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charge on the property in their hands; but it will not entitle her to recover maintenance from them personally, now that the property has passed from them. We decree the appeal and modify the decrees of the Lower Courts, and dismiss the suit with all costs against the appellants.

*Appeal allowed.*

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 March 14.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

SIDH GOPAL (DEFENDANT) v. AJUDHIA PRASAD AND ANOTHER  
 (PLAINTIFFS).\*

*Insolvent—Agreement by creditors to give time—Failure of consideration—Mortgage to creditors as security for payment of debts—Construction of instrument—Suit by creditor before expiration of time—Separate suits by creditors.*

A certain firm gave its creditors jointly, and not severally, a mortgage on certain immoveable property as security for the payment of the debts due to them by the firm, the consideration for such mortgage being a promise by all the creditors not to sue the firm for their debts for a certain time. Before the expiration of such time several of the creditors sued for their debts. Subsequently several of the creditors brought separate suits against the firm to enforce the mortgage in respect of their debts.

*Held* that, the consideration for the contract of mortgage, *viz.*, the forbearance of all the creditors not to sue for their debts for a fixed time, having failed, the firm was discharged from liability on the mortgage.

*Held* also that, had the contract of mortgage remained in force, it would not have been competent for individual creditors to come into Court and enforce the contract in respect of their separate debts.

KHUNNA Mal, Banarsi Das, Radhe Lal, and Sidh Gopal, the sons of Dwarka Das, and members of a joint Hindu family, carried on business at Cawnpore and other places under the style of Dwarka Das Khunna Mal. Shortly before the 22nd June, 1875, the creditors of the firm apprehended that it was insolvent, and they pressed for payment. On that day Khunna Mal, Banarsi Das, and Radhe Lal executed the following instrument, described as a mortgage-bond, in favour of their creditors:—

“ We Khunna Mal, Banarsi Das, Radhe Lal, and Sidh Gopal, the sons of Dwarka Das, and proprietors of the firm known as that of Dwarka Das Khunna Mal, in Old Generalganj, Cawnpore..... heroby declare that, being sound in mind and body, we agree that

\* First Appeal No. 130 of 1881, from a decree of Pandit Jogat Narain, Subordinate Judge of Cawnpore, dated the 19th July, 1881.

a balance of Rs. 30,700 is due by us on account-book accounts and hundis to the following creditors:—

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"Ganga Prasad, proprietor of the firm of Sundar Lal Ganga Prasad, Rs. 6,600; to Babu Lal, proprietor of the firm of Babu Lal Bihari Lal, Rs. 3,100; to Chote Lal, proprietor of the firm of Sirdar Mal Deoki Nandan, Rs. 600; to Puran Chand, proprietor of the firm of Puran Chand Parmeshri Das, Rs. 2,400; to Salig Ram, proprietor of the firm of Salig Ram Har Narain, Rs. 5,200; to Jugal Kishore, proprietor of the firm of Gobardhan Das Sarup Ram, Rs. 2,500; to Madho Ram, Rs. 1,500; to Sidhari Lal and Baldeo Prasad, Rs. 1,500; to Parmeshri Das, proprietor of the firm of Thakur Das Sri Gopal, Rs. 1,400; to Mam Raj and Mustahkam Singh, Rs. 600; to Ram Prasad and Damodhar Das, Rs. 1,350; to Munna Lal, proprietor of the firm of Munna Lal Sheo Sahai, Rs. 1,250; to Man Singh and Debi Charn's firm, Rs. 600; to Khaku Mal, proprietor of the firm of Manu Mal Bhanwani Shankar, Rs. 300; to Jagan Prasad, Rs. 600; to Beni Ram and Brij Raj, Rs. 750; to Ram Gopal, proprietor of the firm of Ram Rattan Ram Gopal, Rs. 450.

"At the present time we cannot arrange to meet these liabilities. Therefore, in lieu of the Rs. 30,700 due to the aforesaid mahajans, we mortgage to them, collectively, three *pucka* masonry houses, together with the shop in which the business of Dwarka Das Khunna Mal is carried on in Old Generalganj, together with all its rights and appurtenances, *dakhili* and *khariji*, within the boundaries noted at foot, and which, up to this present moment, is in our proprietary possession, unincumbered by any sale, mortgage or gift, and without any other share-holders therein. The following conditions and particulars have been mutually agreed upon between us, the mortgagors and mortgagees:—

"(i). The mortgage-consideration, as detailed above, shall be repaid by us to each of the said mahajans within three months, together with an interest of ten annas per cent. per month, and the property shall be redeemed, and in this we shall raise no sort of excuses.

"(ii). That the interest due to each of the mahajans on any unpaid balance shall be paid to them monthly, and if we fail to

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pay any of the mahajans the entire or any part of the interest due to them, then, consequent on such failure, all the mahajans shall be at liberty to cancel the fixed term of three months, and on the basis of the failure to pay the interest, sue us for the principal and interest, and to recover the same from the persons and property of us, the mortgagors, whether the said property be hypothecated or not, or be moveable or immoveable, and it may be recovered from our heirs also. To this neither we nor our heirs shall demur.

“(iii). That until the entire dues of the said mahajans be realized, we shall not mortgage, hypothecate, sell or give the mortgaged property to any one, and should we do so, it shall be invalid.

“(iv). That the said mahajans shall be at liberty, in order to realize the sums due to them, to sue for and recover the same from our persons and property, whether moveable or immoveable, either individually or collectively in a body, and to this we or our heirs shall not object.

“(v). That any payment made by us shall be indorsed at the back of this document, and signed also by the mortgagee, in whose custody this document may be; that no separate receipt, purporting to be payment, shall be considered valid by any Court.

“(vi). Should (God forbid) there be any difficulties in regard to the hypothecated property, we shall be answerable for the same, and the mortgagees shall in no way suffer in consequence.

“(vii). The possession and occupancy of the hypothecated property shall continue with us.

“(viii). This deed of hypothecation shall remain in the custody of Ganga Prasad, the proprietor of the firm of Sundar Lal Ganga Prasad.

“(ix). That the income arising out of the house of business at Benares, in the names of Radhe Lal and Sidh Gopal, and of the business at Lucknow, in the name of Radhe Lal, which belong to the executants hereof, shall be sent by us weekly by hundi, notes, or cash, to Lala Ganga Prasad for the payment of the principal and interest due under this document, and with whom this document shall be kept, and the said Ganga Prasad shall be at liberty,

when he has realized one or two thousand rupees, to make a proportionate distribution thereof to all the said mahajans, and to take their receipts for the same.

“(x). That if, within three months, a portion of the mortgage-consideration be paid to all the mahajans, then the term of this mortgage-deed shall continue up to one year, and we shall thus pay up gradually the amount due to all the mahajans.

“This deed of hypothecation has, therefore, been executed for the satisfaction of the said mahajans, that it may stand good in evidence.”

Although the bond recited that Sidh Gopal was a party to it, it was not executed by him. On the same date as the bond was executed, that is to say, the 22nd June, 1875, Debi Charan, one of the creditors mentioned therein, instituted a suit against the firm of Dwarka Das Khunna Mal to recover the debt due to him, and on the 17th July following, Sidhari Lal, another creditor mentioned therein, did the same. Both these creditors obtained decrees against the firm. On the 30th November, 1880, Ajudhia Prasad and Debi Prasad, sons of Ganga Prasad, a creditor mentioned in the bond, instituted a suit against Khunna Mal, Banarsi Das, Radhe Lal, and Sidh Gopal, in which they claimed the principal amount (Rs. 6,600) due to them and interest, asking for the enforcement of the mortgage contained in the bond. On the same date Puran Chand, another creditor, instituted a similar suit. In January, 1881, Beni Ram and Brij Raj, other creditors, instituted a similar suit. These three suits were the suits out of which the present appeal (No. 130 of 1881) and three other appeals (Nos. 131, 146, and 147) arose. The defendants set up as a defence to all three suits that “although under the deed in suits the plaintiff, as one of the several mortgagees who are mentioned therein, may have a separate right of suit, yet the liability of the mortgaged property to the mortgagees is co-extensive, and the lien created in their favour co-extensive with the whole amount secured by the mortgage, and accordingly the plaint should be rejected by reason of the non-joinder of the other mortgagees as parties to the suit.” The defendant Sidh Gopal set up as a special defence to the suits that the bond of the 22nd June, 1875, was not binding on him, as he did not

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execute it; that he never authorized the defendants Khunna Mal, Banarsi Das, or Radhe Lal to execute it for him, nor was it executed on his behalf by them; that the property in suit being the joint ancestral property of himself and the other defendants, the mortgage of it without his consent was invalid under the Mitakshara Law; and that in any case the suits, as regards his share of the property, should be dismissed. The three suits were tried together, and the Court trying them held on the points raised by the defences set out above as follows: "As respects the first issue, as the obligors have in the bond engaged to pay the amount due to all and each of the creditors, and the property is made liable for the debt due to all and each of the creditors, the bond must be treated as executed in favour of each creditor separately. The fact of some of the creditors having sued separately has broken their unity. As the mortgage was given to all and each of the creditors simultaneously, no creditor can claim priority, and consequently no injury can be inflicted on any one by the plaintiffs suing separately. I think, therefore, that the suit is entertainable in the present form.....As respects the tenth issue, I think the first defendant (Khunna Mal), as head of the family, was competent to mortgage the property for the benefit of the family, and the defendant No. 4 (Sidh Gopal), against whom the claim rests on acquiescence to be inferred from his long silence after the contract came to his knowledge, and his having benefited by the transaction, is liable to the plaintiff's claim."

The defendant Sidh Gopal preferred an appeal to the High Court in the suit in which Ajudhia Prasad and Debi Prasad were the plaintiffs. The defendants Khunna Mal and Banarsi Das preferred a similar appeal in the same suits. They also preferred similar appeals in the two other suits. These appeals were numbered respectively 130, 131, 146, 147.

Mr. *Hill*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and *Munshis Hanuman Prasad and Sukh Ram*, for the appellant in No. 130, and the appellants in No. 131.

Mr. *Conlan* and *Pandit Ajudhia Nath*, for the respondents in those appeals.

The *Junior Government Pleader* (Babu *Dwarika Nath Banarji* and Munshis *Hannuman Prasad* and *Sukh Ram*, for the appellants in Nos. 146 and 147.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondent in No. 146.

Shaikh *Maula Bahsh* and Shah *Asad Ali*, for the respondents in No. 147.

The Court (STRAIGHT and TYRRELL, JJ.), delivered the following judgment:—

STRAIGHT, J.—These four appeals, Nos. 130, 131, 146, and 147 of 1881, have reference to three suits instituted in the Court of the Subordinate Judge of Cawnpore by the several plaintiffs-respondents against the defendants-appellants and one Radhe Lal, who has not appeared, together with other persons who are not before us in appeal. The plaintiffs-respondents came into Court upon the basis of a mortgage or deed of hypothecation of the 22nd June, 1875, and they sued for the recovery of separate sums of money alleged to be due to them from the defendants-appellants, by enforcement of the lien created in that instrument, against three *pucka* houses situate at *Generalganj*, in the city of Cawnpore. The lower Court, on the 19th July, 1881, decreed the claim in each case, and out of the array of defendants, Sidh Gopal, Khunna Mal, and Banarsi Das appeal in the suit at the instance of Ajudhia Prasad and Debi Prasad, and Khunna Mal and Banarsi Das alone in the suits at the instance of Puran Chand and of Beni Ram and Brij Raj. It does not appear to us necessary to enter at length into the circumstances out of which this litigation has arisen, as the facts may be found very fully detailed by the Subordinate Judge in his judgment in the case in which Ajudhia Prasad and Debi Prasad were the plaintiffs. As the matters in difference between the parties are common to the three suits, the four appeals before us may be conveniently disposed of together.

The points arising for determination urged upon us by the learned counsel for the appellants involve the following considerations:—

(i).—Is the appellant Sidh Gopal bound by the instrument of the 22nd June, 1875, he not having been a party to its execution?

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Upon this the further two questions arise, whether Sidh Gopal, being a member of a joint Hindu family along with his brothers Khunna Mal, Banarsi Das, and Radhe Lal, to which the Cawnpore firm of Dwarka Das Khunna Mal and the three other firms at Calcutta, Benares, and Lucknow belonged, the execution of the instrument of the 22nd June, 1875, by his co-partners, was an act necessary to the carrying on of the partnership business, and as such, according to the ordinary law of partnership, binding on him ?

(ii).—Whether, if the ordinary law of partnership is not applicable to Sidh Gopal, or, if applicable, would exempt him from liability under the deed, he, being a member of a joint Hindu family with his three brothers, who admittedly executed the deed under an immediate and pressing necessity of preserving a joint family business, is, under the Hindu law, bound by their act ?

The second and main question, however, raised for the appellants is, assuming the appellant Sidh Gopal to be liable under the instrument of the 22nd June, 1875, in conjunction with his three brothers, was the consideration for which the houses were pledged in that deed a joint and common undertaking and promise of all the creditors of the firm of Dwarka Das Khunna Mal, whose names are recited therein, personally, or by the respondent Ajudhia Prasad on their behalf, to forbear from enforcing payment of their debts for three months, and, if such was the consideration, did the institution of the suits by Debi Charan, on the 22nd June, 1875, and by Sidhari Lal, on the 17th July following, vitiate the contract and discharge the appellants from liability ? In other words, and to put it shortly, was the forbearance of the whole of the creditors mentioned in the deed a condition precedent to liability attaching to the defendants-appellants under the contract ?

It is obvious that if this latter question can be answered in favour of the appellants, all three suits of the defendants-respondents which are founded upon the deed of the 22nd June, 1875, must fail, and in that event it will become unnecessary to enter upon a consideration of the nice and somewhat difficult points of partnership and Hindu Law raised by the first contention put forward in favour of the appeal. We accordingly address ourselves at once to the examination of the second question.

We may premise by saying, that upon looking into the evidence we see no reason to doubt that the deed upon which so much turns was executed by the appellants Khunna Mal, Banarsi Das, and Radhe Lal *bonâ fide*, and with the object, if possible, of tiding over the insolvency that threatened the Cawnpore firm of Dwarka Das Khunna Mal, in consequence of the stoppage of the Calcutta concern of Dwarka Das Banarsi Das. Whether as a matter of fact all the creditors who are mentioned in the deed were or were not assenting parties thereto, or whether the respondent Ajudhia Prasad had or had not authority to represent them as consenting parties, are matters into which it seems unnecessary to enter. As far as we can judge, the only reasonable inference deducible from all the circumstances is, that the three appellants believed one of two things: either that all the recited creditors had given their consent to the arrangement, or that the respondent Ajudhia Prasad was the agent of some or all of them, to bind them in that behalf. If they were not under this impression, it is impossible to understand why they should ever have put their hands to the deed at all. For, as far as we can see, the only concession they could obtain at the time it was executed that would be of any value to keep the business of Dwarka Das Khunna Mal going, was to be given time by the whole of their creditors to turn round and make arrangements to meet the obligations that had been prematurely precipitated by the failure of the Calcutta firm. To our minds the terms of the instrument of the 22nd June, 1875, preclude the notion that it was intended to confer a separate lien in the case of each individual creditor enforceable by separate suit; on the contrary, taken as a whole, we can only regard it as a security-bond given to the whole body of the creditors for the payment of the debts due by the firm of Dwarka Das Khunna Mal to those persons, and interest thereon, through the hands of the respondent Ajudhia Prasad as a trustee, for, as will be observed, it was distinctly declared that he alone was to receive the moneys and indorse the receipt on the deed, and that after he had received one or two thousand rupees he was to make a proportionate distribution of the amount among all the creditors. Looking at the deed, therefore, in its entirety, we find ourselves quite unable to place the construction on it contended for by the respondents. It appears to us in very

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plain terms to indicate that the consideration, upon the strength of which the executants-appellants hypothecated their three houses, was an actual or supposed promise of all the creditors mentioned in the instrument to forbear from enforcing payment of their debts for a period of three months from the date thereof. The value of an executory consideration of this kind could only be its value as a whole, and according as that was or was not forthcoming, would the contract stand or fall. The condition precedent to liability attaching to the defendants under the deed of the 22nd June, 1875, was broken when the suits of Debi Charan and Sidhari Lal were instituted within the three months. Hence there was, in our opinion, such a failure of consideration as discharged the appellants from their liability. In this view of the case it becomes unnecessary to determine the other points raised, to which we have adverted. We think, therefore, that the four appeals before us must be decreed with costs, and that the three suits instituted by the plaintiffs-respondents should stand dismissed. We may add, that had there not been the failure of consideration to which we have referred above, and the contract had remained in full force and effect against the appellants, it would not have been competent for individual creditors to come into Court to enforce the lien created by the deed of June, 1875, in respect of their separate debts, and upon this ground also the suits of the plaintiffs-respondents must have failed.

*Appeals allowed.*

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 March 17.

### CIVIL REVISIONAL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

AJUDHIA PRASAD (PLAINTIFF) v. BAKAR SAJJAD AND OTHERS  
 (DEFENDANTS).\*

*Contract, relation resembling—Money paid—Voluntary payment—Act IX.  
 of 1872 (Contract Act), ss. 69, 79.*

*B* sold certain immoveable property to *A*, one of the terms of the agreement of sale being that *A* should retain a portion of the purchase-money, and therewith pay the amount of a simple decree for money against *B* held by *C*. *A* failed to pay the amount of *C*'s decree, and *B* therefore sued him for the balance of the purchase-money, and obtained a decree. In the meantime *C* had the property attached in execution of his decree against *B*. *A* there-

\* Application No. 274 of 1882, for revision under s. 622 of the Civil Procedure Code of a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 5th July, 1882, affirming a decree of Munshi Man Mohan Lal, Munsif of Kanauj, dated the 24th April, 1882.