1911.

SALEBHAI ABDUL KADER v. BAI SAFIABU.

That being so, the only question remaining to be decided is whether upon an administration of the whole estate there would remain any balance out of the one-third alone available for bequests to satisfy the legacy in suit after deducting the value of the two houses validly bequeathed in priority in Wakf. For this purpose it will be necessary to remand the case to the original Court for a complete administration of the estate.

We, therefore, reverse the decision of the lower Court upon these preliminary issues and remand the case for a complete administration of the estate, with reference to the foregoing observations and Order XX, rule 13 of the first Schedule of the Civil Procedure Code.

Costs to be costs in the administration.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911.
August 7.

TANAJI DAGDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHANKAR SAKHARAM (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XLI, Rule 11—Appeal—Summary dismissal—Judgment not necessary—Lower appellate Court.

In dismissing an appeal under Order XLI, Rule 11, of the Civil Procedure Code (Act V of 1908), it is not obligatory upon the lower appellate Court to write a judgment.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Khandesh, confirming the decree passed by K. G. Tilak, Subordinate Judge at Yaval.

The plaintiff sued to recover possession of certain land from the defendant, who contended that he was the real owner of the land and that the plaintiff was only a *benamidar* of his. The Subordinate Judge upheld the contention and dismissed

* Second Appeal No. 470 of 1910.

the suit. The plaintiff appealed to the District Judge, who dismissed the appeal summarily under Order XLI, rule 11, of the Civil Procedure Code (Act V of 1908), and wrote the following judgment: "The lower Court has given good reasons for holding that plaintiff-appellant was a mere *benamidar* for the defendant-respondent (who is in possession) and not a real purchaser."

The plaintiff appealed to the High Court.

D. W. Pilgaumkar, for the appellant.

M. V. Bhat, for the respondent.

BEAMAN, J.:—Both the Courts below have found that the purchase at the Court sale was a *benami* transaction. Either this *benami* transaction was free from or tainted with fraud. If free from fraud then the decision of the Courts below would be clearly right. If tainted with fraud, and this appears to be the truth from the defendant's own pleadings, then both the plaintiff and the defendant must be taken to have been parties to this fraud upon innocent third persons; and so the old rule, which was laid down more than a century ago, to govern such cases would in my opinion apply: "Let the estate lie where it falls." Here in the events that have happened the estate has fallen into the hands of the defendant, and I can see no equitable ground upon which the plaintiff, himself a party to the fraud, as he now alleges, could expect us to transfer it from the defendant to himself. I think that while section 66 of the Code of Civil Procedure (Act V of 1908) has no applicability directly to a case of this kind, it may be doubted whether the commentary upon it, relied upon in the arguments here and in the Court below, does not go too far. I merely make that observation, because that commentary appears to have influenced the mind of the Judge of the first Court. It is not, however, any part of the ground upon which I think that this case ought to be decided.

For these reasons, I am of opinion, that the decision of the Court below is right and that this appeal must be dismissed with all costs.

1911.

TANAJI DAGDE v. SHANKAR SAKHARAM.

HAYWARD, J. :—I concur and have only to add some remarks with regard to the point raised that the judgment of the lower appellate Court was insufficient under Order XLI, Rule 11, read with Rule 31 of the First Schedule of the Code of Civil Procedure. It was said in the case of *Puttapa* v. *Yellappa*[1] by a Bench of this Court, that a formal judgment was necessary in the case of an appeal dismissed without sending notice to the lower Court. But it is to be observed that no reasons were assigned for that decision. There is also to the same effect the case of *Rami Deka* v. *Brojo Nath Saikia*[2] decided by the Calcutta High Court but a different view was, after commenting thereon, taken in the case of *Samin Hasan* v. *Piran*[3] by the Allahabad High Court. These decisions were, however, under sections 551 and 574 of the old Code of Civil Procedure of 1882 and what has now to be considered are the corresponding provisions of Order XLI, Rules 11 and 31, of the First Schedule of the new Code of 1908.

Now Order XLI is divided under several headings and Rule 11 comes under the heading "Procedure on admission of appeal" and provides that "The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader." If the appellate Court does not so dismiss the appeal, it is provided under the same heading that a day shall be fixed for hearing the appeal after procuring the record and giving notice to the respondent or his pleader. But there is no provision requiring any formal judgment.

The next heading of the Order is "Procedure on hearing" and thereunder provision is made in Rules 17 and 18 for dismissal of the appeal for default of appellant and in the remaining Rules for the procedure to be observed at the hearing of the appeal. But here again there is no provision for any formal judgment.

(1) (1903) 5 Bom. L. R. 233. (2) (1897) 25 Cal. 97.
(3) (1908) 30 All. 319.

It is not until under the following heading "judgment in appeal" that such provision occurs and under that heading Rule 30 provides that "The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court" and Rule 31 provides that "The judgment of the appellate Court shall be in writing and shall state the points for determination; the decision thereon; the reasons for the decision"; and certain other matters. It is to be observed that these provisions apply in their entirety only to regular hearings at which issues are raised in the presence of the parties with the record before the Court.

It appears to me therefore, looking to Order XLI as a whole, and to the position in it of Rule 11, relating to the summary dismissals of appeals, as also of Rules 17 and 18, relating to dismissals for default of the appellant, and having regard to the practical difficulty of applying to any such dismissals the provisions of Rules 30 and 31 relating to judgments, that those provisions cannot be held, and were never intended by the Legislature to be held, applicable to any but regular hearings of appeals in the presence of the parties and with the record before the Court.

BEAMAN, J.:—I entirely concur.

Decree confirmed.

R. R.