1891.

IRÁPA BIN MÁLÁPA NA'IK v. ÁPA'SA'HEB IRDASA'PA DESA'I.

the Court below and send back the case for a decision on the merits. There is no necessity for making Government a party to the suit, as the Government have no interest whatever in the dispute between the parties. Costs to abide the result.

Decree reversed and case sent back.

APPELLATE CIVIL.

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

1891. *December 22.*

PA'NDURANG HARI VAIDYA AND OTHERS, (ORIGINAL OPPONENTS), APPELLANTS, *v.* VINA'YAK VISHNU KA'NE, (ORIGINAL PETITIONER), RESPONDENT.*

Will, blank spaces in the body of—Alterations and erasures—Presumption—Pencil writing subsequent to the execution of the will—Intention of testator.

The circumstance that blank spaces are left in the body of a will is no objection to its being a valid will.

If a will contains alterations and erasures, the presumption will be that they were made after the will was executed; and, if there is no evidence rebutting that presumption, they will form no part of the will.

The lower Court having declined to grant probate of a will, (which it held to be proved), on the ground that it was an incomplete will, being of opinion that the blanks, alterations and cancellations in the will showed that the deceased intended it to be a draft, and not the final expression of his wishes,

Held, that the will being one which did not require to be signed by the testator, probate should be granted to include a pencil addition proved to have been made by the attesting witness at the desire of the testator, but excluding all other additions, erasures or cancellations.

THIS was an appeal from an order passed by Dr. A. D. Pollen District Judge of Poona.

Application for grant of probate.

One Mahádeo Vishnu Káne died after having made a will of his property. In the will there were three executors mentioned, namely, Pándurang Hari Vaidya, Gopál Balvant Nene and Nilkanthráo Govind Gokhale, who having applied for probate of the will, the District Judge granted it on the 22nd December, 1890. Subsequent to the grant, Vináyak Vishnu Káne, the younger brother of the testator, made an application to the District Judge to revoke the probate, and the Court having found that no notice of the proceedings in which the probate was granted was served

* Appeal No. 126 of 1891.

on the applicant, and that the procedure was, therefore, defective, revoked the probate, and made a fresh inquiry, in which it came to the conclusion that the will was not a complete legal document expressing the final intention of the deceased of which probate could be granted under the Probate and Administration Act (V of 1881), the District Judge thereupon passed an order rejecting the application for probate, giving the following reasons for his order.

"Although I have no doubt, upon the evidence, that the signature of the deceased at the foot of the document is genuine, and that the signatures of the attesting witnesses were attached to it at the request of the deceased at the time and place and under the circumstances alleged by them, yet I am unable to hold that it is a complete will of which probate can properly be granted. In its present state it is incomplete, and it seems physically impossible to grant probate of it, for it is impossible to say in what state it left the custody of the deceased, or how it could be copied, so as to express correctly what the real intentions of the deceased were. The cause of this is that the document contains several blank spaces, interlineations in pencil and ink, marginal pencil notes, corrections and alterations of figures, erasures and cancellations of pencil notes. And it seems to be very unlikely that an educated and travelled man, such as Mr. Káne was would have intentionally left in such a state a document which he intended to be his last will and testament. The document further does not give expression to an intention which it is proved that the deceased entertained, namely, of giving Rs. 10,000 to the Bombay University. Some of the alterations no doubt are trivial and unimportant ones, but others seem to me fatal to the grant of probate. There must be something definite of which probate can be granted. In paragraph 9 of the document, for instance, in which the testator estimates the value of his property at thirty thousand rupees, the word *thirty* originally written is scratched through with the pen, and the figure *forty-four* has been written above it. Again, in paragraph 10 the figure 100 has been cancelled and the word 'thirty' in pencil, and the figure 30 (first in pencil and then ink) has been substituted. In paragraph 14 the figure 2,500 has been cancelled, and the figure

1891.

PA'NDURANG HARI VAIDYA v. VINA'YAK VISHNU KA'NE.

3,000 substituted; then again the figure 3,000 has been cancelled and the figure 4,000 with the word four (all in pencil) has been substituted.

"Then, again, in a blank space left at the end of the same paragraph, two lines have been written in pencil and have been cancelled again by a pen drawn across them. None of these alterations and additions have been signed or attested, and there is no satisfactory evidence to show by whom they were made, or when or why. If they were made by the deceased himself, or by his orders, as seems not improbable, this would seem to indicate that he regarded the document as an incomplete draft of a will, and not as a final expression of his wishes. I cannot decide which of the figures above referred to—those marginally written or those subsequently written, those in pencil or those in ink—are to be adopted and embodied in the probate, and under such circumstances I do not see how probate is to be granted, or how such an incomplete and in parts unreadable a document is to be accepted as a lawful declaration of the last wishes of the testator. The fact that blank spaces were left at the end of certain paragraphs by the directions of the deceased, and that he did not make the gift of Rs. 10,000 to the University which he had made preparations to do, confirm my impression that the document, although it was written at the request of the deceased, and though it bears at its foot his signature and the attestations of two respectable witnesses, does not evidence a complete and legal expression of his last wishes, but that he kept it rather as a draft. Had the document been in a complete state, I would, on the evidence before me, have no hesitation in granting probate to the present applicants."

Against the order of the District Court the executors appealed to the High Court.

Branson (with *Mahádeo Chimnáji Apte*) for the appellants:—The lower Court has not granted us probate, because the will contains alterations and interlineations. The Judge has remarked that some of the alterations are of a trivial nature; if so, he should have granted us probate of those alterations. Some of the alterations only relate to the description of the property, and,

1891.

PA'NDURANG HARI VAIDYA v. VINA'YAK VISHNU KA'NE.

therefore, they cannot vitiate the will. The evidence in the case shows that one of the alterations (shown to the Court) was made by a witness at the request of the testator, and that some of the alterations were made by the testator himself. We, therefore, submit that probate should be granted of such of the alterations and interlineations as are explained by the evidence in the case. The evidence further shows that the testator had a draft with him from which he dictated the contents of the will to the writer. The Judge himself does not entertain any doubt as to the genuineness of the will. If the will was executed by the deceased, probate must be granted.

Jardine (with *Dhondu Shámráv Garud*) for the respondent:—The Judge found, from the appearance of the document and other circumstances in connection with it, that what was alleged to be a will was no legal will, but merely a draft of which probate could not be granted. The question to be determined in granting probate is whether the will is genuine and legal. We submit that the draft produced by the appellants may be genuine, but being merely a draft, and not a legal will, the lower Court was right in not granting probate.

SARGENT, C. J.:—The District Judge has found, and we agree with him in his conclusion, that the evidence satisfactorily establishes the genuineness of the deceased's signature, and also of the signatures of the attesting witnesses, but he refuses probate of the document, because he is unable to hold that it is a complete will, being of opinion that the blanks, alterations, and cancellations show that the deceased intended it to be a draft, and not the final expression of his wishes. The evidence, however, of the writer of the will and of the attesting witnesses is entirely opposed to that view, and can leave no doubt that when he signed the document he signed it as his will, and that he intended these witnesses to attest the document as it then stood as his will. The circumstance that blank spaces were left in the body of it is no valid objection to its being a will (Williams on Executors, 8th Ed., Vol. I, p. 82). And as to alterations and erasures, the presumption would be that they were made after the will was executed (Williams on Executors, 8th Ed., Vol. I, p. 132). And if there

1891.

PANDURANG HARI VAIDYA v. VINÁYAK VISHNU KÁNE.

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.

1892.
January 7.

RA'MBHAT, (ORIGINAL DEFENDANT), APPELLANT, *v.* RA'GHO KRISHNA DESHPA'NDE, (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Decree for redemption on payment of a certain amount—In default, mortgagee 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 Rávji v. *A'náji 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 Sholápur with Appellate Powers.

* Appeal No. 32 of 1891.

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