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is no evidence rebutting that presumption, they can form no part of the will. Here it is to be remarked that as to the pencil writing in paragraph 9, the evidence of the attesting witness, Anáji Rámchandra, is that it was made by himself at the time of attesting the will at the desire of the deceased, and it must, we think, be held to be part of his will, although the document had been previously signed by the deceased, as such a will does not necessarily require to be signed by the testator. The writing in pencil which is scored out in the space at the foot of paragraph 14 was also, as the evidence of the same witness shows, in the will when he attested, but it is of no importance being scored out. As to the other alterations, there is no evidence one way or the other. Upon the whole we think that probate of the will should be granted with the pencil writing in paragraph 9, but without any of the other additions, erasures or cancellations. Appellants to have their costs throughout.

Order discharged.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

RÁMBHAT, (ORIGINAL DEFENDANT), APPELLANT, v. RÁGHIO KRISHNA
 DESHPÁNDE, (ORIGINAL PLAINTIFF), RESPONDENT.*

1892.

January 7.

Mortgage—Decree for redemption on payment of a certain amount—In default, mortgages to recover possession—Subsequent suit for an account by mortgagor not maintainable.

A mortgagee having recovered possession of mortgaged property under a decree, which directed the mortgagor to redeem on payment of a certain amount, and in default the mortgagee to recover and retain possession until payment,

Held, that a subsequent suit by the mortgagor against the mortgagee for account and possession would not lie. The mortgagor could recover possession only on payment of the amount mentioned in the mortgage decree.

Dattátraya Rájí v. Anáji Rámchandra(1) distinguished.

This was an appeal from an order of remand passed by Ráo Bahádur Narhar Gadáhar Phadke, Joint First Class Subordinate Judge of Shokápur with Appellate Powers.

* Appeal No. 32 of 1891.

(1) P. J., 1886, p. 237.

Suit for account and redemption.

The plaintiff, Rágho Krishna Deshpánde, alleged that the lands in dispute were mortgaged to the deceased defendant, Rám-bhat bin Nathubhat Kaulgi, who on the mortgage obtained a decree for Rs. 3,081-9-0; and, as the plaintiff made default in payment of the amount, took possession of the property. The plaintiff, therefore, prayed that an account of the profits and the debt should be taken, and that he should be allowed to redeem the property on payment of the balance, if any, due to the defendant on the mortgage.

The defendant, Eknáth Rám-bhat Kaulgi, son and representative of the deceased mortgagee Rám-bhat, pleaded (*inter alia*) that the suit for account would not lie; that the previous decree directed the plaintiff to pay Rs. 3,081-9-0 for redemption, and on his failure to do so the defendant was to recover and retain possession till the amount was paid off; that the plaintiff having failed to pay the amount, the defendant had recovered possession; and that the plaintiff could redeem only on payment of the decretal amount.

The Subordinate Judge (Ráo Sáheb Ganesh Dádáji Deshamukhá) held that it was not open to the Court to go behind the mortgage decree obtained by the defendant and to take the account. He, therefore, passed a decree, directing the plaintiff to pay to the defendant the decretal amount, namely Rs. 3,081, for redemption, within one year from the date of the decree, and in default plaintiff's right of redemption to be foreclosed.

The plaintiff appealed to the District Court, which held that the plaintiff was entitled to have from the defendant an account of the rents and profits of the mortgaged property, and, reversing the decree, remanded the case for further inquiry.

The Subordinate Judge with Appellate Powers made the following observations in his judgment:—

“*Navlu v. Rághu* ⁽¹⁾ and *Dattátraya Rárji v. Anáji Rám-chandra* ⁽²⁾ are very similar, with very little difference in facts involved in them. The first takes the precedence in time of the second. The Division Bench, which decided the first, was com-

(1) I. L. R., S Bom., 303.

(2) P. J., 1886, p. 237.

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posed of West and Nánábhái Haridás, JJ., and that which disposed of the other was composed of the Chief Justice¹ and Birdwood, J. I should, therefore, follow the second case in preference of the first one.

“ Both these cases are in favour of the maintenance of a redemption suit, like the present, following a decree for possession by the mortgagee until payment of the mortgage-debt. They, however, differ in allowing the taking of an account from the date of the decree after that decree. The second case having, in my opinion, a good title to preference, I hold that the plaintiff is entitled to an account from the defendant as to rents and profits of the mortgaged property from 1869 up to the date of the present suit.”

Against the order of remand the defendant appealed to the High Court.

Díji Abáji Khare for the appellant:—The decree in the former suit, which was brought by us to recover our mortgage amount, was to the effect that the respondent should pay us a certain sum of money, and on his failure to do so we were to recover and retain possession of the property till the payment of that amount. We, therefore, contend that the only means by which the respondent can recover possession from us is by paying the amount of the decree. He cannot bring a suit like the present and ask for an account—*Navlú v. Rúghu*⁽¹⁾. The lower Court has relied upon the decision in *Dattátraya Ráoji v. A'náji Rámchandra*⁽²⁾. We submit that the lower Court has taken an erroneous view of that ruling, because in that case the decree merely directed the mortgagee, as is shown by a subsequent Full Bench judgment in *Táni Bágaván v. Hari bin Bhaváni Dubal*⁽³⁾, to recover possession without directing the mortgagor to pay a specific sum for redemption. In such a case it would be proper to take an account, but not where the decree orders payment of a particular sum for redemption.

There was no appearance for the respondent.

SARGENT, C. J.:—The language of the decree passed in Suit No. 336 of 1869 is precisely the same as that which was consider-

⁽¹⁾ I. L. R., 8 Bom., 303.

⁽²⁾ P. J., 1886, p. 237.

⁽³⁾ P. J., 1887, p. 315 (*vide note at foot of this report*).

ed by the Court in *Navlu v. Rághu*⁽¹⁾. There the Court held that an account could not be taken, and the Full Bench, in *Táni Bágavín v. Hari bin Bhaváni Dubal*⁽²⁾, held that the case was rightly decided. In the case of *Duttátraya Rávjí v. Anáji Rámchandra*⁽³⁾, on which the lower Appellate Court relies, the decree simply put the mortgagee into possession. We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge. The appellant to have his costs in the lower Appellate Court.

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Decree reversed.

(1) I. L. R., 8 Bom., 303.

(2) P. J., 1887, p. 315.

(3) P. J., 1886, p. 237.

NOTE.—The following is the report of the case of *Táni Bágavín v. Hari bin Bhaváni Dubal* (Printed Judgments for 1887, p. 315), which is referred to in the argument and the judgment of the Court:—

FULL BENCH.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice West, and
Mr. Justice Farran (officiating).*

TA'NI BA'GAVÁ'N, DECEASED, BY HER HEIR DA'DU, (ORIGINAL DEFENDANT),
APPELLANT, v. HARI BIN BHAVÁ'NI DUBAL, (ORIGINAL PLAINTIFF), RES-
PONDENT. *

1887.

September 29.

THIS was a second appeal from the decision of S. Tágore, District Judge of Sholápur.

This action was instituted by plaintiff, Hari bin Bhaváni Dubal, to redeem and recover possession of certain land from the defendant. He also prayed for an account of the rents and profits and of the mortgage-debt.

The defendant, Dádu, contended (*inter alia*) that under a decree which he had obtained on the mortgage he was to remain in possession of the mortgaged property till the decretal amount was paid by the plaintiff.

The Subordinate Judge (Ráo Sáheb) Báláji Máhadéo made account and directed the plaintiff to redeem and recover possession of the property on payment of Rs. 1-0-7 to the defendant.

The defendant appealed to the District Court, which amended the decree of the Subordinate Judge by disallowing Rs. 1-0-7.

Against the decree of the District Court the defendant appealed to the High Court.