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of the Assistant Settlement Officer was made without jurisdiction.

The result is that this appeal is allowed, the decree of the Court of Appeal below set aside and the case remitted to the Court of first instance for determination of the amount payable by the defendants to the plaintiffs in respect of the years in suit. Each party will pay his own costs in this Court as also in the lower Appellate Court.

L. R. *Appeal allowed.*

APPELLATE CIVIL.

Before Mookerjee and Walmsley JJ.

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July 5.

FANINDRA NARAIN ROY

v.

KACHEMAN BIBI.*

Consideration—Mortgage—Legal consideration—Contract Act (IX of 1872) s. 2 cl. (d).

Where A executed a mortgage in favour of X in 1884, and in consideration of X not enforcing the same and, in substitution therefor, A along with B, C, and D executed a fresh mortgage in 1893, in favour of X, and on X suing to enforce the later mortgage the Court of first instance dismissed the suit on the ground that there was no legal consideration:

Held, that the mortgage of 1893, which replaced that of 1884, was for legal consideration.

Held, further, that it was not necessary that the promisor should benefit by the consideration, it was sufficient if the promisee did some

* Appeal from Appellate Decree, No. 352 of 1912, against the decree of B. C. Mitter, District Judge of Birbhum, dated July 22, 1911, reversing the decree of Umes Chandra Sen, Subordinate Judge of Birbhum, dated Aug. 3, 1906.

act from which a third person was benefited, and which he would not have done but for the promise.

Hurkissen Dass Serowgee v. *Nibaran Chunder Banerjee* (1), *Alhusen* v. *Prest* (2), *Bailey* v. *Croft* (3), *Haig* v. *Brooks* (4) referred to.

SECOND APPEAL by Fanindra Narain Roy, the plaintiff.

The facts necessary for the purposes of this report are shortly these. In 1880, at a sale in execution of a decree against some members of a Mahomedan family, their properties were sold and passed into the hands of the plaintiff. At the request of the judgment-debtors the plaintiff re-transferred to them, for a sum of Rs. 300, the purchased property, and executed a conveyance in their favour which was never registered. On the judgment-debtor's failing to pay the consideration settled, one of the members of the said family named Sadan executed, in 1884, a mortgage in the plaintiff's favour for Rs. 300. Later, on the 11th April 1893, Sadan along with Edu, Badaruddin and Lakhu executed a mortgage bond in favour of the plaintiff in substitution of the mortgage of 1884. On the 26th February, 1906, the plaintiff instituted this suit to enforce the mortgage of 1893. The Court of first instance dismissed the suit, holding that there was no legal consideration for the mortgage, which on appeal was confirmed by the lower Appellate Court. On second appeal to the High Court, Brett and Sharfuddin JJ., on the 23rd February, 1910, allowed the appeal and remanded the case to the lower Appellate Court for the determination of other issues, one of them being whether all the defendants, that is, the representatives of Sadan, Edu, Badaruddin and Lakhu were bound by this transaction. The Court below, on the 22nd July, 1911, found that the mortgage

(1) (1901) 6 C. W. N. 27.
(2) (1851) 6 Exch. Rep. 720
(3) (1812) 4 Taunt. 611.
(4) (1839) 10 A. & E. 309.

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was, as a fact, granted by these four persons, but held that it could not be enforced against the representatives of the mortgagors other than Sadan and Edu as they were not bound by the execution sale and derived no benefit under the mortgage. From this decision the plaintiff preferred this second appeal to the High Court.

Babu Surendra Nath Ghosal, for the appellant
Babu Hemendra Nath Sen, for the respondents.

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiff in a suit instituted on the 26th February, 1906, to enforce a mortgage executed in his favour on the 11th April, 1893, by four members of a Mahomedan family, by name Sadan, Edu, Badaruddin and Lakhu. The suit has now lasted for more than eleven years and has had a chequered career. It was dismissed by the Subordinate Judge on the ground that there was no legal consideration for the mortgage. That decree was confirmed by the District Judge on appeal. On second appeal to this Court, Brett and Sharfuddin JJ. held that the view which had commended itself to both the Courts below was erroneous in law. The mortgage had been executed in lieu of a prior mortgage granted by Sadan in 1884, in circumstances which may be briefly narrated. At a sale held in 1880, in execution of a decree against some members of the family, their properties were sold and passed into the hands of the mortgagee. They supplicated to him to retransfer to them for a sum of Rs. 300, the purchased property (which apparently included their homestead). He consented, and executed a conveyance which, however, was never registered. The judgment-debtors were unable to pay the decree-holder in cash the consideration settled, and the result was that Sadan executed the mortgage of 1884, for

Rs. 300. The conveyance was inoperative in law, but as the statutory period has elapsed since the date of the execution sale and, as the judgment-debtors have continued in undisturbed possession, it may be taken that the title acquired by the purchaser at the sale has become extinguished. The true position, consequently, was that a mortgage was granted to the plaintiff by Sadan in 1884 in order to induce him to forbear from the exercise of his rights as auction-purchaser. On these facts, this Court held, upon the authority of the decision in *Hurkissen Dass* v. *Nibaran Chander Banerjee* (1), that the mortgage of 1884 was granted for a lawful consideration. This necessarily justified the inference that the mortgage now in suit, which replaced the earlier mortgage, was also for a lawful consideration. This Court, thereupon, remanded the case to the District Judge for determination of the other issues in the suit. One of these issues was, whether all the defendants, that is, the representatives of Sadan, Edu, Badaruddin and Lakhu, and two other persons, were bound by this transaction. The District Judge has found, as we read his judgment, that the mortgage was, as a fact, granted by these four persons; but he has held that it cannot be enforced against the representatives of the mortgagors other than Sadan and Edu, as they were not bound by the execution sale and received no benefit under the mortgage transaction. In this view, he has decreed the suit against the representatives of Sadan and Edu and has dismissed the claim as against the others. We are of opinion that the distinction made by him between the two sets of mortgagors is not sound in principle and cannot be supported.

The mortgagors, under the bond now in suit, are all equally bound by the transaction, although two of

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them might not have been directly benefited by the mortgage transaction. This is clear from the definition of the term "consideration" in section 2, clause (*d*) of the Indian Contract Act. That definition, in so far as it is applicable to the facts of this case, may be stated in the following terms: "when, at the desire of the promisor, the promisee has abstained from doing something, such abstinence is called a consideration for the promise." Here, we have, in 1884, a mortgage by Sadan in favour of the plaintiff. The plaintiff was entitled to enforce the security as against Sadan. He was asked to accept in lieu of that security a fresh bond executed in 1893 by Sadan along with three other persons, viz., Edu, Badaruddin and Lakhu. The promise by Edu, Badaruddin and Lakhu to be bound by the mortgage, plainly formed a good consideration for the abstinence of the mortgagee to sue Sadan upon the first bond. The respondents have, however, argued that a consideration is not lawful unless it benefits the promisor. There is no foundation for this contention, and were it accepted, we should have to substitute the phrase "at the desire and for the benefit of the promisor," for the phrase "at the desire of the promisor," which finds a place in clause (*d*) of section 2. We are confirmed in the view that the contention of the respondents is not well founded, from an examination of the authorities in England. Valuable consideration has been defined as some right, interest, profit or benefit, accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration: it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. This view is supported by the decisions

in *Bailey* v. *Croft* (1), *Alhusen* v. *Prest* (2) and *Haig* v. *Brooks* (3). We hold, accordingly, that the reasons assigned by the District Judge in support of his conclusion that Sadan and Edu alone were responsible under the mortgage cannot be accepted. As regards defendants Nos. 3 and 10, however, the District Judge has correctly held that they were in no way bound by the transaction as they were not parties to the mortgage deed.

The result is that this appeal is allowed in part and the decree of the District Judge modified. The decree will be deemed to have been made against all the defendants other than defendants Nos. 3 and 10. The appellant is entitled to his costs of this appeal as against the defendants other than defendants 3 and 10, but he must pay the defendant No. 3, who appeared in this Court, his costs of this appeal. The costs incurred by the plaintiff appellant in all the Courts will be added to the sum due under the mortgage, and a self-contained decree will be drawn up in this Court.

L. R. *Appeal allowed in part.*

(1) (1812) 4 Taunt. 611. (2) (1851) 6 Exch. Rep. 720.
(3) (1839) 10 A. & E. 309.