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though he can refer, the award would be nugatory if any of its terms are unfavourable to the minors. There is no law which lays down that as the principle governing in such cases or which contemplates such a result. As held by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*,(1) "the principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts of this country showed any disposition to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law: see *Adams* v. *Great North of Scotland Railway Company*." (2)

For these reasons we reverse the District Judge's decree and award the claim with costs throughout on the respondents.

Decree reversed.

(1) (1902) 29 I. A. 58; 29 Cal. 167. (2) (1891) A. C. 31.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903. *January* 15.

SITARAM APAJI KODE (ORIGINAL DEFENDANT NO. 1), PLAINTIFF, *v.* SHRIDHAR ANANT PRABHU AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Mortgage—Discharge of mortgage—Death of mortgagee—Heirs of mortgagee—Payment of mortgage debt to one of the heirs.

Where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgagor.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, reversing the decree passed by Ráo Sáheb N. B. Mujumdar, Subordinate Judge of Devgad.

One Vasudev Balkrishna (ancestor of plaintiffs) owned one-sixth share in the khoti villages of Bharni and Chafet. This share he mortgaged with possession to Apashet in 1880 for Rs. 799.

* Second Appeal No. 318 of 1902.

Apashet died on the 20th June, 1899, leaving an eldest son (defendant 1) by a first wife and two other sons (defendants 2 and 3) by a second wife. During Apashet's life the first defendant lived separate from him and his brothers (defendants 2 and 3), and after Apashet's death he continued to live separate from defendants 2 and 3.

On the 2nd August, 1899, plaintiffs paid Rs. 799 to defendant 2, and received from him the mortgage deed and a deed of release.

Subsequently when the plaintiff attempted to collect rent from the tenants of the property, they were obstructed by defendant 1.

The plaintiffs, therefore, filed this suit against the defendants to obtain a declaration that they were entitled to manage their one-sixth share of the khoti villages Bharni and Chafet, and to recover the rents of that share from the tenants.

Defendant 1 contended (*inter alia*) that plaintiffs had not redeemed the mortgage and were not entitled to the relief claimed.

The Subordinate Judge found that payment to defendant 2 was not proved; that it was not effective against defendant 1: and he dismissed plaintiff's suit.

On appeal, however, the District Judge held that the payment by plaintiffs to defendant 2 was proved, and that it was effective against defendant 1. He passed a decree for the plaintiffs. In his judgment he said:

The question that remains is one of law,—whether this payment to defendant 2 is a valid discharge of the mortgage. The law point seems to be the same as in I. L. R. 20 Madras, 461, viz., that there has been a valid discharge; and the question of fact I have decided on consideration of the depositions of Balkrishna (who has made a statement which can afterwards be used against him), of Exhibit 27, and the fact that the mortgage deed was returned to plaintiff by defendant 2 who had been living with Apa. Defendant 1 as the eldest son claims to have been the manager and, therefore, the only person to whom the mortgage money ought to have been paid. It seems certain that since Apa's death defendant 1 was not the *de facto* manager of the whole property or of the family; the two families were living apart and were mutually hostile, though no partition of property was made, each having possession of some portion of the whole.

Defendant 1 appealed to the High Court.

D. A. Khare for the appellant (defendant 1).

H. C. Coyaji for respondents 1 to 7.

M. N. Mehta for respondents 8 and 9.

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The following cases were referred to in the course of the arguments: *Barber Maran* v. *Ramana Goundan*(1); *Ahinsa Bibi* v. *Abdul Kader Saheb*.(2)

CHANDAVARKAR, J.:—The principal question of law argued in this second appeal is whether, where property is mortgaged to one person and that person subsequently dies, leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, amounts to a valid discharge to the mortgagor. The District Judge has held that it does, relying on the authority of the ruling of the High Court of Madras in *Barber Maran* v. *Ramana Goundan*.(1) That decision is based upon the English case of *Wallace* v. *Kelsall*,(3) and the last paragraph of section 38 of the Indian Contract Act, which provides that "an offer to one of several joint promisees has the same legal consequences as an offer to all of them."

So far as this Madras decision proceeds upon the English law, its correctness may well be doubted, having regard to the decision of Farwell, J., in *Powell* v. *Brodhurst*.(4) It is not, however, necessary for us to express any opinion on the correctness of the decision in *Barber Maran* v. *Ramana Goundan*(1) and the construction put there upon the last paragraph of section 38 of the Indian Contract Act. In that case the payment was made to one of several joint mortgagees, and it may well be that in such a case where a mortgagor has mortgaged his property to several mortgagees holding jointly, and promised to pay his debt to them before redeeming, an offer of payment to one of the promisees has, under the last paragraph of section 38 of the Indian Contract Act, the same legal consequences as an offer of payment to all of them. But where, as in the present case, the mortgage was made not to several persons jointly but to one person, there was only one promisee, and the case cannot fall within the meaning of the last clause of section 38 unless the several heirs of the promisee, who, on his death, inherit his estate, are to be regarded as joint promisees. There is nothing either in section 38 or in the definition of "promisee" in the Indian Contract Act to show that they must

(1) (1897) 20 Mad. 461.
(2) (1901) 25 Mad. 26.
(3) (1840) 7 M. & W. 264.
(4) (1901) 2 Ch. 160.

be so regarded. The right which the several heirs jointly get on the mortgagee's death to enforce the mortgage is a right created by law in consequence of the devolution upon them of the single and indivisible right which the mortgagee had as the sole promisee, and not in consequence of their being "joint promisees." In the words of Tindal, C.J., in *Decharms* v. *Horwood*,[1] several co-heirs constitute one heir and are connected together by unity of interest and unity of title. One of the heirs, therefore, cannot enforce the mortgage without the concurrence of the rest so as to give a valid discharge to the mortgagor and free the mortgaged property from the incumbrance.

It is to be remarked that the same view is taken of the law in *Ahinsa Bibi* v. *Abdul Kader Saheb*.[2] In that decision Bhashyam Ayyangar, J., after doubting whether the case of *Barber Maran* v. *Ramana Goundan*[3] was rightly decided, goes on to say: "It may be that when money is advanced to one by several persons jointly, each of them authorises the others, by implication, to act on his behalf, and a release or discharge, therefore, of the claim, by one, is binding upon the others. Assuming that the principle of the English Common Law as to the operation of a release given by one of two or more joint promisees is not affected by the Indian Contract Act, and is the law here, as held in *Barber Maran* v. *Ramana Goundan*[3] already cited, it is clearly inapplicable to the case of co-heirs, who are not joint promisees, but the heirs of a single promisee, and it will be dangerous to extend and apply the English doctrine to a release given by one of such co-heirs......In the case of co-heirs, among Hindus, the Hindu Law, as a general rule, constitutes one of them, the senior in age, as the *karta* or manager of the inheritance on behalf of all the co-heirs."

In the present case, the mortgage was made to Apashet, father of defendants 1 to 3. It is found by the District Judge that since his death the three defendants have not been living together, but that defendants 2 and 3 with their families have been living apart from defendant 1. Assuming that they constitute a joint Hindu family, the plea of the plaintiff 1 that he

(1) (1834) 10 Bing. 526. (2) (1901) 25 Mad. 26 p. 39.
(3) (1897) 20 Mad. 461.

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paid the amount due on the mortgage to defendant 2 as manager of the family is negatived by the District Judge's finding that "the two families"—of defendant 1 on the one hand and of defendants 2 and 3 on the other—"were living apart and were mutually hostile." According to Hindu Law, defendant 1, as the eldest of the three brothers, was entitled to the management of the family; but even as to him, having regard to the above-mentioned finding of the District Judge, it is clear that he could not act on behalf of all the brothers. Much less could defendant 2 represent his brothers and bind them by any transaction which had not their concurrence. We must, therefore, hold that the payment by the plaintiffs did not discharge the mortgage.

It was upon the basis of a discharge of the mortgage that the plaintiffs brought this suit for a declaration that they were entitled to have their names entered in the khoti registers as managers of the property in dispute, and as that basis fails, strictly speaking, the plaintiffs are not entitled to the decree passed by the District Judge. But as all the parties interested in the mortgage are before us, it is not desirable to expose them to fresh litigation if complete relief can be given now without prejudice to the rights of any and without altering the nature of the suit. It has been found that defendant 2 has received the whole of the mortgage debt, Rs. 799, from the plaintiffs. The allegation that the payment was fraudulent is negatived by the finding of the District Judge. The specific fraud alleged by the defendant 1 was that it was a *bogus* payment, and it is not open to defendant 1 to plead fraud of any other kind. The only defence which remains to defendant 1 is that he has not received his proportionate share. As to the last argument of the appellant, the plaintiffs' suit is to have a declaration entitling them to have their names entered in the khoti register, and they are clearly entitled to it, having regard to the admitted fact that most of the lands in dispute are in the possession of tenants.

The decree will be: On payment by plaintiffs to defendant 1 of one-third of Rs. 799 within two months from this date, the decree of the District Judge should stand confirmed, each party bearing

his own costs of this appeal. Otherwise in default of such payment within the period of two months, the decree of the District Judge to stand reversed and that of the Subordinate Judge restored with costs in this and the lower Appellate Court on the plaintiffs (appellants).

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

KANHAYALAL BHIKARAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. NARHAR LAXMANSHET VANI (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

1903. *January* 23.

Mortgage—Redemption—Clog on the equity of redemption—Agreement of sale of the mortgaged property subsequently to mortgage.

It is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But it must not be part and parcel of the original loan or mortgage bargain.

Ramji v. *Chinto* (1 Bom. H. C. R. 199) followed and applied.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Khándesh, reversing the decree passed by E. F. Rego, Subordinate Judge at Erandol.

Suit for redemption. In 1848 the plaintiff's grandfather Hirachand mortgaged the house in question for Rs. 818 with possession to Ramchandra, ancestor of defendants 1—4. The deed of mortgage was dated the 8th April, 1848, and the mortgage-debt was made repayable on the 8th October, 1848. The deed contained a *gahan lakan* clause, which provided that if the mortgagor did not redeem within the time fixed he should for ever be foreclosed. On the 11th October, 1849, the mortgagee had the mortgage-deed registered; and on the 13th March, 1856, he had it again registered apparently on account of some defect in the first registration.

The mortgage-debt was not paid within the stipulated period. About a year after the time fixed for repayment the mortgagor Hirachand being pressed for payment of the mortgage-debt sold the equity of redemption to Ramchandra (the mortgagee). No

* Second Appeal No. 369 of 1902.