

1913.

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factory. The plaintiff asserted his right to the property before the Revenue authorities long ago. The defendants had no reason to suppose that the plaintiff would not assert his right to the property. They have wrongfully withheld the property from the plaintiff so long, and should be directed to pay the mesne profits for three years prior to the date of the suit and for the period from the date of the suit until delivery of possession. I agree that the decree of the lower Court should be modified as regards mesne profits and costs in favour of the plaintiff as proposed by my learned colleague.

Decree modified.

R. R.

APPELLATE CIVIL.

FULL BENCH.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman
and Mr. Justice Shah.*

1913.

June 20.

HANMANT VALAD RAKHMAJI (ORIGINAL DEFENDANT), APPELLANT,
v. ANNAJI HANMANTA (ORIGINAL PLAINTIFF), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), Order XLI, rule 11—Civil Circular,
issued by the Bombay High Court, No. 51†—Summary dismissal of appeal—
Necessity of writing a judgment.*

A lower Court of appeal must write a judgment when it dismisses an appeal under Order XLI, rule 11 of the Civil Procedure Code (Act V of 1908), as provided by Civil Circular 51 issued by the High Court, Bombay.

Tanaji Dagde v. Shankar Sakharam⁽¹⁾, overruled.

* Second Appeal No. 480 of 1912.

† The circular runs as follows :—

51. When an appellate Court dismisses an appeal under section 551 of the Code of Civil Procedure, a judgment should be written and a formal decree drawn up.

(1) (1911) 36 Bom. 116.

SECOND appeal from the decision of C. E. Palmer, District Judge of Nasik, dismissing an appeal under Order XLI, rule 11 of the Civil Procedure Code, 1908, from the decree passed by G. M. Pandit, Subordinate Judge at Sinnar.

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Suit for redemption.

The plaintiff brought this suit to redeem a mortgage which was decreed on certain terms by the first Court.

There was an appeal against the decree: but the lower appellate Court dismissed the appeal summarily, observing: "The appeal is summarily dismissed. Order XLI, rule 11, Civil Procedure Code."

The defendant appealed to the High Court.

The appeal was heard by Heaton and Rao, JJ., on the 25th February 1913. Their Lordships made a reference to a Full Bench, recording the following judgment:—

HEATON, J.:—We refer to a Full Bench this question: Whether the judgment of the first appellate Court in this case is a judgment in accordance with law? If the decision in *Tanaji Dagde v. Shankar Sakharam*⁽¹⁾ is correct, the judgment is in accordance with law. But the decision in that case is contrary to the previous practice as upheld by this Court, as will be seen from the cases reported: *Puttapa v. Yellappa*⁽²⁾, *Narayan Lakshmandas v. Lala valad Sandu Patil*⁽³⁾, *Thakor Takhatsangji v. Bai Sundarba*⁽⁴⁾ and also *Khushal Chintaman v. Supdu Tapiram*⁽⁵⁾. It is because of the conflict between the decision and the previous practice, and because of the doubt which does arise in our own minds as to whether *Tanaji's case* is correctly decided that we make this reference.

(1) (1911) 36 Bom. 116.

(3) (1894) P. J. 113.

(2) (1903) 5 Bom. L. R. 233.

(4) (1891) P. J. 58.

(5) (1891) P. J. 239.

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The reference was heard by a Full Bench consisting of Scott, C. J., Beaman and Shah, JJ., on the 20th June 1913.

D. W. Pilgankar, for the appellant.—The lower Court erred in not writing a judgment (rule 31 of Order XLI) in dismissing an appeal under Order XLI, rule 11.

[Scott, C. J., referred to *Bapu v. Vajir*⁽¹⁾.]

On the point referred there is a conflict of decision : *Tanaji Dagde v. Shankar Sakharam*⁽²⁾ and *Puttapa v. Yellappa*⁽³⁾. The judgment in *Tanaji Dagde v. Shankar Sakharam*⁽²⁾ is based on a consideration of marginal notes, and headings, which are no guides to interpretation. The Allahabad High Court is of the same opinion : see *Samin Hasan v. Piran*⁽⁴⁾.

The decision in *Puttapa v. Yellappa*⁽³⁾ is supported by a long series of decisions, *viz.*, *Narayan v. Lala*⁽⁵⁾, *Thakor Takhatsangji v. Bai Sundarba*⁽⁶⁾ and *Khushal v. Supdu*⁽⁷⁾, based on Civil Circular 51. The view of the Calcutta and Madras High Courts is in the same way : *Rami Deka v. Brojo Nath Saikia*⁽⁸⁾ and *Royal Reddi v. Linga Reddi*⁽⁹⁾.

R. R. Desai, for the respondent.—There is a difference in the language of Order XLI, rule 11, as compared with section 551 of the Civil Procedure Code of 1882. The addition of the words "after sending for the record if it thinks fit so to do" relieves the Court from the necessity of writing a judgment when it agrees with the first Court.

The provisions of rule 31 of Order XLI do not apply to summary disposal of appeals under rule 11.

The Civil Circular 51 which conflicts with Order XLI, rule 11, must yield to it.

(1) (1896) 21 Bom. 548.

(2) (1911) 36 Bom. 116.

(3) (1903) 5 Bom. L. R. 233.

(4) (1908) 30 All. 319.

(5) (1894) P. J. 113.

(6) (1891) P. J. 58.

(7) (1891) P. J. 239.

(8) (1897) 25 Cal. 97.

(9) (1881) 3 Mad. 1.

D. W. Pilgankar was not called upon to reply.

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SCOTT, C. J. :—The question which has been referred to us is whether the judgment of the first appellate Court is a judgment in accordance with law. The reference is made on the ground that the decision in *Tanaji Dagde v. Shankar Sakharām*⁽¹⁾ seems to conflict with the previous practice of the Court, as appearing from *Puttapa v. Yellappa*⁽²⁾, *Thakor Yakhatsangji Ramsangji v. Bai Sundarba*⁽³⁾, *Khushal Chintaman v. Supdu Tapiram*⁽⁴⁾ and *Narayan Lakshmandas v. Lala valad Sandu Patil*⁽⁵⁾. There is much to be said for the reasoning in *Tanaji Dagde v. Shankar Sakharām*⁽¹⁾ upon the materials which were then before the Court. But the Court does not appear to have had in mind the existence of Civil Circular 51 which was published in 1890 under the provisions of the High Courts Act. That Circular provides that “when an appellate Court dismisses an appeal under section 551 of the Code of Civil Procedure, a judgment should be written and a formal decree drawn up.” There is nothing in the new Code of Civil Procedure which introduces any change in the law, except in so far as the rules commencing with rule 9 of Order XLI are headed “Procedure on admission of appeal.” That change is not sufficient to abrogate the rule published under the High Courts Act which is quite consistent with the provisions of the Code. That rule in the Civil Circulars is the basis of all the Bombay judgments above referred to, except that reported in 36 Bom., p. 116. We are, therefore, of opinion that the practice laid down in that Circular must still be observed by the Courts of this Presidency subject to the superintendence of the High Court.

(1) (1911) 36 Bom. 116.

(3) (1891) P. J. 58.

(2) (1903) 5 Bom. L. R. 233.

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BEAMAN, J.:—Had we nothing more to do here than give a true construction of Order XLI, then notwithstanding the conflicting decisions which have been cited to us, I should certainly have adhered to the view expressed by my brother Hayward, in which I concurred, in *Tanaji Dagde v. Shankar Sakharant*⁽¹⁾. I think too that what that case authorized is desirable and right to be done as tending to relieve a hard-worked moffusil judiciary from a heavy burden of clerical work, which must, in many cases at least, be practically superfluous. But in view of the Circular order which has been mentioned, I feel that so long as that Circular order stands, and has the force of law, I ought to concur, and, therefore, I do concur in the judgment which has just been pronounced by my Lord the Chief Justice.

SHAH, J.:—I concur in the judgment delivered by my Lord the Chief Justice.

R. R.

(1) (1911) 36 Bom. 116.

APPELLATE CIVIL.

FULL BENCH.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman
and Mr. Justice Shah.*

1913.
June 20.

SHIVAYAGAPPA BIN SANGAPPA KENGNAL (ORIGINAL PLAINTIFF),
APPELLANT, v. GOVINDAPPA BIN PANDAPPA AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

*Dekkhau Agriculturists' Relief Act (XVII of 1879), section 15B⁽¹⁾—Civil
Procedure Code (Act V of 1908), Order XXIII, Rule 3—Agriculturist
mortgagor—Suit for account of principal and interest—Decree in terms of a
compromise—Compromise made without compliance with the special provisions
of the Dekkhau Agriculturists' Relief Act—Compromise valid.*

* Second Appeal No. 543 of 1912.

(1) Section 15B of the Dekkhau Agriculturists' Relief Act (XVII of 1879) is as follows:—

15B. (1) The Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section 3,