

(1916) 08 CAL CK 0008
In the Calcutta High Court

Srimati Bibijan Bibi and Others

APPELLANT

Vs

Abdul Jabbar Daftary and Others

RESPONDENT

Date of Decision : 03-08-1916

Acts Referred:

Citation : 36 Ind. Cas. 919

Hon'ble Judges : Newbould, J;Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—This is an appeal from an order of the learned Subordinate Judge of Howrah, dated the 8th July 1914. The order appealed against is an order dismissing the application of the appellants before us to be added as co-plaintiffs in a certain suit. That was the form of the application and that is the form of the prayer, we must take it, to this Court. The suit was brought by the original plaintiff for a declaration that a certain deed of gift was fraudulent and for partition of the property comprised therein. The suit was instituted in the month of January 1914. On the 15th February 1914, a document called a wahfnama was executed by the original plaintiff in favour of himself and the infant appellant with a declaration that, if the original plaintiff became incapacitated, then the other appellant Srimati Bibijan Bibi should act as the other mutawalli in his place. On the 28th February 1914, the defendants filed a written statement. Issues were then settled between the parties and an issue was raised as to whether this deed barred the rights of the original plaintiff. According to the allegation of the appellants, on the 9th June 1914, the original plaintiff disappeared. It is said, therefore, that he became incapacitated and Srimati Bibijan Bibi became the mutawalli in his place. Whether that is the sort of incapacity that was contemplated by the settler when he dedicated the property to the Almighty, it is not necessary for us to consider at present. The incapacity of a trustee means the mental or physical incapacity and does not apply to the case of a mutawalli who has gone from his place of abode because the Police are running after him. There is a good number of people, I understand, who have been incapacitated for the same reason. Then comes the application of the 15th June 1914. That

was the application by the two appellants to be added as no-plaintiffs with the original plaintiff. The learned Judge refused the application on grounds which seem to me insufficient. There having been this transfer of interest, he might have not unreasonably exercised his discretion in favour of the parties applying to be added as co-plaintiffs, But the learned Judge having refused the application, the question is whether the present appellants have got a right of appeal to this Court. I am quite clear that they have not. Orders made under Order I of the CPC are non-appealable. These orders for adding parties rest on the discretion of the trying Judge and against that discretion there is no appeal. The appellants through their learned Counsel in this Court have tried to make out that the application is, in substance, an application under Order XXII, Rule 10 Order Civil Procedure Code, for substitution of new plaintiffs, there having been a transfer or devolution of interest from the original plaintiff pendente lite. But that is not what has been asked for. I think the present appellants, having definitely elected to apply to have themselves added as co-plaintiffs, are not entitled now to turn round and say that their application should be treated as an application under Order XXII, Rule 10, Code of Civil Procedure. In the result the present appeal fails and must be dismissed with costs, five gold mohurs.

NEWHOOLD, J.

2. I agree.