1899

IN THE MATTER OF RAJENDRO NATH MUKERJI.

law. In the present case the conviction of forgery, followed by a sentence of two years' rigorous imprisonment, is sufficient without further inquiry to justify the Court in removing the appellant from the roll of vakils and cancelling his certificate. Their Lordships will therefore humbly advise Her Majesty to affirm the High Court's order and to dismiss the appeal.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Barrow, Rogers* and *Nevill.*

APPELLATE CIVIL.

1899
July 3.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Knox.

BASDEO (DEFENDANT) *v.* JOHN SMIDT AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, Sections 51, 578—*Plaint not signed by plaintiff or his authorized agent—Effect of such want of signature—Plaint not necessarily void—Breach of contract—Measure of damages.*

Held, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf as required by section 51 of the Code of Civil Procedure will not necessarily make the plaint absolutely void. A defect in the signature of the plaint, or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and, having regard to section 578 of the Code of Civil Procedure, is not a ground for interference in appeal. *Rajit Ram* v. *Katesar Nath* (1) and *Mohini Mohun Das* v. *Bungsi Buddan Saha Das* (2) referred to. *Marghub Ahmad* v. *Nihal Ahmad* (3) overruled *Mahabir Prasad* v. *Shah Wahid Alam* (4) distinguished. *Katesar Nath* v. *Aggyan* (5) and *Badri Prasad* v. *Bhagwati Dhar* (6) discussed.

The plaintiffs sold to the defendant a certain number of cases of embroidered muslin. The defendant took delivery of some of the cases, but refused to take delivery of or pay for the rest. The plaintiffs re-sold the goods refused by the defendant, and brought a suit against the defendant for damages. *Held,* that the proper of damages was the difference between the contract price

* Second appeal No. 474 of 1897, from a decree of J. E. Gill, Esq., District Judge of Cawnpur, dated the 29th March 1897, confirming a decree of Rai Kishen Lal, Subordinate Judge of Cawnpur, dated the 5th October 1896.

(1) (1896) I. L. R. 18 All., 396.
(2) (1889) I. L. R., 17 Calc., 580.
(3) (1899) Weekly Notes, 1899, p. 55.
(4) (1891) Weekly Notes, 1891, p. 152.
(5) (1894) Weekly Notes, 1894, p. 95.
(6) (1894) I. L. R., 16 All., 240.

1899

BASDEO v. JOHN SMIDT.

of the goods which the defendant had refused to accept, and the price realized by the plaintiffs on the re-sale. *Moll Schutte & Co.* v. *Luchmi Chand* (1) followed. *Yule & Co.* v. *Mahomed Hossain* (2) dissented from.

THIS was a suit to recover damages alleged to have been incurred by the plaintiffs by reason of the defendant's refusal to take delivery of and to pay for certain goods which he had contracted to purchase from the plaintiffs. The Court of first instance (Subordinate Judge of Cawnpore) gave the plaintiffs a decree. The defendant appealed, but his appeal was dismissed by the lower appellate Court (District Judge of Cawnpore). The defendant appealed to the High Court, and there a new point was raised, which had not been taken in either of the Courts below, namely, that "the suit of the plaintiffs is defective in point of law and is wrongly framed and should have been dismissed." This ground of appeal was explained at the hearing to convey an objection to the form of the plaint, the contention being that inasmuch as the person who had signed the plaint on behalf of the plaintiffs was not duly authorized so to sign on their behalf, the plaint was in effect unsigned, and there had never been before the Court any suit of which cognizance could legally be taken. There was on the record no power of attorney authorizing the signature of the plaint and nothing otherwise to show that the person who signed it was authorized to sign within the meaning of section 51 of the Code of Civil Procedure.

Mr. *R. Malcomson* (with whom Pandit *Sundar Lal*) for the appellant.

The suit ought to have been dismissed on the ground that the plaint was not signed by the plaintiffs or by anyone duly authorized by them in that behalf. No Civil Court can take cognizance of a suit without having before it in the first instance a properly constituted plaint, that is to say, a plaint which complies with the requirements of sections 49, 50, 51 and 52 of the Code of Civil Procedure. In this case the plaint was signed on behalf

(1) (1898) I. L. R., 25 Calc., 505 (2) (1896) I. L. R., 24 Calc., 124.

of the plaintiffs by Mr. C. G. Sanders, but Mr. Sanders was not authorized to sign plaints, or this particular plaint, on behalf of the firm. The plaint must therefore be regarded as unsigned. This being so, the so-called plaint was, within the rulings of this Court, no more than a "piece of waste paper"—*Mahabir Prasad* v. *Shah Wahid Alam* (1), *Katesar Nath* v. *Aggyan* (2), *Marghub Ahmad* v. *Nihal Ahmad* (3).

In view of the rule laid down in the last mentioned case, the Court has no power to amend an unsigned plaint or to allow amendment thereof. The defect is much more than a mere irregularity which may be cured by amendment: it is an absolute bar to the entertainment of the suit. Section 578 of the Code of Civil Procedure could not be applied, inasmuch as there was here no suit before the Court of which cognizance could be taken or in the course of which any error defect or irregularity could possibly be committed. I would adopt the reasoning set forth in the judgments in *Katesar Nath* v. *Aggyan* and *Marghub Ahmad* v. *Nihal Ahmad.*

Babu *Durga Charan Banerji,* with The Hon'ble Mr. *Conlan* and Munshi *Ram Prasad,* for the respondents.

I contend that the provision contained in section 51 of the Code of Civil Procedure as to signature and verification is a rule of Procedure merely and any defect in signature does not affect the merits of the case. In order to show that the omission to sign in compliance with section 51 will not lead to the dismissal of the suit it is necessary to show that the plaint was not the plaintiff's plaint. In this case there is no room for such contention upon the admitted facts. If the defect had been pointed out it could and would have been remedied. The defect is certainly covered by section 578 of the Code. Moreover, the defendant by his pleadings and conduct must be held to have waived the irregularity. There was a valid plaint as required by law, and any defect in the prescribed formality as to signature could be remedied

(1) (1891) Weekly Notes, 1891, p. 152.
(2) (1894) Weekly Notes, 1894, p. 95.
(3) (1899) Weekly Notes, 1899, p. 55.

1899

BASDEO v. JOHN SMIDT.

as well as waived. The plaint without the signature is not necessarily a piece of waste paper as contended for on the other side. I rely on *Rajit Ram* v. *Katesar Nath* (1) and *Fateh Chand* v. *Mansab Rai* (2). The plaintiff, although he may not have signed the plaint, is none the less plaintiff in the suit, and it cannot be contended upon the admitted facts of this case that he has in any way or at any stage repudiated the plaint as his.

STRACHEY, C. J.—There are in substance two objections taken on behalf of the appellant. The first objection is not set forth in the memorandum of appeal, but upon an application made to us under section 542 of the Code of Civil Procedure, we allowed the learned counsel for the appellant to argue in support of it. That objection is that the plaint was not signed as it should have been in accordance with section 51 of the Code, and that consequently all the proceedings in the suit have been bad and void *ab initio*. Now, with regard to that objection, the plaint purports to be signed on behalf of the plaintiffs by an advocate of this Court, who, as the Munsarim's note shows, himself filed the plaint, and also by a gentleman named C. G. Sanders who purports to sign as "agent" for the plaintiffs, who are a firm of foreign merchants, residing out of, but trading within, British India. There is no finding which would justify us in holding that Mr. Sanders was a recognised agent of the plaintiffs within the meaning of section 37 of the Code, so that the point considered in *Maharanee Surnomoye* v. *Poolin Behary Mundul* (3) and *Roy Dhunput Singh* v. *Jhoomuk Khawas* (4) does not arise. There is on the record no power of attorney authorizing Mr. Sanders to sign the plaint on behalf of the plaintiffs, and there is nothing which otherwise shows that he was so authorized within the meaning of section 51. The most probable reason why there is nothing of the kind on the record is that, until the point was raised for the first time in second appeal, the defendant appears

(1) (1896) I. L. R., 18 All., 396.
(2) (1898) Weekly Notes, 1898, p. 110.
(3) (1878) 3 C. L. R., 15.
(4) (1879) 3 C. L. R., 579.

never to have thought of suggesting that Mr. Sanders was not authorized to sign the plaint, or that there was any sort of defect or irregularity in the institution of the suit. There is no such suggestion in the defendant's written statement, in the issues, the judgments of the Courts below, the defendant's memorandum of appeal in the lower appellate Court, or his memorandum of appeal to this Court. Now, in the first place, as I have said already, the plaint is signed and was filed by an advocate of this Court, who thus claimed to represent the plaintiffs named in the plaint. The decrees of both the Courts below show that throughout the trial of the suit in both Courts the same advocate appeared and conducted the case as representing the plaintiffs. There is no plea, no suggestion, still less any finding, that that advocate did not possess in fact the authority to represent the plaintiffs named in the plaint which he claimed throughout to possess. On the contrary it is clear that the suit was throughout contested entirely on the merits, and on the assumption of everybody that it was properly brought by the right parties. Under section 39 of the Code an advocate of this Court does not depend for his authority to represent a party upon any document empowering him to act. It appears to me that in the total absence of any finding, evidence or suggestion to the contrary, it must be presumed that the plaintiffs named in the plaint were throughout represented in the suit by the counsel who claimed to represent them, and that the suit was therefore instituted and conducted throughout with the knowledge and authority of those plaintiffs. Bearing this in mind, I have come to the conclusion, first, that the defect in the plaint arising from non-compliance with section 51 has been waived by the defendant, and that therefore the suit cannot on that ground be now dismissed. Secondly, that the defect falls within section 578 of the Code, which prohibits our interference with the decrees below on the ground of any error, defect, or irregularity which affects neither the merits of the case nor the jurisdiction of the Court. If it were necessary, I should be prepared to hold, having regard

1898

BASDEO v. JOHN SMIDT.

Strachey, C. J.

to the judgment of this Court in *Rajit Ram* v. *Katesar Nath* (1), that we are, even at this stage, competent under section 53 (*c*) of the Code to direct that the plaint be amended by the addition of the signature of the plaintiffs or of any person duly authorized by them in that behalf. But for the reasons which I have indicated, I am of opinion that any such amendment is unnecessary. The argument on behalf of the appellant is shortly this, that where a plaint is not signed in accordance with section 51, not merely is there "an error, defect or irregularity," but there is no suit: the plaint is "waste paper," and the Court has no suit before it which it can legally decree. From this argument I entirely dissent. Section 48 of the Code shows that a suit is instituted by presenting a plaint to the Court or to the proper officer. The Code contains no definition of a plaint, but section 50 shows what a plaint substantially is, and states the various particulars which it must contain. It says nothing about signature, and in no way suggests that what it describes as a plaint is not a plaint if it is unsigned or if the signature is in any way defective. Section 51 deals with the signature and verification of the plaint. It places the signature and the verification on exactly the same footing. In that connection I observe that at page 400 of the report in *Rajit Ram* v. *Katesar Nath*, the Full Bench of this Court observed:—"It would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or the jurisdiction of the Court." There is nothing whatever in section 51 to suggest that, if its terms are not complied with, the defect stands on any different footing from the other defects mentioned in section 53 (*b*), or involves any other consequence than rejection of the plaint if not amended in accordance with an order for amendment, or that the defect cannot be waived like other initial irregularities, or that the plaint by reason of the defect is necessarily "waste paper," or that there is no suit legally before the Court. The object of the verification of the plaint

(1) (1896) I. L. R., 18 All., 396.

is to fix upon the plaintiff the responsibility for the statements which it contains, and to afford a guarantee of his good faith. The object of the signature to the plaint is to prevent, as far as possible, disputes as to whether the suit was instituted with the plaintiff's knowledge and authority. I do not underrate the importance of this: but there may be other ways of establishing the plaintiff's responsibility besides signature; and the fact that the Code contains no provision requiring an appellant to sign his memorandum of appeal supports this view. In a work by a learned American author, Mr. Vanfleet, "*The Law of Collateral Attack on Judicial Proceedings*," there is stated what, I think, is the true principle as to verification, and the whole context shows that the principle is equally applicable to signature, which section 51 places on the same footing. At page 235 he says:—"The statutes require many kinds of petitions to be verified. This includes generally all complaints and petitions in special proceedings, the bill in equity, the libel in admiralty, and, in some states, the complaint or petition in all cases. Such verification adds no allegation to the pleading and tenders no issue. Its only object is to show the good faith of the petitioner. In other words, if he will not swear that he believes his cause to be just, the law does not care to bother with it. But when the adversary comes in, such verification is of no moment. It is not even evidence. The justice of the cause must then be proved by competent evidence. Like any other formal matter its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction, of course, mere defects in it cannot."

Section 53 *(b), (i)* clearly shows that there may be a plaint within the meaning of the Code, although the plaint is not signed and verified as required by section 51. If such a plaint were "waste paper," or not a plaint at all within the meaning of the Code, the section would not have called it a plaint and would not have provided for its amendment. It is only upon the plaintiff's failure to comply within the time fixed by the Court, with the order allowing the amendment, that such a plaint has to be

1899

BASDEO v. JOHN SMIDT.

Strachey, C. J.

rejected under section 54 (*d*). The doctrine that the plaint is waste paper because it is not duly signed in accordance with section 51 of the Code, and that there is consequently no legal suit before the Court, is opposed to the judgments of this Court in three connected unreported cases, First Appeals Nos. 170, 126 and 29 of 1895, in which the plaint was, at the stage of first appeal, returned for amendment under section 53, on the ground that the person who had signed it was not duly authorized in that behalf by his power of attorney. In these cases the objection was taken by the defendant in his memorandum of appeal; and, in two at least out of the three, was specifically pleaded by him and put in issue in the Court below. The doctrine that a plaint not duly signed is necessarily waste paper also appears to me to be opposed to the judgment of the Privy Council in *Mohini Mohan Das* v. *Bangsi Baddan Saha Das* (1). In that case there were three plaintiffs named in the plaint as joint creditors. Only one of them signed and verified the plaint. Some time after the plaint was filed, the Court made an order adding another of the joint creditors as a plaintiff, evidently on the view that he was not one already. The suit was dismissed on the ground that it must be regarded as instituted on the date of the order, and that, so regarded, it was barred by limitation. On appeal the Privy Council set aside the dismissal, holding that all the creditors became plaintiffs when the plaint was filed, that the order was "merely waste paper," and that the suit was not barred. Their Lordships observed:—"On the face of the plaints the three joint creditors are named as co-plaintiffs. The names of Gobind Rai and Khettar Mohun have not been struck out, nor did they, or either of them, attempt to repudiate the suits. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint." Observe, they do not say that a person named as a co-plaintiff need not sign and verify the plaint. They could not have said so, for section 51 makes no distinction between a co-plaintiff and a

(1) (1889) I. L. R., 17 Calc., 580.

single plaintiff. What they say is, that it does not follow from his omitting to sign and verify the plaint that he is not to be treated as a plaintiff. They further indicate the considerations which, in that case, prevented such a consequence from following. The persons in question were named as co-plaintiffs on the face of the plaint; their names had not been struck out; they had not attempted to repudiate the suit. In other words, there was no reason to doubt that the suit was really theirs, and, that being so, their omission to sign the plaint would not justify the Court in treating them as not plaintiffs. Nothing in the judgment turns upon their being joint creditors with the plaintiff who had signed, or upon any supposed authority in him to sign on their behalf. Several cases have been cited in support of the argument I am considering. The first was *Mahabir Prasad* v. *Shah Wahid Alam* (1). That case is, I think, clearly distinguishable. The evidence there showed that the so-called plaintiff knew nothing whatever about the suit and was not a party to its institution. The second case was *Katesar Nath* v. *Aggyan* (2). It does not appear to me quite clear from the report whether the learned Judge held that there was no legal plaint and no legally instituted suit merely because the plaint was not signed in accordance with section 51, or whether he so held on the ground that there was no valid authority given by the plaintiff for the institution of the suit. My doubt arises from the learned Judge's allusion to the case of *Badri Prasad* v. *Bhagwati Dhar* (3), which has nothing to do with the signing of the plaint, but relates only to the conditions under which a suit or appeal may be filed under a vakalatnamah. The case of *Katesar Nath* v. *Aggyan* was a decision of a single Judge of this Court, and if it means that, in all circumstances whatever, whether the plaintiff knew of and authorized the suit or not, whether the defendant waived the defect or not, and notwithstanding section 578 of the Code, an unsigned plaint is necessarily waste paper,

(1) Weekly Notes, 1891, p. 152. (2) Weekly Notes, 1894, p. 95.
(3) (1894) I. L. R., 16 All., 240.

1899

BASDEO v. JOHN SMIDT.

Strachey, C. J.

and a Court of appeal is at liberty to treat the suit as no suit at all, then, with the greatest respect for the learned Judge, I cannot agree with him. The last case on the point to which I need refer is the case of *Marghub Ahmad* v. *Nihal Ahmad* (1). In that case not only did the defendant make no objection that the plaint was not duly signed, but he expressly stated that he desired the suit to be disposed of on the merits. In that suit also, so far as one can gather from the report, although the plaintiff had not signed the plaint, there seems to have been no doubt at all that the suit was instituted with his knowledge and authority, but it was held that, notwithstanding these facts, neither the Court below nor this Court had power to allow any amendment, and that the plaint must be rejected. All I can say as to that case, in which no doubt it was held that the plaint in such cases was "a piece of waste paper," and that there was no suit before the Court, is that it appears to me to be wholly at variance with the three unreported decisions which I have mentioned, that in this conflict of authority it is open to me to adopt the view which I think right, and that I unhesitatingly prefer that taken in the unreported cases. In my opinion, to dismiss a suit at the stage of second appeal upon a point of this kind never raised before by the defendant, would be to sacrifice the substantial merits and justice of the case for the sake of technicality, to an extent to which I could never agree. Although I do not say that an objection founded on section 51 is always and necessarily one of pure form, I think that it is so here, and that this objection therefore to the decrees of the Courts below must be over-ruled.

The only other objection which has been pressed is that the Courts below have applied a wrong principle as to the measure of damages. The damages claimed are the difference between the contract price of the goods which the defendant refused to accept and the price realized by the plaintiffs on the re-sale. That claim is in accordance with the clause in the indent contract, which is admittedly indistinguishable from the clause under

(1) Weekly Notes, 1899, p. 55.

consideration by the Full Bench of the Calcutta High Court in *Moll Schutte and Co.* v. *Luchmi Chand* (1). That case is exactly in point, and the only question is, whether we ought to follow it or the previous decision of the same Court in *Yule and Co.* v. *Mahomed Hossain* (2). For my part I have no hesitation in agreeing with the decision in the later case, and I adopt all that was said by the Chief Justice in delivering the judgment of the Full Bench. In this case, as in that, section 107 of the Contract Act has no application. I think that the Courts below have taken the right view of the measure of damages, and that this appeal should be dismissed with costs.

KNOX, J.—I too am of the same opinion, namely, that although the plaint in the case in which this appeal arises was not signed by the plaintiffs as required by section 51 of the Code of Civil Procedure, the circumstances of the case raise a proper presumption that the plaintiffs have been privy to the suit throughout.

As the learned Chief Justice has pointed out the plaintiffs were represented by an advocate of this Court. The appearance in and prosecution of the suit by such advocate can be and must be taken to be an appearance by the plaintiffs themselves, especially as it was never suggested until the case came before the Court in Second Appeal that there could be any doubt upon the matter at all.

In First Appeal No. 170 of 1895, decided on the 22nd July, 1898, a decision of which I was one of the Judges, and which more-over is a stronger case, inasmuch as it was a case in which the plaintiffs were not represented in the Court of first instance by an advocate, my brother Banerji and myself were prepared to hold that the plaint might even in the appellate stage be amended and rectified. *Marghub Ahmad* v. *Nihal Ahmad* (3), is an authority at variance with this; but I have heard nothing which leads me to differ from the view which I took in F. A. No. 170 of 1895. In that case, the absence of the signature of the

(1) (1893) I. L. R., 25 Calc., 505. (2) (1896) I. L. R., 24 Calc., 124.
(3) (1899) Weekly Notes, 1899, p. 55.

1899

BASDEO v. JOHN SMIDT.

plaintiffs was held not to be a defect which affected the merits of the case or the jurisdiction of the Court; in my opinion no ground has been made out, so far as this appeal is concerned, for interference with the decrees of the Courts below.

The only other question raised before us, namely, as to damages, was fully considered in the case of *Moll Schutte and Co.* v. *Luchmi Chand* (1), and I agree with the way in which it was then decided.

Appeal dismissed.

1899
July 3.

FULL BENCH.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Banerji and Mr. Justice Aikman.

LALTA PRASAD (APPLICANT) *v.* NAND KISHORE AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, sections 102, 103, 157—*Order dismissing a suit for default of appearance—Construction of order—Application for restoration of suit—Pleadings—What constitutes an "Appearance".*

In construing an order alleged by one side and denied by the other to be an order under section 102 of the Code of Civil Procedure, the order will be considered as an order under section 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear.

Where, his suit having been dismissed for default of appearance under section 102 of the Code, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear.

It is not an "appearance" within the meaning of section 102 of the Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply

*First Appeal No. 22 of 1899 from an order of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 23rd January 1899.

(1) (1898) I. L. R., 25 Calc., 505.