

KNOX, TUDBALL and PIGGOTT, JJ. :—After hearing the learned Government Advocate we agree with the Board of Revenue, which has made this reference, that the words “final order” in section 2, clause (15) and article 45, clause (c) of schedule I of the Stamp Act, No. II of 1899, refer to the final order of the lowest court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed. Let this be the answer to the reference made by the Board of Revenue.

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STAMP
REFERENCE
BY THE
BOARD OF
REVENUE.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1914
January. 17.

CHETAN DAS (DEFENDANT) v. GOBIND SARAN (PLAINTIFF) AND DAN KUNWAR AND OTHERS (DEPENDANTS.)*

Act No. IV of 1882 (Transfer of Property Act), section 84—Mortgage—Prior and puisne incumbrancers—Tender of amount of prior mortgage by puisne incumbrancer—Offer by letter.

Held that an offer by letter of the amount due on a mortgage is not a good tender within the meaning of section 84 of the Transfer of Property Act. It is necessary that the money should be actually produced unless it can be shown that the person entitled to receive the money has waived this condition. Kamaya Nait v. Devapa Rudra Nait (1) referred to.

THIS was a suit on a bond executed in the year 1899. The principal defendant, Chetan Das, was a puisne mortgagee who held a mortgage of the year 1903. Shortly after the execution of this mortgage Chetan Das had deposited in court a sum of money to clear off the incumbrance of 1899, and in this suit he pleaded that payment in bar of the plaintiff's claim. It was found, however, that the actual amount deposited, which the plaintiff had refused to accept, was less than the sum due under the mortgage. But the defendant further relied upon a letter in which he had offered to pay to the plaintiff a sum which was in fact in excess of what was due. The court of first instance gave the plaintiff a decree, but not for the whole amount claimed. The plaintiff appealed and the decree was modified in his favour by the lower

* Second Appeal No. 86 of 1913 from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 3rd of February, 1912, modifying a decree of Laddi Prasad, Additional Subordinate Judge of Saharanpur, dated the 24th of July 1911.

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appellate court. The defendant Chetan Das then appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Sarat Chandra Chandhri*, for the respondents.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit on foot of a mortgage. The appellant was a subsequent mortgagee of the mortgaged property, and he alleges that he tendered more than the amount which was actually due, and that, therefore, he should be relieved from the payment of interest subsequent to the alleged tender, and also the costs of the suit. Admittedly the appellant did not deposit sufficient: he only deposited the sum of Rs. 2,346-14-0. The amount found actually due was Rs. 2,513-7-9. The appellant, however, relies upon a letter which he wrote offering to pay Rs. 2,743-3-0. If this letter can be regarded as a good tender, the appellant is entitled to succeed. We are clearly of opinion that the offer by letter was not a good tender within the meaning of section 84 of the Transfer of Property Act. It is necessary that the money should have been actually produced, unless it could be shown that the person entitled to receive the money had waived this condition (*see Wharton's Law Lexicon*, 10th Ed., p. 747, and *Fisher on Mortgages*, 6th Ed., para. 1506). The same view has been taken by the Bombay High Court in the case of *Kamaya Naik v. Devapa Rudra Naik* (1). It is thus clear that the letter cannot be regarded as a tender within the meaning of section 84 of the Transfer of Property Act. The appellant is, therefore, not entitled to claim relief from the interest after the date of the letter.

With regard to the costs in the suit something might be said if the appellant had taken steps to redeem the property immediately after he made the offer to pay it. He did not do so, and the plaintiff had to bring the present suit.

We accordingly dismiss the appeal with costs. We overrule the objections filed on behalf of the respondents. We extend the time for payment to six months from this date.

Appeal dismissed.