1895.

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tion to the Court to take a step in aid of execution of the decree, *viz.*, to grant leave to the decree-holder to bid.

We agree with the decision of the Allahabad High Court in *Bansi* v. *Sikree Mal*[1] on this point, which dissents from the expression of opinion of the Calcutta High Court in *Torce Mahomed* v. *Mahomed Mabood Bux*[2] on this question, and accordingly confirm the order of the lower appellate Court with costs.

Order confirmed.

(1) I. L. R., 13 All., 211. (2) I. L. R., 9 Cal., 730.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1895.
December 10.

MA'RUTI (ORIGINAL DEFENDANT), APPELLANT, *v.* RA'MA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Partition—Partition made under a bonâ fide mistake as to property subject to partition—Re-partition.

The parties to a partition under a *bonâ fide* mistake included in the division certain property which did not belong to the family, but was held in mortgage from a third person who subsequently brought a suit for redemption and recovered it from the party to whom it had been allotted at the partition.

Held that the party who had lost his share was entitled to claim a re-partition.

SECOND appeal from the decision of Ráo Bahádur N. G. Phadke, Joint First Class Subordinate Judge, A. P., of Sholápur, in Appeal No. 61 of 1893.

Suit for partition. The family to which the parties to this suit belonged was possessed of certain joint property consisting (*inter alia*) of two *malás* (or orchards).

At a partition made about twenty years before suit one of the *malás* was assigned to the plaintiff's predecessors in title, and the other *malá* to the defendants' predecessor. At the time this partition took place all the parties *bonâ fide* believed that the *malá* assigned to the plaintiffs' predecessors was family property, but as a matter of fact it was only held on mortgage, it having been mortgaged to the family at a very remote period.

* Second Appeal, No. 707 of 1894.

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In 1885 the mortgagor's descendants brought a suit for redemption of the *malá* in question, and obtained a decree for possession, the Court finding that the mortgage-debt had been paid off out of the usufruct. In execution of this decree the plaintiffs were dispossessed of the *malá*.

The plaintiffs thereupon brought this suit to recover their share in the other *malá* by its equal division between themselves and the defendants.

The Subordinate Judge rejected the plaintiffs' claim, holding that the property could not be partitioned afresh.

This decision was reversed, on appeal, by the First Class Subordinate Judge, A. P.

The defendants thereupon preferred a second appeal to the High Court.

Mánekshán Jehángirshán for the appellants.

Ghanashám Nilkanth for the respondents.

PARSONS, J. :—An interesting point arises in the decision of this appeal. The family to which the parties belong thought that they owned absolutely two *malás* (orchards), and at a partition made some twenty years ago one *malá* was assigned to the defendants' and one to the plaintiffs' predecessors-in-title. Very recently a suit was brought against the parties by a third person to obtain possession of the *malá* that had been assigned to the plaintiffs, and it was decided that the *malá* was held by the family on an ancient mortgage, the right to redeem which was still subsisting, and that the mortgage money had been paid off from the usufruct; the plaintiffs consequently lost their *malá*, and they now bring this suit to make the defendants contribute towards the loss they have sustained, in other words, for a re-partition. No fraud is alleged at the time or in the mode of the partition. There was a *bonâ fide* mistake shared in by all parties as to the ownership of the *malá*. The Judge says: "It is beyond all doubt that the parties to the division made it in ignorance of the mortgage and under the idea that the mortgaged property was absolutely theirs and that their interest in it was not limited at all." Under these circumstances we think that the plaintiffs are

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entitled to the relief they ask. In his work on Hindu Law, at p. 232, Sir T. Strange says: "Whenever from any cause not understood at the time the division proves to have been unequal or in any respect defective, it may be set to rights notwithstanding the maxim 'Once is partition of the inheritance made.'" In the case of *Davloba* v. *Rayagavda*[1] a person claiming by a paramount right came in after partition and took away one-half of the property. The learned Judges decided that in such a case the parties "were bound to bear that loss equally. They had divided under such a misapprehension of the true state of the case that the Hindu law, like common equity, would correct the error by distributing the existing but unknown burden evenly where it was placed on one only of the sharers." The principle of that decision applies exactly to the present case. We confirm the decree with costs.

Decree confirmed.

(1) P. J for 1883, p. 227.

TESTAMENTARY JURISDICTION.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

GHELLA'BHA'I A'TMA'RA'M (ORIGINAL PLAINTIFF), APPELLANT, v. NANDUBA'I (ORIGINAL DEFENDANT), RESPONDENT.*

1896. *August*, 21

Executor—Will—Arbitration—Power of executor to refer the question of execution of a will to arbitration—Evidence—Evidence to explain written document—Evidence Act (I of 1872), Secs. 92 and 94—Practice.

Semble.—An executor against whose application for probate a caveat has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased.

An executor having propounded a will, and applied for probate, a caveat was filed denying the execution of the alleged will, and the matter was duly registered as a suit. The executor and the caveatrix subsequently referred "the dispute" to arbitration, signing a submission paper, which was as follows:—

"To Bhangsáli Kálidás Rámji. Written by us the undersigned. By this instrument we give to you in writing as follows:—In the matter of an application presented by Ghellábhái Átmárám Tambuwála to obtain 'power' (probate) from the High Court for the administration and enjoyment between us two persons of the property of Bái Godáwari, widow of Darji (tailor) Bhowán Deva Dáve, I, Nandubái, the

* Testamentary Suit, No. 21 of 1893; Appeal No. 907.