

(1929) 11 CAL CK 0009
In the Calcutta High Court

Mahammad Mahmud Choudhry and Others

APPELLANT

Vs

Behary Lal Saha and Others

RESPONDENT

Date of Decision : 19-11-1929

Acts Referred:

Citation : AIR 1930 Cal 463 : 129 Ind. Cas. 408

Judgement

1. This appeal has been preferred from an order of remand passed by the First Additional District Judge of Sylhet. The facts necessary to be set out for the purposes of the present appeal are these:

The appellants were the plaintiffs in a suit for money in which there were originally three defendants. The defendants filed a joint defence taking various objections to the claim, one of them being that the amount claimed by the plaintiff's had been already paid back to them. When the suit was pending in the trial Court one of these defendants died leaving two minor sons as his heirs and thereupon the said two minors were substituted as defendants in the place of their deceased father and a pleader of the Court was appointed as their, guardian ad litem. The guardian ad litem appointed a3 aforesaid entered appearance in this suit and filed a petition on 22nd June 1928 adopting the original defence of the defendants as the defence of the minors who had been substituted. On the same day after a witness was examined on behalf of the plaintiff a petition was filed by the pleader, who had entered appearance on behalf of all the defendants originally, now signing on behalf of the two adult defendants, namely, Bepin Chandra Saha and Behari Lal Saha. The petition was also signed on behalf of the substituted minor defendants, namely, Bonomali Saha and Barindra Chandra Saha by the guardian ad litem Mohendra Nath Das, pleader. In this petition it was stated that the defendants would be bound by the special oath of plaintiff 2 in respect of the principal amount of Rs. 1,414. This statement in the petition obviously meant that as regards the question as to whether the principal amount advanced by the plaintiffs to the defendants had been repaid by them or not, the defendants would be bound by the said special oath. It was further stated in the petition that the question of compensation, costs and other things would have to

be decided by the Court itself. On this petition being filed, the Subordinate Judge allowed plaintiff 2 to go into the witness box and to take the special oath and on that being done he decreed the suit for the sum of Rs. 1,414 with compensation and costs.

2. Thereafter Bepin Chandra Saha and Behari Lal Saha and the two minor defendants through the said Behari Lal Saha preferred an appeal from the trial Court's decision. Before the learned Judge it appears to have been contended that when the petition to be bound by the special oath of plaintiff 2 was filed on 22nd June 1928 only one of the two adult defendants was present in Court and the pleader who purported to file the said petition had not been properly authorized to do so. It appears also to have been contended before him that the guardian ad litem of the minor defendants had not received instructions to join in the application and had not obtained the Court's permission for that purpose. The learned Judge came to no finding on the first contention, but preferred to decide the case on the second one. He took the view that Order 32, Rule 7, Civil P.C., applied to the case and that the proceedings were in the nature of an agreement or compromise to enter into which it was necessary for the guardian ad litem to have the leave of the Court and such leave should have been expressly recorded in the proceedings. Being of opinion that the absence of the leave aforesaid rendered the proceeding void and because the minors would not be bound by the agreement aforesaid he held that the decree would not possibly stand either as against the minors or even as against the adult defendants. The learned Judge, therefore, remanded the suit to the trial Court in order that it might be retried in the ordinary way after giving opportunity to the parties to adduce evidence. From this order the plaintiffs have preferred the present appeal.

3. In order to appreciate the exact position it is necessary to set out a few facts. It would appear from the order sheet that when on 22nd June 1928, the application was filed on behalf of the defendants the guardian ad litem was present in Court and on the same day made the application praying that the defence originally filed by all the defendants might be accepted as the defence of the minors who had been subsequently substituted. In the petition, as has been already stated, the guardian-ad litem had put down his signature as representing the minors Bonomali Saha and Barindra Chandra Saha. The question as to whether the proceedings were void or not by reason of the fact that leave of the Court was not taken seems to us to be concluded by the decision of this Court in the case of Sheo Nath Saran v. Sukh Lal Singh [1900] 27 Cal. 229. In that case it was held that:

the offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on oath taken in a particular form under the Oaths Act, stands on a very different ground from an agreement or compromise contemplated by Section 462, Civil P.C., of 1882, and that in such a case, the minor is bound by the consent of his guardian although given without the leave of the Court, provided that there is no fraud or gross negligence on the

part of the guardian.

4. It may be stated here that in so far as the present case is concerned it has not been alleged that there was any fraud or negligence on the part of the guardian ad litem. The learned Judge's reason therefore, for holding that the proceedings were not binding upon the minor by reason of the fact that leave of the Court was not taken nor recorded seems to us to be entirely erroneous.

5. As regards the want of authority on the part of the pleader who put in the petition it may be stated here that it is an admitted fact that one of the defendants, namely, Bepin Chandra Saha was present in Court at the time when, the petition was put in. The whole question, therefore, so far as this matter is concerned, is whether because of the fact that Behari was not present it should be held that the pleader who put-down his name in the petition could not file the petition on his behalf as well, or that he acted without authority. Having regard to the circumstances of the case, specially to the fact that there was one joint defence originally filed by all the defendants and also to the fact that Bepin was present in Court to do all that was necessary for the purpose of doing all that was necessary to be done on that day, in our opinion, it is not an unreasonable inference at all to make to hold that Bepin had been authorized by Behari to instruct the pleader to make the petition that he eventually did. We are of opinion that the circumstances of the case do not point to the pleader having acted on his own initiative or without instructions nor do they suffice to establish that merely because one of the defendants was absent from Court on that particular day he is not to be held bound by the statement contained in the petition. There is no indication at all of any intention on the part of Bepin or of the pleader to defraud Behari.

6. Our attention has been drawn to a number of cases on behalf of the respondents in support of the proposition that the pleader as agent on behalf of his client had no authority to bind the latter by making a petition of this character. One of the cases referred to in this connexion is the case of Sadashiv Rayaji v. Maruli Vithal [1890] 14 Bom. 455. In that case it was held that

an agent, holding a power of attorney authorising him to act and appear for a party to a suit cannot bring the suit to a close by offering to be bound by the oath of the opposite party in a particular form. Nor can a pleader so bind his client.

7. The proposition laid down in that case cannot be disputed but it is quite open to a Court to make an inference from the peculiar circumstances of the case as we feel inclined to do in this case as regards the fact that there was authority on the part of the pleader because of the presence of one of the adult defendants who evidently had been put forward by the other to take all necessary steps in connexion with the suit.

8. Another case referred to is the case of Parbhu Dayal Vs. Jamil Ahmad and Another, , The special circumstance in that case was that in addition to the

stipulation to be bound by the special oath there was a prayer to the effect that the suit would be decreed in terms of the oath taking the whole case out of the decision of the Court. Whether this decision is correct or not we need not discuss. It is sufficient for us to say that it has expressly followed *Sheo Nath Saran v. Sukh Lal Singh* [1900] 27 Cal. 229.

9. We are of opinion, therefore, that the view which the learned Additional District Judge has taken is not correct. We accordingly allow the appeal, set aside the order from which it has been preferred and direct that the decree of the trial Court be restored. The appellants will be entitled to the costs of this appeal as well as of the appeal before the lower appellate Court, hearing fee in this Court being assessed at two gold mohurs. The connected application is dismissed.