

this they can only do by establishing their right in the sense of s. 283. We do not think such a suit is cognizable by a Small Cause Court, or that it can be properly regarded as simply one for "personal property" or its value. Were we so to hold, the result must follow that a decree of a Small Cause Court could override orders in execution of the ordinary Civil Courts passed under ss. 280, 281 and 282—a form of procedure that could not but be most inconvenient. In expressing the above view, we regret to have formed a different opinion to that of the Courts of Madras and Bombay, though it does not appear to be in conflict with the Calcutta rulings to which we have referred. The reference may be answered as indicated above.

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 GODHA
 v.
 NAIK RAM.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

 1884
 November 1.

CHUNNI LAL (PLAINTIFF) v. CHAMMAN LAL (DEFENDANT).*

Civil Procedure Code, ss. 108, 136—Decree against defendant under s. 136—"Ex-parte" decree.

A defendant failing to comply with an order to answer interrogatories, the Court, under s. 136 of the Civil Procedure Code, struck out his defence, and, proceeding *ex-parte*, passed a decree against him. *Held* that the decree could not be treated, in respect of the remedy by appeal, as an *ex-parte* decree, and therefore, under the ruling in *Lal Singh v. Kunjan* (1), not appealable, but that an appeal would lie from the decree.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Sital Prasad* and Munshi *Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The plaintiff instituted this suit in the Court of the Munsif of Etawah, and the defendant was called upon by the Munsif to answer certain interrogatories, and, having failed to comply with the order, the Munsif proceeded, under s. 136, Civil Proce-

* First Appeal No. 51 of 1884, from an order of Maulvi Muhammad Basit Khan, Subordinate Judge of Mainpuri, dated the 5th May, 1884.

(1) I. L. R., 4 All., 387.

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Code, to strike out his defence, and disposed of the suit as if he had not appeared and answered.

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The defendant appealed in the Subordinate Judge's Court, and the Subordinate Judge has set aside the decree, and remanded the suit for fresh trial.

The plea in appeal before us is that there is no appeal, inasmuch as the decree of the Munsif must be treated as an *ex-parte* decree. It is true that the majority of this Court (Oldfield and Brodhurst, JJ., dissenting) have held that no appeal will lie from an *ex-parte* decree—*Lal Singh v. Kunjan* (1). We are of opinion, however, that a decree made in a suit, where the provisions of s. 136 of the Civil Procedure Code have been put in force, cannot be treated as an *ex-parte* decree in respect of the remedy by appeal. In the first place, as a matter of fact, the defendant did appear to answer to the suit, and, therefore, there was no *ex-parte* decree in the strict sense of the word; and next, unless allowed an appeal, he would have no remedy, for the remedy by application to the Court that makes an *ex-parte* decree under s. 108 is inapplicable to a case dealt with under s. 136, as the terms of s. 108 show. Under that section, a defendant, in order to succeed, has to satisfy the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. It contemplates cases of *ex-parte* proceedings strictly and properly so, and not such as are made under s. 136. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1884
November 14.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Duthoit.

QUEEN-EMPRESS v. KALLU AND ANOTHER.

Criminal Procedure Code, s. 338—Tender of pardon to accomplice who has pleaded guilty—Accomplice—Evidence—Corroboration—Practice Accused not defended—Court to test statements of witnesses for prosecution.

A Court of Session, under s. 338 of the Criminal Procedure Code, tendered a pardon to an accused person, charged jointly with two others for the same offence, who had pleaded guilty. The tender was accepted, and such person was examined as a witness against the other accused. *Held* that the tender of pardon was not improperly made, and the evidence of the approver was admissible.

(1) I. L. R., 4 All., 387.