : 14 Bom. L.R. 1223.

26. I see no warrant for this construction. And the words "as soon as" suggest that no further events have to be considered.

27. Finding, as I do, that the law is laid down with sufficient clearness by the Legislature in Section 84 of the Transfer of Property Act and that the

decision in *Krishnasami Chettiar v. Ramasami Chettiar* 8 Ind. Cas. 763 : 35 M.a 44 : 9 M.L.T. 131 : (1910) M.W.N. 89 had reference to facts

which do not furnish any analogy to the facts now before us, it seems to me that the present decision should not be affected by the observations to

which I have referred; especially as those observations allude to English Law and are, therefore, capable of. being read in the light of the fuller

statement of that law in the English decisions. To these considerations I must add that unless so read, those observations seem to me to conflict

with Velayuia Naiker v. Hyler Hussan Khan 3 Ind. Cas. 729 : 33 M. 100 : 6 M.L.T 262 : 19 M.L.J. 648. They can be distinguished only on the

ground that the law relating to tender out of Court is quite different from the law relating to deposit in Court, a ground for distinction which for the

purposes of the rules which are now under consideration cannot, it seems to me, be supported on principle.

28. For the reasons I have already given I would ask for findings on the following issues:

1. Whether the defendants Nos. 1 to 6 did all that had to be done by them to enable the mortgagees to take out of Court the amount deposited in

Court on the 1st of October 1903 by the defendants Nos. 1 to 6 u/s 83 of the Transfer of Property Act?

2. If the first issue is answered in the affirmative then: whether the defendants Nos. 1 to 6 were at any time after withdrawing the said amount from

the Court not ready or unwilling to pay the sum. due to the mortgagees?

29. For the reasons that I have already given the onus of the 2nd issue would, in my opinion, lie on the respondents.

30. The questions, whether, if the 2nd issue were answered in the negative, interest would continue to run on the mortgage amount in spite of

Section 84 of the Transfer of Property Act, and if so, at what rate, and for what period, do not arise at the present moment, even if my view on the

other points were not correct, and I express no opinion on them.

31. I have already given my reasons for thinking that the second appeal should not be dismissed. Assuming that the interpretation I put on Section

84 of the Transfer of Property Act is wrong, I should be inclined to think that the second appeal fails on a technical ground and I should, therefore,

make no. order as to costs and would also dismiss the memorandum of objections with costs.

32. In the result the second appeal and the memorandum of objections are dismissed with costs.