

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 Ahmedabad. 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.

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.

1894.

BA'I SHRI
MAJIRAJBA
v.
MAGANLAL
BHA'I-
SHANKAR.

1894.

April 5.

1894.

MAHA'RA'JA'-
DHIRA'J
MAHARANA
SHRI
MANSINGJI
v.
MEHTA
HARRIHAR-
RAM
NARHARRAM.

The plaintiff appealed, but the Judge held that the order of the Subordinate Judge was not appealable, and dismissed the appeal.

The plaintiff preferred a second appeal.

Kálábhái Lallubhai, for the appellant (plaintiff):—We submit that the order of dismissal passed under section 136 of the Civil Procedure Code is appealable—*Rámchandra v. Mádhav*⁽¹⁾, *J. R. Williams v. T. A. Brown*⁽²⁾, *Chunni Lál v. Chimman Lál*⁽³⁾, *Lálla Dabee Pershád v. Santo Pershád*⁽⁴⁾, and *Prem Sukh v. Indro Náth*⁽⁵⁾.

Chimanlál H. Setalvad for the respondent (defendant):—There was no adjudication, by the Court, on the plaintiff's right to recover the money, and there being no adjudication there was no decree in the suit which could be appealed against—*Lucky Churn v. Budurrunnisa*⁽⁶⁾.

SARGENT, C. J.:—The question in this case is, whether the order of the Subordinate Judge dismissing the plaintiff's suit under section 136 of the Civil Procedure Code was appealable. It has been contended for the respondent that such an order is not a decree under the definition contained in section 2 of the Civil Procedure Code, because it does not adjudicate on the "merits" of the right claimed. In *Lucky Churn v. Budurrunnisa*⁽⁶⁾ the Court was "disposed" to take that view of the section, but did not decide it, being of opinion that in any case the appeal must be dismissed on the merits. However, we think that, having regard to the numerous authorities the other way, it is too late to reopen the question, although had it been *res integra* it must be admitted that there is force in the argument for the respondent based on the words of the section and also on the circumstance of there being a special provision for an order rejecting the suit. In *Rámchandra v. Mádhav*⁽¹⁾ the cases were reviewed, and the conclusion came to by Birdwood, J., that an order dismissing the appeal under section 556 was appealable. In *J. R. Williams v. T. A. Brown*⁽²⁾ it was held by a Full Bench that the definition of decree in section 2 shews that when the procedure of the Court finally disposes of the suit it is a decree. In *Lálla Dabee*

(1) I. L. R., 16 Bom., 23.

(2) I. L. R., 8 All., 108.

(3) I. L. R., 7 All., 159.

(4) I. L. R., 10 Calc., 505.

(5) I. L. R., 18 Calc., 420.

(6) I. L. R., 9 Calc., 627.

Pershád v. Santo Pershád⁽¹⁾ and *Prem Sukh v. Indro Náth*⁽²⁾ it was apparently assumed that an appeal would lie against an order made under section 136. We ought, therefore, we think, in this state of the authorities, to hold that an appeal does lie against the order in question, and must discharge the order of that Court, and remand the appeal for decision according to law. Costs to be costs in the cause.

Order discharged.

(1) I. L. R., 10 Calc., 505.

(2) I. L. R., 18 Calc., 420.

1894.

MAHARAJA-
BHIRAJ
MAHARANA
SHRI
MANSINGJI
v.
MEHTA
HARIHARRAM
NABHARRAM.

APPELLATE CIVIL.

FULL BENCH.

Before Mr. Justice Jardine, Mr. Justice Farran and Mr. Justice Ranade.

VIRUPAKSHA'PPA' (ORIGINAL OPPONENT No. 1), APPELLANT,
v. NILGANGA'VA' (ORIGINAL APPLICANT), RESPONDENT.*

1894.
April 5.

Guardian and Wards Act (VIII of 1890)—Minor—Minor co-parcener in a joint Hindu family governed by the Mitákshará law—Guardianship—Hindu law.

Under Act VIII of 1890 a guardian cannot be appointed to the property of a minor who is a member of a joint Hindu family governed by the Mitákshará law, and possessed of no separate property. A guardian of the person of such a minor may be appointed under the Act.

APPEAL from the order of Venkatráo R. Inámdár, Assistant Judge of Bijápur, in Application No. 30 of 1891 under Act VIII of 1890.

The petitioner Nilganga'va applied under Act VIII of 1890 for a certificate of guardianship to the persons of her minor sons. She also prayed that a certificate of administration, in respect of the minors' property, be issued either to the Collector or to the opponents Virupaksha and Siddáppa, the former of whom was the step-brother and the latter the first cousin of her minor sons. She alleged that the minors were entitled to property worth Rs. 55,000; that the minors and the opponents were members of a joint Hindu family; that the whole of the family property was

* Appeal, No. 145 of 1893.