

(1912) 04 CAL CK 0065
In the Calcutta High Court

Shashee Bhushan Das and Others

APPELLANT

Vs

Rasik Lal Roy and Others

RESPONDENT

Date of Decision : 12-04-1912

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 53

Citation : 15 Ind. Cas. 583

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of the plaintiffs in an action for recovery of possession of Immovable property, which has been concurrently dismissed by the Courts below. It is plain that the decision on the merits cannot be successfully challenged in second appeal. But it has been ingeniously argued by the learned Vakil for the appellants that no decision on the merits ought to have been given by either of the Courts below inasmuch as the defendants successfully urged before the Court of first instance that the plaint had not been properly verified. In support of this proposition, reliance has been placed upon the case of Baroda Prosad Bose v. Girija Nath Roy Chowdhury 2 C.L.J. 11 . In our opinion, this position cannot be supported.

2. There were six plaintiffs in the suit, of whom three were sui juris and the rest were infanta on whose behalf their mother acted as next friend. The plaint was verified by the first three plaintiffs for themselves, and on behalf of the mother of the other three plaintiffs, by her son who was the first plaintiff. Objection was taken by the defendants that the plaint had not been properly verified, as it transpired that the first plaintiff had no authority from the mother of the infants to verify the plaint on their behalf. The Court of first instance, therefore, held that the plaint had not been properly verified, but proceeded to try the suit on the merits. As we have already stated, the case of the plaintiffs was negatived on the merits and that decision has been affirmed on appeal by the District Judge. The plaintiffs now contend that as in respect of the three infants, the plaint was

not properly verified, so far as they were concerned, the plaint ought to have been taken off the file. There is obviously no substance in this contention. No doubt, it was held, in the case of *Baroda Prosad Bose v. Girija Nath Roy Chowdhury* 2 C.L.J. 11, that the provisions of Section 53 of the Code of 1882 for amendment of the plaint, when it has not been signed and verified as recognised by Section 51, cannot be put into operation after the issues have been framed. It is clear, however, that the proper procedure to follow in cases of this description, where the verification is challenged, is not to frame any issue but to decide the preliminary question first. In fact, it is obvious from the definition of the term "issue" as given in Section 146 of the Code of 1882 that no issue, that is material proposition of fact or law affirmed by one party and denied by the other, can arise till there is a proper plaint. Consequently, as pointed out in the case of *Port Canning and Land Improvement Co. v. Dharanidhar Sardar* 9 C.W.N. 608 the Court should first decide the preliminary objection to the validity of the plaint. But the learned Vakil for the appellant has argued that if issues have been, as a matter of fact, raised; the power of the Court to act u/s 53 completely ceases. This contention is inconsistent with the decision in *Ganga Sahai v. Muhammad Ali Jan Khan* 20 A. 444 note, where it was explained that the mere fact that issues have been raised does not stand in the way of the return of the plaint by the Court for amendment u/s 53. It is the duty of the Court to return the plaint before the settlement of issues and the mere fact that issues have been improperly settled, cannot deprive the plaintiff of the opportunity which he might otherwise have had and ought to have had of curing the defect in the plaint. If, therefore, the proper procedure had been followed in this case, the position would have been that the plaintiffs might have got an opportunity to verify the plaint properly, and, if it had been so amended, there is no question that it could not have been rejected as laid down in the cases of *Fateh Chand v. Mansab Rai* 20 A. 442 and *Munshi Fakir Chand v. Mahesh Das* 20 A. 445 note. There is, therefore, no substance in the objection taken on behalf of the appellants. We may further add that, as laid down by (he learned Judges of the Allahabad High Court in the case of *Basdeo v. John Smidt* 22 A. 55, the defect, if any, has been completely cured by the provisions of Section 578 of the CPC of 1882. See also *Shama Soonduree v. Rahim-ud-deen* 24 W.R. 71.

3. The result is that the decree made by the District Judge is affirmed and this appeal dismissed with costs.