APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Rânade.

BA'I SHRI MAJIRA'JBA (ORIGINAL DEFENDANT), APPELLANT, *v.* MAGANLA'L BHA'ISHANKAR AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1894 *April* 4.

Civil Procedure Code (Act XIV of 1882), Secs. 53, 562 and 582—Remand—Amendment of plaint in appeal—Appellate Court's power to amend plaint—Suit for rent converted into one of ejectment.

When a suit is not disposed of on a preliminary point, it is not competent to a Court of appeal under section 562 of the Code of Civil Procedure (Act XIV of 1882) to remand the case for a fresh trial.

The section, moreover, contemplates a remand back to the Court which first disposed of the suit, and to no other Court.

An amendment of a plaint, which materially transforms the nature of the claim, cannot be made under section 53 of the Code, and certainly not in appeal. Section 53 permits amendment of the plaint before judgment, and not after. The larger powers conferred on appellate Courts by section 582 do not authorize such a material transformation o a suit in appeal.

APPEAL from an order of remand passed by G. McCorkell, District Judge of Ahmedabad, in Appeal No. 134 of 1893.

The plaintiffs sued to recover Rs. 2,150 on account of arrears of rent, alleging that they had let the house in dispute to the defendant at a monthly rent of Rs. 50, and that she had passed to them a promissory note for Rs. 600 for a portion of the rent due.

The defendant denied both the letting and the execution of the promissory note, and pleaded that the house in dispute belonged to her and not to the plaintiffs.

The suit was filed in the Court of the Joint Subordinate Judge of the Second Class, who raised the following (among other) issues :—

(1) Are the plaintiffs owners of the house mentioned in the plaint, and have they let it to the defendant on the terms stated therein ?

(2) Is the promissory note proved ?

(3) What amount are the plaintiffs entitled to recover ?

*Appeal No. 1 of 1894 from order.

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The Subordinate Judge found that the plaintiffs were not owners of the house in suit, that they had not rented it to the defendant, and that the promissory note was not proved. He, therefore, rejected the plaintiffs' claim.

On appeal the District Judge was of opinion that in a rent suit like the present the question of ownership of the house in dispute could not be raised, and that only two issues could properly arise: (1) as to attornment, and (2) as to the amount due. He, therefore, refused to hear the appellants on the question of title and possession.

The appellants thereupon applied for leave to amend the plaint, by converting the suit into one for a declaration of their ownership of the house in dispute, and for possession, together with arrear of rent due.

The District Judge allowed this amendment, and remanded the case to the lower Court for a fresh trial.

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

Ganpat Sadáshiv Ráo for appellant:—The order of remand is opposed to the provisions of section 562 of the Code of Civil Procedure (Act XIV of 1882). The Court of first instance did not dispose of the suit on a preliminary point. Evidence was taken and findings were recorded on all the issues involved in the case. The appellate Court was not, therefore, competent to reverse the decree and remand the case for a fresh decision. Nor had it the power to allow an amendment of the plaint. Section 53 of the Code of Civil Procedure, as amended by Act VII of 1888, allows a plaint to be amended *before* judgment, and not after. The plaint cannot, therefore be amended in appeal. The amendment in the present case is bad for another reason. It has changed the character of the suit altogether. Plaintiffs having failed to prove the lease sued upon, cannot be allowed to fall back on their general title—*Lakshmibái* v. *Hari bin Rávji*[1]; *Rámchándra Bápuji* v. *Vásudev Morbhat*[2]; *Gávrishánkár* v. *Atmárám*[3]. The amendment has further the effect of ousting the jurisdiction of

(1) 9 Bom. H. C. Rep., 1. (2) I. L. R., 10 Bom., 451.
(3) I. L. R., 18 Bom., 611.

the Second Class Subordinate Judge who originally tried the case. The house in dispute is worth nearly Rs. 15,000. A suit to recover possession of such a house must be brought in the Court of the First Class Subordinate Judge. That being so, the remand order in the present case can only be enforced by transferring the suit to another Court. This cannot be done under section 562 of the Code. That section clearly contemplates a remand to the same Court which had originally decided the case. The remand order is, therefore, illegal.

Viccáji (with him Messrs. *Gulábchand M. Damania* and *Kharsedji D. Shroff*) for respondents:—The real point in the present case is whether the amendment can be allowed. Section 53 of the Code of Civil Procedure must be read with section 582. The latter section confers on appellate Courts all the powers exercised by Courts of original jurisdiction, including the power of amending plaints. The amendment in the present case does not alter the nature and character of the suit as originally framed. The main question at issue between the parties relates to the ownership of the house in suit. A distinct issue on this question was raised and decided by the first Court. The appellate Court was of opinion that this issue could not be properly dealt with in a mere rent suit. It, therefore, allowed the suit to be amended so as to enable the Court to decide the question of title in a satisfactory manner. The amendment was, therefore, proper, and even necessary, to prevent a multiplicity of suits. The amendment does not materially alter the nature of the suit. In such cases regard is to be had "not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was treated by the lower Courts"—*Rájah Rup Singh* v. *Rání Báisni*[1].

RA'NADE, J.:—The only point of law involved in this case is, whether the lower appellate Court was right in remanding the case back to the lower Court, after allowing plaintiff to amend his plaint.

The original suit was brought by plaintiffs Nos. 1 and 2 to recover Rs. 2,150 on account of the rent of a house alleged to

(1) L. R., 11 I. A., 149 at p. 155.

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have been leased by plaintiffs to defendant in May, 1888. Defendant denied the alleged lease, and contended that she was not plaintiffs' tenant, but owner of the house. There was admittedly no written lease, and plaintiffs relied chiefly on oral evidence, and on a promissory note for a portion of the rent claimed, which note, defendant contended, was a forgery.

The issues laid down for inquiry included one about the ownership of the house. On this issue, evidence was given, and a finding recorded, although the Second Class Subordinate Judge remarked that this question could not be gone into in the present case, and that the inquiry must be confined to the question of the alleged lease, and the arrears of rent claimed. He held that the alleged lease was not proved, and that the promissory note, on which plaintiffs relied, was not passed by the defendant. He accordingly rejected plaintiffs' claim.

In appeal, the District Judge was of opinion that the issue about ownership ought not to have been laid down, and that the Second Class Subordinate Judge was right in confining the inquiry to the issues decided by him. At the same time, as the dispute between the parties related chiefly to the question of ownership, the District Judge permitted plaintiffs to amend the plaint, and remanded the case back to the lower Court for fuller investigation and fresh decision.

The procedure adopted by the District Judge in this case is certainly open to the objection urged by the appellant's pleader. If the District Judge was at one with the Court of first instance, there was obviously no scope for a remand under section 566, and he should have in appeal disposed of the case upon his appreciation of the evidence on the narrower issues decided by the Second Class Subordinate Judge, and referred plaintiffs to a separate suit on their general title. The suit was not disposed of on a preliminary point, and there was thus no proper occasion for a remand under sections 562, 564 and 578—*Lingammal* v. *Venkatammal*[1]; *Farzand Ali* v. *Yusuf Ali*[2]. Section 562, moreover, contemplates a remand back to the Court which first disposed of the suit. In this case, as the value of the property in dispute exceeds

(1) I. L. R., 6 Mad., 239. (2) I. L. R., 2 All., 669.

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Rs. 5,000, the remand inquiry could not possibly be conducted in the Second Class Subordinate Judge's Court, and the suit would have to be inquired into by the First Class Subordinate Judge of Ahmedábad. An amendment, which transforms so radically the nature of the claim, cannot be made under section 53, and certainly not in appeal. Section 53 requires and permits amendment of the plaint before judgment, and not after. The large powers conferred on appellate Courts by section 582 do not authorize such a transformation of a suit in appeal.

We accordingly reverse the order of remand, and direct the District Judge to dispose of the appeal on the evidence in respect of the issues decided by the Court of first instance. The respondents should pay the costs of this second appeal.

Remand order reversed.

APPELLATE CIVIL.

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

1894.
April 5.

MAHA'RA'JA'DHIRA'J MAHA'RA'NA SHRI MA'NSINGJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* MEHTA HARIHARRA'M NARHARRA'M (ORIGINAL DEFENDANT), RESPONDENT.*

Practice—Procedure—Civil Procedure Code (Act XIV of 1882*), Secs. 2 and* 136*—Order dismissing a suit—Decree—Appeal.*

An order dismissing a suit under section 136 of the Civil Procedure Code (Act XIV of 1882) is a decree under the definition contained in section 2 of the Code, and as such is appealable.

SECOND appeal from the decision of J. B. Alcock District Judge of Surat.

The plaintiff sued to recover Rs. 4,521 due on a mortgage.

The defendant denied the plaintiff's claim.

After issues had been framed the defendant put interrogatories to the plaintiff on material points. The plaintiff evaded replying to them, and several adjournments took place to enable him to reply. Finally the Judge dismissed the suit under section 136 of the Civil Procedure Code (Act XIV of 1882), the plaintiff not having replied to the defendant's interrogatories.

* Second Appeal, No. 987 of 1892.