Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ajudhia Pershad and another v. *Sidh Gopal and others from the High Court of Judicature for the North-Western Provinces of India at Allahabad; delivered December* 18*th*, 1886.

Present:

LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THE Appellants in this appeal, who are the Plaintiffs in the suit, are bankers at Cawnpore. The Respondents are a joint Hindoo family consisting of four brothers, the sons of Dwarka Das, and carried on business at Cawnpore, Calcutta, and Lucknow, the business at the different places being managed by some members of the family. It was a family business apparently founded by Dwarka Das the father; and the evidence was that the joint expenses of the family were paid out of the profits of the business. Indeed, on the argument of the appeal it was not disputed by the counsel for the Respondents that the members of the family would be bound by the deed upon which the suit was brought if it were valid and binding in other respects. In June 1875 the Calcutta firm of the Respondents stopped payment, and that brought the firm at Cawnpore into financial difficulties. Hundis had become due, and other hundis, for which the Cawnpore firm was liable, were becoming due. It appeared to be the object of the creditors of the Cawnpore firm to prevent

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a stoppage of payment, and, by giving time to that firm, to tide them over the difficulties in which they were placed. For that purpose it seems to have been arranged by some of the creditors that a meeting should take place to see what could be done.

The evidence with regard to this is as follows:—The first witness to which it is necessary to refer is Kakai Mal, who was one of the creditors. He said:—"Five or six days "before the execution of the mortgage deed I "had a conversation with Ajudhia Pershad"—that is the Appellant and Plaintiff in the suit—"at his house, to the effect that if all the "creditors were willing a deed may be obtained "from Kanha Mal"—the Defendant, who appeared to have the management of the business at Cawnpore—"regarding the property. Kanha "Mal was then sent for. He said that though "the hundis had not fallen due, yet he would "pay half of the amount of the hundi which "would fall due and give a hundi for the other "half. I and Ajudhia Pershad asked Kanha "Mal to give a mortgage of his property for "three months, and that we would settle with "the creditors. I had made mention of my "Rs. 8,000. It was agreed at the time that all "the money due to me would be entered. "When I came from Lucknow I then learnt "that only Rs. 300 of the amount due were "entered. I got very much displeased with "Kanha Mal for Rs. 300 only being entered as "due to me. Kanha Mal had asked me to "obtain the consent of all the creditors, and "that then he would execute a deed. He had "told this to me and Ajudhia Pershad. Both "of us had agreed to this, that we would "obtain the consent of all the creditors." The next witness is Madho Ram, who was also a creditor. He said:—"The amount due to me

was Rs. 1,5.0. I said that I was not agreeable" —that is with reference to their asking him to join in giving time. "Ajudhia Pershad, Puran "Chand, and others, said that I should get my "money included in the bond which was to "be executed in favour of all persons. After- "wards I said that I was agreeable to what all "proposed. Afterwards Kanha Mal was asked "to execute the deed. He said that as some "were agreeable and some not, let the dates of "the bills of exchange expire, and he would pay "the money as each date expired. Ajudhia "Pershad told him to execute the deed, and "that he would obtain the consent of all."

Another witness was Lalman, who was the gomashta of Kanha Mal. He said:—"Five, six, "or four days before execution of the deed, "there was some conversation between Ajudhia "Pershad and Kanha Mal at 10 or 11 o'clock "at the new house. The former told the latter "to write an agreement to all his creditors that "they would be paid in proportion to each one's "share from the income of the Benares and "Lucknow firms. Kanha Mal then replied that "the amounts of expired dates would be paid "first, and those of unexpired dates would be "paid from time to time as their dates of pay- "ment expired. Ajudhia Pershad then said:— "'This arrangement might lead some one to "'institute a suit whereby you will be put to "'a loss. I will make them understand that I "'will pay them proportionately when the "'money is received.' Kanha Mal answered "that those who had amounts of expired dates "still outstanding would hardly agree to this; "whereupon Ajudhia Pershad said that he would "make settlement with them all. Kanha Mal "then said:—'If you take the responsibility "upon yourself I will execute the agreement.'

" Kanha Mal then executed the agreement, and " pledged his property therein."

Kanha Mal was also called as a witness, and after speaking as to the firms at Cawnpore and Calcutta, he said :—" Five or six days prior to " the execution of the document the creditors " began to make their demands. Radhe Pershad, " Puran Chand, and Parmeshri Das made " demands in respect of *kutcha* and *pucca hundis*. " No other creditors made demands. The " request made was to have the property made " over to them, lest we should hereafter deny, " as others had done, and that a suit should be " brought, and a proportionate division of any " moneys be paid. Ajudhia Pershad and others " said that all would be settled up, and I asked " how those were to be settled whose dates for " payment had fallen due. The first day the " conversation was held with me alone, and the " next day Behari Das was also with me. " Ajudhia Pershad said that he had prevailed " on all to take a proportionate share." Further on he made a statement to which the subordinate Judge who tried the suit seems to have attached some importance. He said :—" There was no " stipulation as to what would be the result if " any creditor complained after the document " had been written."

There was some evidence given on the part of the Plaintiff which was not altogether in agreement with that which has been read, but the subordinate Judge took no notice of that evidence, and the High Court appears not to have thought it to be trustworthy. It is to be observed that the principal part of Ajudhia Pershad's debt was upon hundis which had not become due. He had, therefore, a strong interest in promoting an arrangement which would place him in the same position as the creditors whose hundis were due.

It is true that Kanha Mal made the statement that there was no stipulation, but the whole of the evidence shows that the parties from the first appeared to have contemplated that all the creditors would join; and it would not be necessary that there should be an express stipulation if, from the nature of the transaction, and their conduct, it is apparent that this was the understanding of the parties, and that they all acted upon the faith that all the creditors would join in the arrangement.

Upon that the deed which is the subject of the suit was executed. It is dated the 22nd of June 1875, and is in these terms. "Hypothecation "Deed, dated 22nd June 1875, executed by "Kanha Mal and others. We, Kanha Mal, "Benarsi Das, Radhe Lal, and Sidh Gopal, the "sons of Dwarka Das, and proprietors of the "firm known as that of Dwarka Das, Kanha "Mal, in Old Generalganj, City Cawnpore, by "caste Khattri, and residents of Cawnpore, do "hereby declare that being sound in both body "and mind we agree that a balance of Rs. 30,700 "is due by us on account book accounts and "hundis to the following creditors. Here follow the names of all the creditors, with the sums due to them, as in a list given in by Kanha Mal, the whole amounting to Rs. 30,700. Then it says:—"And 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 pucca masonry houses, together with "the shop in which the business of Kanha Mal, "Dwarka Das, is carried on in Old Generalganj, "together with all its rights and appurtenances." Then follow some conditions and particulars which need not be read, one being a provision that Ajudhia Pershad's firm should collect the

debts due to the firm and divide the money amongst the creditors.

Shortly after the mortgage was executed two of the creditors named in it, namely, Sadhari Lal, and Debi Charn, brought suits against the Respondent's firm, and obtained decrees. It does not appear that from the time of the execution until the suit of the Appellants was brought anything was done under the deed, that any of the debts due to the firm were collected by Ajudhia Pershad's firm, and apparently the deed was not acted upon in any way.

The present suit was not brought until November 1880. It was brought to enforce the claim of the Appellants under the mortgage. In their plaint they treated the deed as a mortgage to them for Rs. 6,600, the amount of their debt, and they prayed:—"A "judgement to recover the Rs. 6,600, principal "and interest, with costs of suit, by enforcement "of the mortgage lien against, and auction sale "of the mortgage property entered in the "mortgage deed to the extent of the Plaintiff's "right, and also by holding liable the persons "of the Defendants, and the other property "owned and held by them."

The subordinate Judge made a decree in their favour to the effect of what was prayed for in the plaint.

Some questions have been raised upon the form of this decree, and the form of the suit being not upon the whole mortgage, and for the benefit of all the mortgagees and creditors, but for the benefit of the Appellants alone. It is not necessary for their Lordships to say anything upon those questions.

The main ground of defence in the case is that in consequence of the two creditors who brought their suits and obtained decrees not assenting