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Thus the sentence in the ruling, "a notice issued under this section, therefore, pertains to those items only which have escaped assessment and to no others", unless torn out from their factual context, cannot be deemed to throw any light on the question to be answered in this case.

After having given most anxious consideration to the various grounds advanced before us, and for the reasons stated above, the question referred to this Court must be answered in the affirmative. We are, therefore, of the view that in the circumstances of the case, when a notice is issued under section 34, based on a certain item of income, that had escaped assessment, it is permissible for the Income-tax authorities to include other items in the assessment, in addition to the item, which had initiated and resulted in the notice under section 34. The assessee shall pay costs to the Department which we assess at Rs. 250.

Bhandari, C. J.

BHANDARI, C.J.—I agree.

APPELLATE CIVIL

Before Tek Chand, J.

KALI CHARAN,—*Plaintiff-Appellant.*

versus

RAVI DATT, AND OTHERS,—*Defendants-Respondents*

Second Appeal from the Order No. 45 of 1953.

1957

Feb. 18th

Code of Civil Procedure (Act V of 1908)—Order 20 rule 14—Pre-emption Money—Deposit—Mere presenting of an applicaion to deposit money—Provisions of Order 20 rule 14 Civil Procedure Code whether complied with—Tender, meaning of—Contract Act (IX of 1872) Section 38.

Held, that a mere application to court requesting, without the actual production of the money, that the pre-emption money be deposited does not amount to compliance of the

provisions of order 20 rule 14 of the Code of Civil Procedure.

Held further, that word "tender" has a definite legal signification and it imports, not merely the readiness and the ability to pay or perform at the time and place mentioned in the contract, but also the actual production of the thing to be paid or delivered over, an offer of it to the person to whom the tender is to be made, and an unqualified refusal to accept. In its broader sense, it is an offer to perform a contract, but usually it is an offer of money to a person holding a claim in satisfaction of such a claim without any stipulation or condition. A mere offer to pay does not constitute a valid tender; the law requires that the tenderer has the money present and ready, and produces and actually offers to the other party. The law insists upon an actual, present, physical offer; it is not satisfied by a mere spoken offer to pay, which although indicative by present possession of money and intention to produce it is unaccompanied by any visible manifestation of intention to make the offer good.

Second Appeal from the order of Shri Ishwar Dass, District Judge, Hissar, dated the 18th August, 1953, affirming that of Shri William Augustine, Senior Sub-Judge, Hissar, dated the 5th March, 1953, dismissing the application.

SHAMAIR CHAND, for Appellant.

P. C. PANDIT, for Respondents.

JUDGMENT

Tek Chand, J.

TEK CHAND, J.—This is a second appeal from order filed by plaintiff-appellant in this Court from the judgment of the District Judge, Hissar, dated 18th August, 1953, affirming the order of the Senior Subordinate Judge, dated 5th March, 1953, refusing to grant extension of time for deposit of the purchase-money, as allowed by the decree, into Court. The brief facts of this case are that on 27th January, 1953, a decree was passed for possession by pre-emption on payment of Rs. 3,655 into Court on or before 4th March, 1953. On the 4th March, 1953, the last

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day for the payment of the purchase-money, the plaintiff, in whose favour the decree was passed, presented an application, stating that a sum of Rs. 2,655 representing the balance of consideration remained to be deposited and prayed, that that amount may now be got duly deposited by the plaintiff. On this the usual order was passed, *"kaifiat sarishta kal pesh howe"*. On the same day the *Ahalmad* submitted his report by way of *kaifiat*, and on 5th of March, 1953, there is an order of the Court to the effect that nobody was present, that the period of limitation for depositing the sum had expired and the application was ordered to be dismissed.

It seems that on 4th March, 1953, after the first application, the plaintiff presented another application which stated as under:—

> "In the case noted in the heading, this Court had passed a decree in my favour, wherein the consideration money was ordered to be deposited by 4th March, 1953. As I am a Government employee, I could not get leave in time and thus was delayed in arranging for money. Due to this, yesterday, in the morning I missed the train. After that I appeared in the Court after coming over here by means of a lorry but by this time the treasury had closed. But, I, the plaintiff, had filed an application in this Court to that effect. An order was passed on that directing me to file another application for grant of extension of time for depositing money, and that that application would then be considered. It is, therefore, prayed that an extension of time by one day may be granted. I shall deposit the money today."

On 5th March, 1953, the Senior Subordinate Judge dismissed the application finding that, after the decree had been passed,the Court was not competent to

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grant extension of time for deposit of consideration money.

Kali Charan plaintiff then filed an appeal in the Court of the District Judge at Hissar, which was dismissed on the 18th August, 1953. The learned District Judge held, that there was nothing on the record to show that the pre-emption amount, which was due, was actually tendered for payment in the Court by the appellant as required by the provisions of Order XX, rule 14. As the pre-emption-money had not been deposited in terms of the decree, the suit stood dismissed. The plaintiff has now instituted a second appeal from the afore-mentioned order in this Court.

Mr. Shamair Chand, arguing on behalf of the plaintiff-appellant, contends that the order of the trial Court made on 4th March to the effect that *kaifiat sarishta kal pesh howe* was illegal. He says, as that was the last day for depositing the amount, order for its deposit should have been made immediately. He further complains that the Court should not have dismissed the application on 5th March, 1953, on the ground that the plaintiff was not present. His main argument, however, is that the amount that was due had been tendered on 4th March, 1953, and the provisions of Order XX, rule 14, had been duly complied with, and, therefore, his client's title accrued from the 4th March, 1953, and in these circumstances the Courts below were wrong in treating the suit as dismissed, in terms of Order XX, Rule 14(1)(b).

On the other hand, Mr. Prem Chand Pandit, arguing on behalf of the defendant-respondent, contended that there was no equity in a pre-emption case in favour of the pre-emptor, who must strictly comply with the terms of the decree, which he failed to do. Mr. Prem Chand contends that it has not been proved by the plaintiff that he had in fact money in his possession, when he made the application in the Court

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on 4th March, 1953. He says that the plaintiff led no evidence, nor did he himself appear in the witness-box, nor swore any affidavit to the effect that he had the money with him at that time, and further, that he actually tendered that amount in Court. The request made in his first application of 4th March, that the amount may now be got deposited from the plaintiff, is no proof of either possession on his part, of the requisite amount, or of its actual tender. Mr. Prem Chand, contends that the requisite amount should have in fact been tendered into Court, in other words, the actual cash amount should have been handed over to the judge. Mr. Shamair Chand argues, firstly, that the cash amount could not be handed over to the Court and, secondly, that it should be presumed from the application of his client, that he had with him the amount to deposit, and, lastly, his application amounted to a tender of the pre-emption money in the eye of law. In the alternative, Mr. Shamair Chand argues, that as the treasury had closed at 2 p.m., he could not get the money deposited in time as, due to fortuitous circumstances, his client could not reach in time at Hissar, He has drawn my attention to Rules and Orders of the High Court, Volume II, Chapter 8, Part E, and in particular to rules 40, 41, 44 and 45. In rule 40 it is stated that these rules apply, among others, to all Courts of Subordinate Judges, at the headquarters of a district or at stations where there is a treasury or a sub-treasury, as in the case at Hissar. Rule 41 provides that Courts should neither receive, nor pay out money, but that all deposits should be paid into the treasury on documents signed by the presiding officer of the Court and all payments should be made by means of vouchers on the treasury. The above provision, however, is not an absolute bar to the deposit of cash into Court, especially in the particular circumstances of a case like the present, where the treasury had closed in the afternoon when the plaintiff reached, but the Court

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was open. Rule 44 provides for the procedure, when a deposit is tendered by the depositor, requiring him to present an application to the Court, which would then be verified from the judicial record of the case concerned by the *Ahalmad,* and if it is found to be in order it would be passed by the *Ahalmad* on to the Nazir, who would then fill in the necessary columns of the Register of Receipts and prepare a "challan" in duplicate. The Nazir would then produce the depositor and those documents before the presiding officer who, if he approves of the deposit, would sign the challan in duplicate. Then the application along with the challan in duplicate would be handed over to the depositor for presenting the documents at the treasury. Among the list of items, which may properly be included in Civil Court Deposit Accounts mentioned in Schedule A, item No. 2, deals with "pre-emption money". Mr. Shamair Chand contends, that all this procedure which was necessary could not be gone through on 4th of March, and he rests his case on a judgment of Tek Chand, J., in *Buti Ram* v. *Sardar Singh* (1), The facts in the reported case were that in execution of a money decree for Rs. 270-12-0 obtained by respondent against the petitioner, his land was attached and sold for Rs. 775. The auction-sale was fixed for confirmation for 18th March, after hearing the objections, if any. In the meantime, on 28th March, 1933, the judgment-debtor presented in the executing Court an application under Order XXI, Rule 89, stating that he was prepared to pay the decretal amount together with five per cent of the purchase price, and prayed that on his depositing the amount the sale be set aside. One distinguishing feature of that case was that there was an uncontradicted affidavit of the petitioner that he had actually brought the amount with him but under the Rules the deposit had to be made in the treasury after the

(1) A.I.R. 1934 Lah. 875.

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challan had been obtained from the Court. His complaint was, that instead of issuing the challan at once the Subordinate Judge unnecessarily sent the application to the *Ahalmad* for *kaifiat*, and as the next day was a holiday, it was put up before the Court the day after. The petitioner stated that he immediately went to the treasury with the money, but as it had become too late he was asked to come the next day, and the amount was actually deposited after the thirtieth day, that is, beyond the period of limitation prescribed under article 166 of the Limitation Act. Tek Chand, J., while holding that the period of limitation could not be extended and that section 148, Civil Procedure Code, had no application, made the following observation:—

> "It has also been held in several cases that section 148 has no application to such cases and the period of thirty days cannot be extended by the Courts. But, it is equally well-settled, that a party litigant ought not to be penalized, when he found it impossible to comply with the requirements of the statute, not because of any fault of his own, but by reason of the action or inaction of the Court. On the happening of such a contingency, the maxim '*actus curiae neminem gravabit*' (an act of Court pre-judices no man) applies."

The following observation from the judgment in *Gopala Krishna Pillai* v. *Kunjithapatham Pillai* (1), was cited with approval by Tek Chand, J:—

> "It will be contrary to all principles of justice to require a man to comply with the rules, which insist on the taking out of a challan and paying the money to a different officer, and then to dismiss the application on the

(1) A.I.R. 1924 Mad. 324.

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> ground, that the money ought to have been paid to the Judge himself, or to hold that the payment to the officer contemplated by the rules, would not be equivalent to compliance with the rules, where the delay in payment is entirely due to causes beyond the control of the person taking out the challan."

For the above reasons, it was held in *Buti Ram's case* (1), that requirements of Order XXI, Rule 89, had been complied with and the decretal amount was deemed to have been duly deposited.

In reply Mr. Prem Chand Pandit, learned counsel for the respondent, contends that the judgment of the Lahore High Court in *Buti Ram* v. *Sardar Singh* (1) is not applicable to the facts of this case, in so far as it had been found as a fact, on the basis of the uncontradicted affidavit of the petitioner in that case, that he had actually brought the money with him, whereas the proof of such tender or deposit of pre-emption money in this case is not forth-coming. He next contended, that the equities in the rulings, favoured the petitioner, who was being deprived of his immovable property worth several times the decretal amount. He called my attention to the dicta in *Sardar Zorawar Singh and others* v. *Jasbir Singh and others* (2), where Din Mohammad, J., observed as under :—

> "In a case of pre-emption, where artificial rights brought into existence by the Legislature are used to defeat the legal rights of persons dealing with property, no equities are involved and if a subordinate Court exercises its legitimate powers

(1) A.I.R. 1934 Lah. 875
(2) A.I.R. 1938 Lah. 606

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in legitimate manner, a court of appeal would be loath to interfere unless any strong or cogent reasons exist justifying interference."

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Mr. Shamair Chand rightly contends, that though equities are not involved a pre-emption decree, nevertheless, like any other decree, has the sanction of statute. Real question to be determined in this case is, whether on the proved and admitted facts on the record, it is possible to deduce that there was a legal tender in accordance with the old established principles governing it.

The term "legal tender" has not received any statutory definition, but some of the principles covering it may be gathered from section 38 of the Indian Contract Act, which runs as under:—

> "Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract".

> "Every such offer must fulfil the following conditions:—
>
> (1) It must be unconditional,
>
> (2) It must be made at a proper time and place,

and under such circumstances that the person to whom it is made has a reasonable opportunity of ascertaining that the person by whom it is made is able and willing, there and then, to do the whole of what he is bound by his promise to do.

> (3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of

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seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

"An offer to one of several joint promisees has the same legal consequences as an offer to all of them."

The word "tender" has a definite legal signification, it imports, not merely the readiness and the ability to pay or perform, at the time and place mentioned in the contract, but also, the actual production of the thing to be paid or delivered over, an offer of it to the person to whom the tender is to be made, and an unqualified refusal to accept. In its broader sense, it is an offer to perform a contract, but usually it is an offer of money to a person holding a claim in satisfaction of such a claim without any stipulation or condition: (*see* 86, C.J.S. 558). Mr. Shamair Chand, learned counsel for the appellant, contends that the application that his client made on 4th March, 1953, was sufficient for the Court to conclude that he had the requisite amount with him, and his application constituted a tender to the Court and that was adequate compliance with the provisions of Order XX, Rule 14, relating to a pre-emption decree.

Mr. Prem Chand Pandit objects and says, that the aforementioned facts by themselves are not sufficient to justify an inference, that he had the requisite amount of money in his possession, and even assuming that the money was in his pocket, the application by itself was insufficient for being considered as an offer under the provisions of section 38 of the Contract Act. He further contends that the words in the application *"ab mudai se raqam mundarjabala hasab zabta dakhil karwai jawe"* (now the amount entered above be got deposited from the plaintiff in accordance with procedure) do not tantamount to an offer under section 38 of the Indian Contract Act. This request, he

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contends, is no proof of actual possession at that time of the requisite amount, and in no case could that be treated as "payment into Court" or even an offer to pay within section 38 of the Indian Contract Act. He has drawn my attention to *Sheoram* v. *Jhabar and others* (1), where a similar argument was advanced before Kapur, J., who at p. 309, made the following observations:—

> "The contention of the learned Advocate is that the application he made and the fact that he had the money with him were enough to constitute a tender to the Court and that is in law sufficient compliance with the decree. I am afraid I cannot agree with this contention. 'Tender' has been defined to be offer of lawful money which must be actually produced to the creditor by producing and showing the amount to the creditor or to the person to whom the money is to be paid. The application does not show that any such tender was made in these terms nor does the evidence show any such thing. All that has been proved in this case by the evidence is that the judgment-debtor did have the money with him when he made the application. That in my opinion does not constitute tendering the money as required by law. Learned counsel relied on *Prabhu* v. *Nihal* (2), judgment of Shadi Lal, J., which held that praying for permission to deposit money and tendering of money was sufficient to constitute compliance with the clause relating to a pre-emption decree. But there money was tendered and, therefore, the ruling cannot help the appellant."

(1) A.I.R. 1951 Punjab 309.
(2) 72 P.L.R. 1917: A.I.R. 1916 Lah. 77.

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No other authority, which may have a bearing on the question involved in this case, has been produced by either counsel in this case. I have, however, thought it advisable myself to examine the matter further, with a view to find out if it is incumbent upon a person, who wants to tender money, to actually produce and show the amount to the person to whom it is to be paid. In the words of Leake—

> "A tender of money in payment must be made with an actual production of the money; a mere statement of the debtor that he is ready to pay is not sufficient; unless, the debtor having it ready and offering to pay the creditor expressly or impliedly dispenses with the production: (*see* Leake on Contracts, 8th Edition, p. 666)."

In Chitty on Contracts, 21st Edition, Volume I, p. 327, this proposition is stated in para 636, in the following words:—

> "To constitute valid tender, there must either be an actual production of the money, or its production must be expressly or impliedly dispensed with."

In Halsbury's Laws of England, 3rd Edition, Volume 8, p. 170, under the heading "Requisities of valid tender", it is stated:

> "There must be an actual production of the money at the time of the tender, - unless this is dispensed with by the creditor either expressly or by implication."

In *Finch* v. *Brook* (1), the question was whether there was a good tender of £ 1, 12s. 5d. The jury found that the defendant's attorney called on plaintiff and said, "I come to pay you £ 1, 12s. 5., which defendant

(1) (1834) I Bing. N.C. 253: 4 L.J.C.P.I.

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owes you" and the attorney put his hand in his pocket but did not produce the money. Holding that it was not a legal tender Tindal, C.J., observed:—

> "All the cases agree that in order to constitute a sufficient tender, there must be an actual production of the money, or a dispension of such production. Here there was no actual production."

In *Re Farley Ex. p. Danks* (1), Lord Gramworth at p. 945, said—

> "Now, in order to make a tender, I assume that the person pleading the tender must either have actually produced the money, or have been ready and able to produce it, and only be prevented from producing it by the other party dispensing with his so doing."

The above principles of law relating to legal tender were accepted in a comparatively recent decision of the King's Bench Division in *Farquharson* v. *Pearl Assurance Company* (2). Though on the facts and circumstances of that decision, the offer was held valid, Singleton, J., expressed his satisfaction that the claimant was ready and willing to pay the amount.

The law in the United States of America relating to requisites and sufficiency of a valid tender has developed on similar lines. According to both English and Amercian law, an unconditional offer coupled with manifest ability to perform the obligation by actual production of the money, or the goods, as the case may be, is an essential characteristic of a valid tender. In United States of America, as much as in England, a mere offer to pay does not constitute a valid tender; the law requires that the tenderer has

(1) (1852), 2 De. G.M. and G. 936: 42 English Reports 1138.
(2) (1937) 3 A.E.L.R. 124.

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the money present and ready, and produce and actually offer to the other party. Tender implies the physical act of offering the money or thing to be tendered. The law insists upon an actual, present, physical offer; it is not satisfied by a mere spoken offer to pay, which, although indicative of present possession of the money and intention to produce it is unaccompanied by any visible manifestation of intention to make the offer good. In this connection reference may be made to 52 Am. Jur. p. 219.

In *Samuel A. Peugh* v. *Henery S. Davis* (1), the opinion of the Supreme Court of the United States was expressed in the following words:—

> "But in order to make a tender that would have caused the interest to cease, he should have ascertained for himself the sum due, or have fixed upon a sum which was sufficient, and then made a formal tender by counting out or offering that sum to Davis distinctly and directly as a tender."

There are a large number of American decisions where an actual or manual production of the money has been considered to be an essential requisite of a valid tender, but not a mere offer to pay money into Court.

> " 'Tender' is defined to be the offer of money in satisfaction of a debt, by producing and showing the amount to the creditor or party claiming, and expressing verbally a willingness to pay it. *Tompkins* v. *Batie* (2), citing Wercest Dict.

> "A 'tender' is the actual proffer of money, as distinguished from a mere proposal or proposition to do so. A tender must always

(1) United States Supreme Courts Reports 20 Lawyers' Edition 1127.
(2) 7 N.W. 747, 748, 11 Neb. 147, 38 Am. Rep. 361.

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be kept good and when actually made into court cannot be withdrawn *Hart* v. *Kanawha Oil* (1). " 'Tender' imports not merely readiness and ability to pay, but actual production of thing to be paid, and offer thereof. *Messer* v. *London Operating Company* (2).

"To support averment of 'tender' of money, it is necessary for party to show that precise sum was actually produced and offered to him to whom it is to be paid, *Greene County Union Bank* v. *Miller* (3).

"A sufficient 'tender' imports, not only readiness and ability to perform, but actual production of the thing to be delivered. *Leask* v. *Dew* (4), quoting and adopting definition in *Eddy* v. *Davis* (5), *Alpern* v. *Farrell* (6).

"To constitute a valid 'tender' money must be actually produced and offered to person entitled to it, unless such production is waived by party entitled to receive payment. Mere offer or statement that party has money ready and is willing to pay is insufficient to constitute valid tender. *Mondello* v. *Hanover Trust Company* (7).

"In order to constitute a valid 'tender', there must be actual ability, accompanied by immediate physical possibility of reaching out and laying hold of the thing to be delivered and the making of a manual proffer thereof, or of placing it in such a position

(1) 90 S.E. 604, 606, 79 W.Vs 161.
(2) 145 So. 79, 83, 106 Fla. 474.
(3) 75 S.W. 2d. 49, 53, 18 Tenn. App. 239.
(4) 92 N.Y.S. 891, 893, 102 App. Div. 529.
(5) 22 N.E. 362, 116 N.Y. 247.
(6) 11 N.S. 786, 793, 133 App. Div. 278.
(7) 140 N.E. 136, 137, 252 Mass. 563.

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that the person to receive it may lay hold of it if he chooses, *Greenwood* v. *Watson* (1),

"To prove a plea of tender it must appear that there was a production and manual offer of the money, unless the same be dispensed with some positive act or declaration on the part of the creditor; and it is not enough that the party has the money in his pocket, and says to the creditor that he has it ready for him, and asks him to take it, without showing the money, *Bakemany, Pooler* (2).

"A mere offer to pay money into Court in a law case does not constitute a 'tender' under the Law *Ray Realty Company* v. *Hotzman* (3). To constitute a valid 'tender' the money must be present, ready, produced, and offered to the person, who is entitled to receive it. St. *George's Society* v. *Sawver Lowa,* (4).

Vide, "Words and Phrases", Permanent Edition, Volume 41, p. 330, et seq.

Before concluding I must not forget to mention the ruling *Harnath Rai-Binjrai and another* v. *Hirdyanarain Kumar and others* (5), in which some doubts were expressed as to the correctness of the proposition contained in the following passages from Leake on Contracts, 8th Edition, p. 663, and in *Dixon* v. *Clark* (6), first of which reads as under:—

"Without acceptance on the part of him, who is to receive, the act of him who is to

(1) 171 F. 619, 621, 96 C.C.A. 421.
(2) N.Y. 15 Wend. 637, 638,
(3) Mo. App. 119 S.W. 2d. 981, 986.
(4) 214 N.W. 877 878,
(5) A.I.R. 1947 Pat. 208
(6) 136 English Reports 919, 1847, 16 L.C.J. P. 237.

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deliver or pay can amount only to a tender. But the law considers a party, who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made *Rolfe B. Startup* v. *Macdonald* (1). Accordingly, the principle of the plea of tender 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 precluding a complete performance, by refusing to receive it. And as, in ordinary cases, 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 *profert in curiam* of the money tendered, or according to the present practice, by payment into Court (*per cur*). *Dixon* v. *Clark* (2).

Other passage occurs at p. 923, in *Dixon* v. *Clark* (2), which reads:—

"In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (*toujoura prist*) to perform entirely the contract on which the action is

(1) (1843) 12 L.J.C.P. 477.

(2) (1847) 16 L.J.C. p. 237-(1847) 136 E. R. 919.

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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 cases, 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 *profert in curiam* 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 *uncore prist* and *profert in curiam*) 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."

Ray, J., of Patna High Court criticises the above passages at p. 212 of the report in the following words:—

"The passages from Leake on Contracts and from the decision of the Court in the case in 136 E.R. 919, if properly analysed make it clear that tender as such is valid and complete as soon as the party, who has entered into a contract to pay money to another, tenders the same to the party to whom the payment is to be made, but while speaking *as to the plea of tender* in an

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action for recovery of the debt or for enforcement of the contract, it is said that pursuant to the practice prevalent in accordance with the English common law, the plea of tender must be accompanied with deposit in Court. There is no authority for such practice in India. The law of tender in India is contained in section 38, Contract Act, quoted above. There is no room for importing into that section anything like the requirement of depositing the amount in Court, along with the plea of tender put forthwith as a bar in an action for recovery. But the section requires that the tender in order to be effective must be made in due time, at proper place and in a manner so as to make it to the person who has to receive easily ascertainable that the tender is real and sufficient. This condition is sufficiently fulfilled, in this case, in view of the finding of the lower Court with which we entirely agree that the money was actually tendered to the decree-holder in due time."

But the actual facts in *Harnath Rai-Binjraj and another* v. *Hirdyanarain Kumar and others* (1), were that a sum of Rs 1,000 was in fact tendered to the decree-holders in Bhagalpur, on 25th August, 1939, but the decree-holders refused to accept the money and referred the judgment-debtors to their attorney at Calcutta. The judgment-debtors then offered the sum to the decree-holders' attorney at Calcutta who too refused to accept the amount. For the third time the judgment-debtors offered the said sum of money through their own attorney to the attorney of the decree-holders but the latter again refused to accept. In the above circumstances, their Lordships of the

(1) A.I.R. 1947 Pat. 208.

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Patna High Court were satisfied that the judgment-debtors had done all that lay in their power to comply with the terms of the decree. The ground on which the validity of this tender was impugned was that it was not followed by a deposit in Court. The argument of the counsel, Mr. P.R. Das, who appeared for the appellants, which did not find favour with the High Court was, that the tender in order to be valid must be followed by a deposit in Court and failing that the plea of tender could not be taken notice of. The above reasoning of the Patna High Court cannot be imported into the facts of this case, where neither the sum was offered by the plaintiff-appellant to the defendant-respondent outside Court, nor was the amount actually paid into Court. I do not think that the dicta in the Patna High Court can be made use of on behalf of the plaintiff-appellant. The result may perhaps be rather unfortunate for the plaintiff-appellant, but having regard to the view that I take of the law he cannot enjoy the fruit of pre-emption decree, but, for this failure, he is himself to blame. He chose to reach the Court on the last day after the treasury was closed and did not take the trouble to place the actual sum, assuming that he had the same with him, in the hands of the Court. If the amount in fact had been produced in Court, and then the Court had declined to accept it, he would have been fortified in his contention that the sum had been validly tendered. As a matter of fact there is no evidence or affidavit in support of the contention which has now been advanced on his behalf by his learned counsel that he did carry the exact amount on his person on that day.

I do not consider that the plaintiff-appellant has complied with the terms of the decree. Under section 148 of the Code of Civil Procedure I cannot extend limitation. The result, therefore, is that the provisions of Order XX, Rule 14, Civil Procedure Code,

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not having been complied with, the pre-emption suit stands dismissed with costs. I therefore, dismiss the appeal, but in the circumstances of the case, leave the parties to bear their own costs of this appeal.

I have refrained from going into and determining the question of the appealability of the orders of the trial court and of the lower appellate Court. As the point was not mooted before me, I have not considered it desirable, to raise this question *suo motu* and to rest my judgment upon a finding on this question.

APPELLATE CIVIL

Before Tek Chand, J.

MANSHA RAM,—*Plaintiff-Appellant*

versus

TEJ BHAN,—*Defendant-Respondent*

Regular Second Appeal No. 472 of 1956, with Cross-objections.

1957

Feb. 18th

Indian Partnership Act (IX of 1932)—Section 37 and Indian Trusts Act (II of 1882)—Section 88—Doctrine of attributable share—A partner retaining assets of the firm after dissolution and utilizing for his own benefit—Liability of, towards other partner—Section 13(b)—Partners contributing unequally—No agreement regarding the share of profits—Whether entitled to share profits equally.

Held, that when on the dissolution of a firm, one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he is liable to account for them to the other partner on the basis of the doctrine of attributable share, which is justified on the ground that the profits are accretions to the property which has yielded them, and ought to belong to the owner of such property in accordance with the maxim, *accessorium sequitur suum principale*. The outgoing partner has the option either to claim such share of the profits as may be attributable to the use of his share of the property of the firm or interest