1896.

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the same parties in the contentious proceedings taken under Chapter V of Act V, 1881. In point of fact, however, no issue was ever raised throughout these proceedings, and the High Court only held that on the evidence on the record the due execution of the will had not been proved. It came to no conclusion as to whether it was a forgery or not. Such a finding cannot, we think, be treated as a final decision of the Court upon the genuineness or otherwise of the will. The Act does not in express terms preclude a fresh application on the part of the executors when they are in a position to support it with more complete proof.

Without, therefore, deciding whether, if an issue upon the question of forgery had been raised and decided, it would have concluded the parties in the present suit, we are of opinion that the decision of the District Court in the present case is correct, and we accordingly confirm the order with costs on the appellant.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

YADAO BABAJI SURYARAO (ORIGINAL PLAINTIFF), APPELLANT, *v.* AMBO AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896. *January* 28.

Mortgage—Apportionment of mortgage-debt—Question of apportionment first raised in second appeal—Practice.

A plaintiff, who had purchased part of certain mortgaged property and sued for possession, obtained a decree ordering that he should get possession on payment of the whole mortgage-debt. He did not in the lower Courts ask that the mortgage-debt should be apportioned, but did so in second appeal to the High Court. Under the circumstances the High Court refused to interfere with the decree. The plaintiff had a remedy by suit for contribution.

SECOND appeal from the decree of L. G. Fernandez, First Class Subordinate Judge, A. P., of Thána.

In 1885 the first and second defendants mortgaged the plots of land in dispute together with some other land for Rs. 300 to one Martand.

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In 1890 they sold the lands in dispute to the plaintiff for Rs. 300 and executed a sale deed to him.

In 1893 Bhaskar (defendant No. 3), who was the heir of Martand, sued them on Martand's mortgage and obtained a decree for Rs. 600. As defendants Nos. 1 and 2 could not pay this sum within the time allowed by the decree, they received Rs. 200 more from Bhaskar (defendant No. 3) and sold him the lands.

The plaintiff now sued defendants Nos. 1 and 2 for possession of the land sold to him in 1890. Defendant No. 3 was subsequently added as a party.

Defendants Nos. 1 and 2 alleged that, although they had executed the sale-deed to the plaintiff, he had not completed the sale by paying the purchase-money, and they, therefore, had sold the lands in question together with the other mortgaged property to Bhaskar (defendant No. 3).

The Subordinate Judge found that Bhaskar (defendant No. 3) had purchased with knowledge of the previous sale to the plaintiff, and he ordered that possession should be given to the plaintiff on his paying Rs. 600 (the amount of the decree on the mortgage) to Bhaskar (defendant No. 3), and passed a decree accordingly.

In appeal the Judge confirmed the decree.

The plaintiff appealed to the High Court, contending that as the mortgage to Martand included other property, the whole of the mortgage-debt should not be made payable out of the lands which he (the plaintiff) had purchased.

Narayan G. Chandavarkar and *T. R. Kotwal* for the appellant (plaintiff):—The burden of the mortgage-debt ought to be apportioned between the plaintiff and defendant No. 3, who have each bought a part of the mortgaged property. It is inequitable to order the plaintiff to pay the whole—*Lomba* v. *Vishvanath*[1]; *Nawab Azimut Ali Khan* v. *Jowahir*[2].

Mahadev B. Choubal for the respondents:—It is too late now to raise the question of apportionment. The debt cannot be

(1) I. L. R., 18 Bom., 86, at p. 91. (2) 13 Moo. I. A., 404.

apportioned without taking evidence of the respective values of the lands.

JARDINE, J.:—It has been admitted that the plaintiff might have been entitled, on pleading it in the Courts below, to the benefit of the doctrine of apportionment of the mortgage-debt over the two parts of the mortgaged property, as in *Lomba* v. *Vishvanath*[1]. We have been urged to pass a similar decree, and thus allow the sum to be paid to be ascertained in execution, although the matter does not appear to have been mooted in the Courts below, or suggested itself to either of the Judges. Such a course prolongs litigation, and tends to draw to the High Court matters which are more easily determined by lower Courts, —a result objected to in *Queen-Empress* v. *Chagan*[2]. Where otherwise there might be a failure of justice, especially where there is no other remedy, or where some special circumstance exists, such as the deep ignorance of a party, the intricacy of the law, or the passing of a new statute, or of a judgment altering the interpretation, such indulgence, as has been sought, has often been given. But it is not denied that the doctrine of apportionment is not one of recent introduction into the mofussil; and we see no circumstance, and have been shown no authority, for treating it in a special way. It is admitted that the plaintiff has a remedy by suit for contribution. We refrain, therefore, from interfering with the decree on the above ground.

We notice that the lower Court of appeal has failed to give effect in its decree to its finding that the plaintiff is entitled to the rent claimed, namely, Rs. 30, from the defendants Nos. 1 and 2. We, therefore, amend the decree by making that provision; and in other respects confirm it. Costs of this appeal on the appellant.

Decree amended.

(1) I. L. R., 18 Bom., 86. (2) I. L. R., 14 Bom., 331 at p. 342.