than that of the life interest of the alienor. Such alienation would have been perfectly legal, whether they had agreed to it or not, and the provision relating to the house and backyard was nothing more than a mutual limitation of that power made by each in favour of the other in respect of that portion of the property, the transfer of which to a stranger during the life time of the other would have been specially inconvenient. The general tenor of the arrangement under exhibit I does not suggest that the parties contemplated any alienation by each party to enure beyond the life of the alienor, and it is difficult to see what object they could have had in providing that the survivor should be bound by the alienations of the other after the death of the latter.

In the absence of express terms or clear indications to the contrary the presumption is that the parties, being Hindu females, did not intend to create in each other an absolute estate. Their intention was to create a life estate only. As to the question of limitation, the mother-in-law, who had only a life estate having died in 1890, the plaintiff's suit for possession is clearly not barred by limitation.

We must, therefore, reverse the decree of the Lower Appellate Court and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

1897. July 29. August 10.

BARBER MARAN AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

RAMANA GOUNDAN AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 3), RESPONDENTS.*

Contract Act—Act IX of 1872, ss. 38, 42, 43, 45—Joint promisee—Discharge by one of two joint mortgagees.

The sum due upon a mortgage was paid to one of the two mortgagees, and he gave an acquittance without the knowledge of the other mortgagee who now

* Second Appeal No. 1010 of 1896.

BARBER MARAN v. RAMANA GOUNDAN.

brought this suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors and that the mortgagee who received payment was not the agent of the plaintiff in that behalf:

Held, that the mortgage had been discharged and the plaintiff was not entitled to sue.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Coimbatore, in Appeal Suit No. 95 of 1895, reversing the decree of S. Krishnasami Ayyar, District Munsif of Erode, in Original Suit No. 431 of 1894.

Suit to recover principal and interest due on a mortgage, dated 13th May 1891, and executed by defendants Nos. 1 and 2 in favour of the plaintiff and defendant No. 3. The mortgagors pleaded that the mortgage had been discharged, and it appeared that three years before this suit they had paid to defendant No. 3 the sum then due upon the mortgage and received from him a receipt; but the plaintiff was not present at the time and had not received the money, and defendant No. 3 was not his agent for the purpose of receiving it. The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge who passed a decree for the plaintiff.

The mortgagors preferred this second appeal.

Mahadeva Ayyar for appellants.

Kasturi Rangayyangar for respondent No. 1.

JUDGMENT.—The question raised by this appeal is whether a payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond. It is found that the party who received payment was not the agent in that behalf of the plaintiff. On the other hand it is not suggested that there was any fraud on the part of the defendants who made the payment. The appellants' vakil in support of his contention that the payment to one joint creditor was a valid discharge of the debt as against the other referred to in section 38 of the Contract Act and to the English case of *Wallace* v. *Kelsall*(1). "An offer to one of several joint promisees has the same legal "consequences as an offer to all of them." That is the language of the last paragraph of the section. In the first part of the section it is provided that, where an offer of performance has been

(1) 7 M. & W., 264.

made and not accepted, the promisor is not responsible for non-performance. It follows that, when a legal tender has been made to one of two joint promisees and refused by him, the promisor is discharged from liability in respect of his promise. It would be difficult to reconcile with this proposition the view adopted by the Subordinate Judge, viz., that the defendants were not discharged by the payment made to the party jointly entitled with the plaintiff. But it is argued on the first respondent's behalf that section 45 of the Act, by declaring the right of the several joint promisees to performance, makes it incumbent on the debtor to satisfy them all before obtaining a complete discharge. It is also suggested that the fact of the creditor being a mortgagee makes a material difference. With regard to section 45, we cannot see that the declaration that the several joint promisees are entitled to performance is otherwise than consistent with English Law or that, unless it be construed as converting the joint rights under a contract into several rights, it conflicts with the last paragraph of section 38. To put that construction on the section would amount to saying that, where a contract is made in favour of more than one person, they must be taken to be severally entitled under it, for they cannot be jointly and severally entitled (*Keightley* v. *Watson*(1), Bullen and Leake's Precedents, 3rd edition, page 471). There is no reason whatever to suppose that this was intended by the Legislature. A somewhat similar contention was raised in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee*(2) with reference to section 43 of the Act as affecting the obligation of persons liable for a debt. The point there decided on the authority of *King* v. *Hoare*(3) was that a decree against one joint debtor was a bar to an action afterwards brought against the others. The Court refused to accede to the contention that, since the passing of the Contract Act, the rule in *King* v. *Hoare*(3) had become inapplicable, because the effect of section 43 was to enable a promisee to sue one or two of his joint promisors severally in two or more suits. Taking together sections 42, 43 and 45, we find that the Legislature has declared against the common law rule of survivorship as well in the case of joint creditors as in that of joint debtors. Further in section 44, the Act has abolished the rule of English Law according to which the release of one joint

(1) 3 Ex., 723. (2) I.L.R., 3 Calc., 353. (3) 13 . & W., 494.

BARBER MARAN v. RAMANA GOUNDAN.

debtor operates to release his co-debtors. For the proposition that the Legislature intended to go beyond this and refuse recognition altogether to rights or liabilities *in solidum*, we do not think that there is any foundation. We think that effect must be given to the plain language used in section 38 and that the question above stated must be answered in the affirmative. So construed the section is consistent with section 165 which lays down the rule that a bailee who has taken goods from several joint owners may deliver them back to one without the consent of all. It is also consistent with the common law case of *Wallace* v. *Kelsall*(1) and does not as far as we can ascertain conflict with any other case except one which might have been cited in support of the respondents and which we think it well to mention, lest it should be supposed that it has been overlooked. We refer to *Steeds* v. *Steeds*(2), the material facts of which are similar to those in *Wallace* v. *Kelsall*(1). In both the cases one of the joint creditors who joined in the action had been satisfied by payment or otherwise. In *Wallace* v. *Kelsall*(1) the plea was held good on demurrer. In *Steeds* v. *Steeds*(2) the statement of defence was held to be good only as regards the plaintiff who had been satisfied and his share of the debt. The cases cited in the judgment in *Steeds* v. *Steeds*(2) do not, in our opinion, altogether support the conclusion arrived at. They go to show that, in equity, persons lending money to a third person are deemed to be tenants in common, and not joint tenants as well of the debt as of any security held for it. Some of the cases refer to the presumption in favour of tenancy in common as against the rule of survivorship; while *Watson* v. *Dennis*(3) which is also cited, is to the effect that a purchaser of property comprised in a mortgage would not be compelled to accept the title when it appears that the receipt for the money paid to discharge the mortgage was signed by one only of the mortgagees. Lord Justice Knight Bruce in holding that the estate was not fully discharged by such a receipt carefully avoids expressing an opinion as to the question which might arise in an action for the mortgage money. In the present case it may be that a purchaser of the mortgaged property might rightly have refused to complete on the ground that the plaintiff, one of the mortgagees, was not ready to give a receipt or acknowledgment for

(1) 7 M. & W., 264. (2) L.R., 22 Q.B.D., 540. (3) 4 DeG. J. & S. R., 345.

the mortgage money. But, when the question arises in an action to recover the debt, we cannot see that it makes any difference that the debt was secured by a mortgage. If the debt has been satisfied by payment, the rights under the mortgage instrument are extinguished and the action must fail. The law entitles a mortgagor to a registered receipt for his mortgage money, but does not exclude other evidence of payment or make the giving of the receipt a condition precedent to the discharge of the property. In our opinion the mortgage amount was discharged by payment made to the plaintiff's co-mortgagee and therefore the suit should have been dismissed.

The decree of the Lower Appellate Court is set aside and that of the District Munsif restored with costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

RAMASAMIA PILLAI (PLAINTIFF), APPELLANT,

1897. August 23.

v.

ADINARAYANA PILLAI AND OTHERS (DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 53—Transfer in fraud of creditors—Good faith.

When it is said that a deed is not executed in good faith what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Tinnevelly, in Appeal Suit No. 382 of 1894, reversing the decree of T. Sadasiva Ayyar, District Munsif of Srivaikuntam, in Original Suit No. 660 of 1893.

Suit to recover principal and interest due on the mortgage, dated 6th December 1886, and executed by defendant No. 1 in favour of the plaintiff. The land comprised in the mortgage had been attached and brought to sale in execution of a decree against the mortgagor and purchased at the court-sale in January 1890 by

* Second Appeal No. 1277 of 1896.