

(1942) 08 AHC CK 0005
In the Allahabad High Court

Muktanath Tewari and Another	Vs	APPELLANT
Vidyashanker Dube and Others		RESPONDENT

Date of Decision : 24-08-1942

Acts Referred:

Citation : AIR 1943 All 67 : (1942) 12 AWR 378

Hon'ble Judges : Bajpai, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Bajpai, J.—This is an application by the defendants and arises out of a suit brought by the plaintiffs for certain reliefs in the shape of a perpetual injunction and partition and possession. The suit was partially decreed by the trial Court. Then there was an appeal by the defendants and during the pendency of the appeal an application was made on behalf of the plaintiffs seeking permission to withdraw the suit with liberty to file a fresh suit. This application was granted by the lower appellate Court, It is against that order that the present application in revision has been filed, and it is contended that there is no such formal defect as is contemplated by Order 23, B. 1, Civil P. C., and the lower appellate Court has acted illegally and with material irregularity in the exercise of its jurisdiction in giving the permission to the plaintiffs. It appears that the plaintiffs based their title upon a certain deed of gift executed by their maternal grandmother, Mt. Bela. The case of the defendants was that the deed of gift did not comprise the property which was the subject of the present suit. In order to remove this defect (if there was any force in the contention of the defendants; let it be understood that I am not deciding nor did the lower appellate Court decide that the deed of gift did not cover the property in suit) the plaintiffs applied that they would institute a fresh suit either along with Mt. Bela or would implead Mt. Bela as a pro forma defendant. The Court below thought that this was sufficient ground for giving permission under Order 23, B. 1, Sub-clause (2), Civil P. C.

2. I do not think that the expression "formal defect" means a defect like the

present one. In Ramrao Bhagwantrao Inamdar Vs. Babu Appanna Samage, a Pull Bench of the Bombay High Court held that the expression "formal defect" must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case. Now here the merits of the case are affected inasmuch as the plaintiffs say that it would be necessary to have Mt. Bela in the array of parties in order to obtain a correct adjudication of the controversy between the parties. In Haridas Sadhu Khan and Another Vs. Giridhari Sadhu Khan and Another, it was held that the defect that certain necessary parties were not impleaded is not a formal defect.

3. What I feel about this case is that either the plaintiffs are the owners of the property about which they filed a claim in the Court below or they are not the owners of the property. If they are the owners of the property then there is no reason why the appeal should not be decided on the merits by the lower appellate Court. If they are not the owners of the property but Mt. Bela is the owner of the property, then there is no reason why the plaintiffs' suit should not be dismissed and Mt. Bela should be left at liberty to institute a fresh suit if she is so advised. It is a tall order on behalf of the plaintiffs to say that they will induce Mt. Bela to join them as plaintiffs if the Court comes to the conclusion that the deed of gift does not cover the property in suit. They must take their stand upon the deed of gift and must either rise or fall with the same. For the reasons given above, I allow this application in revision, set aside the order of the Court below and remand the case to that Court with directions to re-admit the appeal on its original number, dispose of it according to law. The applicants are entitled to their costs of this revision.