1945 *Present:* **Soertsz S.P.J.**

RATNAYAKE, Appellant, *and* GUNATILEKE, Respondent.

297—C. R. Kandy, 33,673.

Contract—Tender—Agreement by defendant to transfer land to plaintiff on payment of money—Tender of the money in court without previous extra-judicial offer—Validity—Appropriate order regarding costs, interest, &c.—Prescription—Plaint filed within the period of limitation—Summons on defendant served after the period—Claim not barred.

Where the defendant had agreed to transfer a portion of land to the plaintiff on payment of a certain sum of money and the plaintiff brought the money into court in the first instance within the stipulated time and asked for a conveyance of the land—

Held, (i) that a previous extra-judicial offer of the money and a refusal by the defendant to accept it was not a necessary condition precedent to the institution of the action and the deposit of the money; subject to an appropriate order in regard to interest, costs, &c., in a particular case, a deposit made in court within the stipulated time would be sufficient without a previous offer;

(ii) that as the plaintiff did not prove tender prior to action he should not be given costs of the trial court.

Held, further, that as the plaint was filed and the money deposited within the period of prescription the plaintiff's claim was not barred on the ground that summons was not served on the defendant till after the period of limitation.

APPEAL from a judgment of the Commissioner of Requests, Kandy.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the defendant, appellant.

Cyril E. S. Perera (with him *M. H. M. Naina Marikar*), for the plaintiff, respondent.

Cur. adv. vult.

May 17, 1945. SOERTSZ S.P.J.—

The material facts upon which this appeal rests are these:—The defendant, appellant, by a deed of agreement dated November 2, 1935, contracted with one R. M. Ukku Banda to transfer to him after final decree had been entered all that share or portion of land that the appellant would be allotted by the final decree in partition case No. 46,783 D. C., Kandy, which was pending at the date the deed was entered into. The rights of Ukku Banda under this deed were sold in execution to one Yusoof who in turn sold those interests to the plaintiff, respondent. By final decree dated October 8, 1937, the defendant, appellant, got lot 3 in plan XI dated August 20, 1937. The plaintiff instituted this action on September 6, 1943, and asked for a deposit note to enable him to deposit a sum of Rs. 150 which he alleged was the amount on payment of which

he would be entitled to a transfer. A deposit note No. 40736 was accordingly issued and a Kachcheri receipt referred to in the journal shows that on October 6, 1943, a sum of Rs. 150 was deposited in the Kachcheri to the credit of this case.

The learned Commissioner held that this constituted a sufficient tender to entitle the plaintiff to a transfer and he gave judgment accordingly.

On appeal, Mr. Thambiah contended that the plaintiff's action failed and should have been dismissed because the plaintiff had not proved that he had tendered the amount due to the appellant, *before* the plaintiff came into court. In other words, Mr. Thambiah's contention is that it is not open to a party in the position of the appellant here to bring the money into court in the first instance within the stipulated time and to ask for a conveyance. He submits that a previous offer of the amount and a refusal by the other party to accept it is a necessary condition precedent to the institution of the action and the deposit of the money. It seems to me that if this proposition is sound it would put a premium on evasiveness for a party, by making himself inaccessible during the relevant period, could contrive to deprive the other party of a cause of action and so defeat him. Mr. Thambiah sought to support his argument with a passage from the judgment of Innes C.J. in the case of *Odendaal v. Du Plessis* [1] in which it is laid down—

> " Protection even more effective than that given by the doctrine of tender in England was afforded in Holland by the process of judicial deposit (*consignatie*) derived from the Civil Law. A debtor who considered that the claim of his creditor was either excessive as to *amount* or unwarranted as to terms was entitled *after due offer* (*oblatie*) to make a judicial deposit of the sum or the thing for which he admitted liability. The deposit was placed in charge of some person approved by the Court, generally one of its officers. *There could be no deposit without a previous offer, for as remarked by Huber . . . . consignatie could have no place unless there had been an unwarranted refusal of a prior oblatie* ".

Mr. Thambiah relies particularly on the words I have italicized, but I do not see that they support his argument. Innes, C.J. was examining the case of a defendant who on being sued for damages in £5,000 on account of assault and defamation admitted the assault but denied the slander and brought £100 into court in settlement of any damages sustained. The trial court found that both assault and defamation had been established and awarded £100 damages in respect of both injuries and gave the plaintiff costs up to the date of tender, but ordered him to pay the defendant all costs incurred thereafter. The question on appeal was whether the plaintiff was entitled to all costs on the ground that the tender relied on by the defendant was not an adequate tender in that it was in respect of the assault only, and was conditional inasmuch as it was offered in full settlement. The answer given by Innes C.J. and Solomon J.A. to that question was that in regard to the first objection

[1] *S. A. L. R.—App. Div. 1918 p. 475.*

that the defamation was denied, the plea showed that although the defamation was denied the tender of the £100 was intended to cover both heads of the claim and in regard to the second objection they held that " the object of the process (*i.e., consignatie*) was to enable a debtor to protect himself against interest, costs and other consequences of default by discharging his obligation. The purpose was to extinguish the claim and the offer and deposit would always therefore be in full settlement. That condition was inherent in their nature ". From this it is clear that a previous offer is not necessary to give the plaintiff a cause of action but such an offer if shown to have been made before action and if held to be sufficient as to its amount and its terms would entitle the plaintiff to costs, interest, &c., by putting the defendant *in mora*. If on the other hand the defendant proves that no offer had been made and that if it had been made he would have accepted it and that it was not due to his default that such an offer was not made he would get the costs incurred, in the unnecessary litigation. Mr. Thambiah's proposition that an extra-judicial offer is necessary before an action with *consignatie* could be instituted is refuted by another part of the same judgment in which it is stated that " under certain circumstances an actual tender (*realis oblatie*) made *in judicio* would be enough to prevent interest from commencing to run. Huber goes further—an offer *in judicio* (*rechtelijk in een praees gesihiedt*) he thinks has the same result as an extra-judicial *oblatie* followed by *consignatie*. Zutphen is of the same opinion for he says that an offer made judicially on which issue is joined has the force of an extra-judicial offer supplemented by *consignatie*. I would therefore hold that subject to an appropriate order in regard to interest, costs, &c., in a particular case, a deposit made in court within the stipulated time is sufficient without a previous offer.

The next question is whether in view of the fact that although the plaint was filed and the money deposited on September 6, 1943, that is to say, within six years of the final decree which was entered on October 8, 1937, the plaintiff's claim is barred because summons was not served on the defendant, appellant, till December 14, 1943, that is to say—after the six year period of limitation. In my opinion the answer to the question should be in the negative. The filing of the plaint constituted the institution of the action and the deposit then made placed the money *in custodia legis*. Any delay that occurred thereafter in the course of the routine of the business of the court cannot fairly be imputed to the plaintiff. *Actus curiae neminem gravabit.*

It only remains to say that as the plaintiff has failed to lead any evidence to show that he had previously tendered the money due and that the defendant refused to accept it and as the defendant denies that such an offer was made I would direct that each party bear his costs in the court below. Subject to that variation the appeal is dismissed with costs.

Appeal dismissed.