

1892
SEP. 27.

17 B. 686.

APPEL-
LATE
CIVIL.
17 B. 686.

[686] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.*BAYABAI (*Applicant*) V. SARASVATIBAI, MINOR, BY HER GUARDIAN
GANGADHAR BHAGAVANT (*Opponent*).^{*} [27th September, 1892.]*Will—Probate—Application for probate refused by District Court on ground that will not proved—On appeal finding by High Court that the will was proved—Subsequent application for probate to be made to District Court and not to High Court—Practice—Procedure.*

Where on appeal from the District Court it was found by the High Court that a will was proved.

Held that a subsequent application for probate should be made to the District Court.

THIS was an application against an order passed by Dr. A. D. Pollen, District Judge of Poona.

One Bayabai presented an application to the District Court at Poona to obtain probate of a certain will under Act V of 1881. The District Judge found that the will was not proved and rejected the application. Bayabai appealed, and the High Court reversed the order, holding that the will was proved by the evidence, and directed that probate be granted to her (see Printed Judgments for 1891, p. 146).

In pursuance of the High Court's order, Bayabai presented a fresh application to the District Court for the grant of the probate on the 10th February, 1892. The application was also rejected by the Judge on the following grounds :—

"The application for probate must be made to the Court that ordered the grant of probate. This Court cannot proclaim that the will was proved before it when it has held that the will was not proved. The probate is equivalent to a decree, and when a decree is reversed on appeal by an appellate Court, it is the appellate Court that passes a new decree."

Bayabai then applied for probate to the High Court.

Mahadeo Chimnaji Apte, for the applicant.

JUDGMENT.

SARGENT, C.J.—The District Judge objects to issuing a probate, because, he says, he cannot proclaim that the will was proved [687] before the District Court. No doubt the District Court would have to state in the probate that the will was proved before it, but so it must be deemed to have been, after the decision of this Court that it was established on the evidence. In order to execute the order of this Court a probate, (which is not, as the District Judge supposes, a decree of the Court, but "the copy of the will under the seal of the Court" s. 3, Act V of 1881), has to be prepared and issued, which, under s. 583, is the duty of the lower Court. We must, therefore, refuse the application that probate be granted by this Court, and direct the District Judge to grant it.

Application rejected.