

gives the manner in which the jurors are to be chosen by lot. As the number of European jurors who appeared on the 7th of October, 1910, was only three, and as all of them were empanelled, it is evident that the imperative procedure prescribed for choosing jurors was not followed. Jurors are the judges of facts, and in the absence of a properly constituted jury, the violation of the imperative procedure prescribed by the Code of Criminal Procedure is of such a serious nature as cannot be cured by the provisions of section 537 of that Code. See *Brojendra Lal Sircar v. King-Emperor* (1).

For the above reasons I allow the appeal, set aside the sentence and conviction, and direct that the appellant be retried by a properly constituted jury. As the appellant is in the Naini Jail, I, on the application of his learned counsel, allow him to be admitted to bail to the satisfaction of the District Magistrate of Allahabad.\*

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
 GHULAM HAZRAT AND ANOTHER (PLAINTIFFS) v. GOBARDHAN  
 DAS AND OTHERS (DEFENDANTS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 82—Mortgage—Contribution—Principle upon which contribution is to be assessed.*

Where of two properties belonging to the same owner one is mortgaged to secure one debt and then both are mortgaged to secure another debt, for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage, the value of the two properties must be taken into account, and credit given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. Where the amount due upon the earlier mortgage exceeds the value of the property comprised in that mortgage the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the later mortgage.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Jogindro Nath Chaudhri* (with him Mr. *Nihal Chand*), for the appellant.

\* See also *Emperor v. George Booth* (I. L. R., 26 All., 211).

\*First Appeal No. 308 of 1909 from a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 26th of May, 1909.

(1) (1901) 7 C. W. N., 138.

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Mr. B. E. O'Connor (with him Babu Lalit Mohan Banerji),  
for the respondents.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiffs appellants under the following circumstances :—Muhammad Amin, the seventh defendant, mortgaged on the 28th of October, 1895, the northern mahal of the village Daranagar without any reservation to one Gulzari Lal. On the 27th of April, 1896, he mortgaged to the same mortgagee all his rights and interests in the northern mahal and a 2½ biswas share in the southern mahal together with its appurtenances. Gulzari Lal brought a suit for sale on both mortgages and obtained a decree on the 17th of April, 1905. The total amount decreed to him was Rs. 3,732-14-0. He assigned the decree to one Kamla Dat, who took out execution of it and caused the mortgaged property to be advertised for sale. On the 11th of September, 1907, Muhammad Amin made a usufructuary mortgage of his share in the northern mahal excluding the miscellaneous property appurtenant to that mahal in favour of the plaintiffs. The amount of the mortgage was Rs. 4,000, and it was agreed that this sum should be applied to part satisfaction of the decree of the 17th of April, 1905. The amount was paid, but as a further sum still remained due under the decree, the plaintiffs paid into court Rs. 6,760-14-0, on the 18th of September, 1907, and thus averted the auction sale which had been fixed for the 21st of that month. The defendants Nos. 1—6 are purchasers of the southern mahal in execution of a money decree. The sale in their favour took place in 1902. The plaintiffs claimed contribution from them in respect of the southern mahal purchased by them and from the mortgagor Muhammad Amin in respect of the miscellaneous property which was not mortgaged to the plaintiffs.

The court below has excluded from consideration the sum of Rs. 4,000 which was the amount for which the mortgage in plaintiffs' favour was made. In so doing we think it was right. That amount was payable to the mortgagor and the payment of it must be deemed to be payment by the mortgagor himself. As to the remainder of the amount paid by the plaintiffs we fail to understand the method pursued by that court in ordering

contribution. The decree which was passed in favour of Gulzari Lal was no doubt a decree for recovery of Rs. 8,730-14-0 from the mortgaged property, but it is urged on behalf of the appellants that the decree must be deemed to be a decree for sale of the property mortgaged under the first mortgage, for realization of the amount due under that mortgage and of the remainder of the property for realization of the amount of the second mortgage. On the other hand Mr. *O'Connor*, for the respondents, contends that the decree directed the realization of the total amount decreed from all the property comprised in the two mortgages. We are unable to agree with Mr. *O'Connor's* contention. In the prayer in the plaint of Gulzari Lal what he asked for was that the 6½ biswas share in the northern mahal should be first sold by auction and out of the sale proceeds the amount of the first mortgage should be satisfied and that the remainder of the mortgaged property, namely, the southern mahal, should then be sold for the realization of the amount due under the second mortgage of 1896. It is [this prayer of the plaint which was granted by the court. There is nothing to show that the court intended to award to the then plaintiff anything more than what he had asked for. In the decree it is provided that upon payment not being made on or before the date fixed, the mortgaged property or a sufficient part thereof will be sold, and in the specification of the mortgaged property reference is made to the relief asked for in the plaint. This reference clearly indicates that the court awarded to the plaintiff what he had prayed for and no more, that is to say, it directed that the property comprised in the first mortgage should be sold for the realization of the amount due upon that mortgage and the property mentioned in the second mortgage should be sold for the realization of the amount payable under that mortgage. The decree contains a specification of the amounts severally due under the two mortgages. We think that in this respect the contention put forward on behalf of the appellants is correct.

This being so, it is urged that the court below ought to have declared the amounts for which the respective properties were liable after taking into consideration the value of the property comprised in the first mortgage and the amounts due under that

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mortgage. Reliance is placed on section 82 of the Transfer of Property Act. The second paragraph of this section provides that "where of two properties belonging to the same owner one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid." The value of the northern mahal including miscellaneous property appertaining thereto has been found by the court below to be Rs. 3,636. The amount due under the decree of Gulzari Lal on account of the first mortgage of 1895 was Rs. 3,844-8-0. Therefore, when for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage the value of the two properties is taken into account, credit must be given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. In this case the amount due upon the earlier mortgage exceeded the value of the property comprised in that mortgage. The necessary result is that the whole of the amount of the second mortgage was recoverable from the other property comprised in the mortgage, viz., the 2½ biswas of the southern mahal and its appurtenances. The defendants respondents who are now the owners of the southern mahal, are therefore liable to the plaintiff for the amount which the plaintiff paid for saving that mahal from sale in execution of the decree obtained by Gulzari Lal, and the plaintiffs are entitled to recover the amount paid by them, viz., Rs. 5,760-14-0 with interest thereon from the defendants and their property.

We accordingly vary the decree of the court below and make a decree in the plaintiff's favour for the recovery of Rs. 5,760-14-0, with interest thereon, at 6 per cent. per annum, from the date of suit up to the date of realization, to be recovered from the property in the hands of the defendants, namely, 2½ biswas of the southern mahal together with its appurtenances. The parties will pay and receive costs in both courts in proportion to failure and success. We fix the 1st of July, 1911, for payment.

of the amount decreed and direct that the decree be drawn up in the terms of order XXXIV, rule 4, of the Code of Civil Procedure.

*Decree varied.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
AHMAD HUSAIN AND OTHERS (APPLICANTS) v. GOBIND KRISHNA  
NARAIN AND OTHERS (OPPOSITE PARTIES).\*

*Civil Procedure Code (1908), sections 105, 108, 109; order XLI, rule 23  
—Remand—Appeal—Privy Council.*

*Held that an order remanding a case to the lower appellate court passed by the High Court under order XLI, rule 23, of the Code of Civil Procedure, 1908, is not appealable to His Majesty in Council. Forbes v. Ameer-oon-nissa Begum (1), Mahant Ishwargar Budhgar v. Caudasama Amarsang, (2) Saiyid Muzhar Hossain v. Mussammi Bodha Bibi (3) and Radha Kishan v. The Collector of Jaunpur, (4) referred to.*

IN a suit for the recovery of possession of certain property the court of first instance held that the suit was barred by the provisions of section 43 of the Code of Civil Procedure, 1882, and dismissed it. There was then an appeal to the High Court. The High Court held that section 43 of the Code was not a bar to the suit, and accordingly remanded the case to the lower court for a decision on the merits. The present application was made for leave to appeal to the Privy Council against this order of remand.

*Dr. Tej Bahadur Sapru*, for the applicants.

The opposite parties were not represented.

STANLEY, C. J. and BANERJI J.:—This is an application for leave to appeal to His Majesty in Council. The suit out of which the case has arisen was brought by the plaintiffs for recovery of possession of certain property. It was held by the court of first instance that the suit was barred by the provisions of section 43 of the Code of Civil Procedure of 1882. But upon appeal to this Court the decree of the court below was set aside and the case was remanded to the court below on the ground that the suit was not concluded by section 43 of the former Code, and

\* Application for leave to appeal to the Privy Council, No. 35 of 1910.

(1) (1865) 10 Moo. I. A., 345. (3) (1894) I. L. R., 17 All., 112.  
(2) (1834) I. L. R., 8 Bom., 548. (4) (1900) I. L. R., 23 All., 220.

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