

be precluded from disputing its correctness. This section would no doubt justify the application which has been made if it were applicable to Privy Council appeals, but in our judgement it is not applicable to Privy Council appeals. Such appeals are dealt with in section 109 and following sections. It is further, we think, manifest from the language of section 108 that section 105 does not apply to Privy Council appeals.

For these reasons we reject the application, but without costs as the respondents are not represented.

Application rejected.

1911

AHMAD
HUSAIN
v.
GOBIND
KRISHNA
NARAIN.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
GANGA RAI AND OTHERS (DEFENDANTS) v. KIRTARATH RAI AND OTHERS
(PLAINTIFFS).*

1911
January 20.

Mortgage—Redemption—Right to redeem one of two properties separately mortgaged.

Two persons mortgaged certain property in 1879. In 1883 one of the mortgagors executed a mortgage comprising in part property subject to the mortgage of 1879 and in part other property in favour of the same mortgagees. This latter mortgage contained a stipulation that the mortgagor would redeem it before redeeming the mortgage of 1879. Certain property comprised in the first mortgage, but not in the second, was sold, and the purchasers sued for redemption of that mortgage alone. *Held* that in the circumstances they were not precluded by the covenant in the second mortgage from redeeming the first.

On the 6th of May, 1879, two persons, Ram Lakhan and Ram Baran, executed a mortgage of certain property in favour of Bharose Rai, Ganga Rai and Mahpat Rai. This mortgage contained the usual covenant allowing the mortgagors to redeem on payment in the month of Jeth in any year. A portion of the property comprised in this mortgage was afterwards sold to Kirtarath Rai and others. In the year 1883 Ram Lakhan alone mortgaged certain property—partly property other than that comprised in the mortgage of 1879—to the same mortgagees. That mortgage contained the following covenant:—"First I (the mortgagor) shall pay this money, and then the money borrowed on the security of fields (i. e. the amount of the former mortgage)." The purchasers above referred to sued for redemption of

*Second Appeal No. 797 of 14-10, from a decree of Sri Lal, District Judge of Ghazipur, dated the 20th of June, 1911, reversing a decree of Baij Nath Das, Subordinate Judge of Ghazipur, dated the 16th of December, 1909.

1911

GANGA RAI
v.
KIRTANATH
RAI.

the mortgage of 1879, but were resisted upon the ground that it was incumbent on them first to redeem the mortgage of 1883. The court of first instance (Subordinate Judge of Ghazipur) acceded to this contention and dismissed the plaintiffs' suit. On appeal, however, the District Judge reversed this decree. The defendants mortgagees appealed to the High Court.

Mr. *M. L. Agarwala* and *Munshi Parmeshar Dayal*, for the appellants.

Babu Sital Prasad Ghosh and *Babu Balram Chandra Mukerji*, for the respondents.

STANLEY, C. J. and BANERJI J:—This appeal arises under the following circumstances. The suit is one for the redemption of mortgage of the 6th of May, 1879. This mortgage was executed by two persons—*Ram Lakhan* and *Ram Baran*—in favour of *Bharse Rai*, *Gunga Rai* and *Mahpat Rai*. It contained the following provision, namely, that “when in the month of Jeth in any year the mortgagees paid the principal with Government revenue paid by the mortgagees, the property will be redeemed.” Portion of the property in this mortgage was subsequently sold to the plaintiffs by *Ram Lakhan* and by the heirs of *Ram Baran* who was then deceased. Having so purchased portion of the property, it is clear that the plaintiffs would, under ordinary circumstances, be entitled to redeem the mortgage. Their claim, however, to redeem, was resisted by the appellants on the ground that a subsequent mortgage of the 24th of October, 1883, was executed, whereby the mortgagor undertook, as it is alleged, not to redeem the first mortgage, until the mortgagor had first redeemed the second mortgage. This second mortgage was executed by *Ram Lakhan Rai* alone and not by *Ram Baran* or his heirs. It also comprised different property from the property comprised in the mortgage of the 6th May, 1879. On turning to this mortgage we find the following provision upon which reliance has been placed by the learned counsel for the appellants, namely, “First, I (the mortgagor) shall pay this money and then the money borrowed on the security of fields” (the fields representing the property comprised in the first mortgage.) The contention is that, in view of the provisions of section 61 of the Transfer of Property Act, the plaintiffs, who are purchasers of a portion of

the property comprised in the first mortgage, which was not included in the second mortgage, are not entitled to redeem the mortgage of the 6th of May, 1879, until they first redeem the later mortgage—a mortgage with which they have no concern. The court of first instance acceded to this contention and dismissed the plaintiff's suit.

On appeal the learned District Judge reversed the decision of the court below, holding that upon a true construction of the agreement in the later mortgage, it did not amount to a consolidation of the two mortgages, but simply fixed the time when Ram Lakhan would pay the amount of the second mortgage.

We entirely agree with the lower appellate court upon the view so adopted. By the second mortgage no charge whatever was created upon the property comprised in the first mortgage. This second mortgage was executed by Ram Lakhan alone, and by the undertaking which Ram Lakhan gave, he could not in any way prejudice the rights of Ram Baran or his heirs. Moreover, the agreement is not an agreement whereby the mortgagor deprived himself or purported to deprive himself of the right to redeem the first mortgage. It is simply an agreement on his part to pay the money secured by the second mortgage first, and then the money secured by the first mortgage. This is nothing more than a provision fixing the time for payment. There is no agreement in the second mortgage on the part of the mortgagor that he would not be entitled to redeem the first mortgage, without paying the money due under the second mortgage. Mr. Agarwala strenuously relies upon the language of section 61 of the Transfer of Property Act, but we think that he puts a forced construction upon that section. If we turn to the illustration to the section, we get a clue as to the true meaning of it. The illustration is as follows:—

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage, to Z alone.

Here, Ram Lakhan and Ram Baran executed a mortgage of one property, and subsequently one of the mortgagors, Ram Lakhan alone, mortgaged separate property, making no stipulation as

1911

 GANGA RAY
 v.
 KIRTARATH
 RAY.

1911

GANGA RAY
v.
KIRTA RATH
RAY.

to any additional charge on the first property. This illustration discloses the intention of the Legislature in enacting section 61 and exactly meets the present case. Therefore this ground of appeal is without force.

It is further contended that under the first mortgage the mortgagors agreed upon redemption to pay the principal amount of the mortgage debt, together with any Government revenue which might have been paid by the mortgagees, and that the sum deposited in court under the provisions of the Transfer of Property Act fell short of the amount due under the mortgage by a sum of Rs. 25; which, it has been found, the mortgagees paid on account of revenue. It is contended that in view of this fact the mortgagors have a right to be deprived of the costs of the litigation. We are unable to accede to this contention. The sum is a very small sum and the mortgagors had no knowledge that the mortgagees had paid this amount. In fact, in their statement of claim they alleged that no revenue was paid by the mortgagees. On the other hand the mortgagees asserted that they had paid a sum of Rs. 246 in respect of revenue, whereas, as a matter of fact, they only paid Rs. 25. In view of this we do not think that the order passed by the court below in the matter of cost, was unreasonable. We accordingly dismiss the appeal with costs.

[Appeal dismissed.]

REVISIONAL CRIMINAL.

1911.
January, 26.

Before Mr. Justice Sir George Know and Mr. Justice Karamat Husain.

EMPEROR v. KAMTA PRASAD.*

Criminal Procedure Code, section 476—"Brought under the notice of the Court,"—"Judicial proceeding"—Decree on an award—Jurisdiction.

Held that the words "brought under its notice" in section 476 of the Criminal Procedure Code, are wide enough to cover an offence which may have been committed in another forum and on some previous occasion.

Held also that a proceeding in which a court is asked to pass a decree in accordance with an award made with reference to a pending suit cannot be said to be other than a "judicial proceeding" within the meaning of the

*Civil Revision No. 43 of 1910.