
(1921) 01 AHC CK 0005
In the Allahabad High Court

Mohammad Bax and Others	Vs	APPELLANT
Musammat Piari alias Nasiban and Others		RESPONDENT

Date of Decision : 18-01-1921

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : 62 Ind. Cas. 744

Hon'ble Judges : Ryves, J;Gokul Prasad, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit brought by the plaintiffs-appellants under the provisions of Section 92 of the Code of Civil Procedure. The plaintiffs' allegations were that there was an old takia situated in the city of Bareilly near the Civil Hospital, that the ancestors of the plaintiffs were buried in it, that amongst others one Rasul Shah and after him Ramzan Shah, his son, were the takiadars and managers of the cemetery on behalf of the Muhammadans, that after the death of Ramzan Shah, the last takiadar, his widow, sister and daughters along with the other defendants commenced appropriating the property to their private use as proprietors, built houses for residence, misappropriated building materials of a dilapidated mosque and did certain other acts of desecration which caused mental pain to the plaintiffs, and that the defendants also made some transfers inter se of the various parts of the takia aforesaid. The plaintiffs further allege that they, having taken the necessary permission of the Legal Remembrancer, as required u/s 92 of the Code of Civil Procedure, bring the present suit for the following reliefs:--(1) The defendants may be removed from the supervision of the takia and the graves, (2) a new mutawalli may be appointed, (3) the land of the takia may be made over to the mutawalli, and the usual prayer for any other relief to which they might be entitled. The defense pleaded was that Section 92 of the CPC did not apply to this suit and that the property was not waqf property, but belonged to Ramzan Shah and Rasul Shah as private individuals and had now become the property of defendants Nos. 1 and 2. The suit was instituted in the Court of the District Judge of Bareilly, who came to the conclusion that the

defendants" allegation that the property was their private property and not waqf property was incorrect, and that the property was really endowed property and a graveyard. So far he was with the plaintiffs, but he dismissed the suit on the ground that in his opinion there was no express or constructive trust and, therefore, the suit did not lie. It is very difficult to follow the reasoning of the learned Judge on this latter point and indeed the learned Vakil for the respondents has not tried to support it on that ground. When he once found that the property in dispute was a cemetery or graveyard, then it naturally became trust property, and having regard to the evidence on the record, there is no doubt that it was a public trust, because we find that the ancestors of all the parties to the suit were buried in this takia and there is evidence that other Muhammadans also used to bury their dead in it until the Municipality of Bareilly prevented the burial of corpses in this graveyard. So that if the case had stopped here, we should have had no difficulty in directing further enquiry into the matter by the District Judge, but it has been argued on behalf of the respondents that the plaintiffs nowhere alleged that the defendants had been or are trustees of this property. Their allegation in paragraph 2 of the plaint clearly shows that since the death of the last takiadar or trustee Ramzan Shah, the defendants, some of whom are his heirs, have been misappropriating the property. There is no allegation whatever that of the defendants those who are the heirs of Ramzan Shah were either appointed as, or ever took upon themselves the duties of, trustees and, therefore, they could not be charged with committing a breach of the trust. They are trespassers, pure and simple, having regard to the way in which they have dealt with the property, and we think the proper course for the plaintiffs to proceed against them should have been by an ordinary suit in the Civil Court for ejectment. In accordance, therefore, with the principle laid down in the case of Muhammad Abdullah Khan v. Kallu 21 A. 187 : A.W.N. (1899) 18 we direct that the plaint be returned to the plaintiffs-appellants for presentation to the proper Court. The decree of the first Court dismissing the plaintiffs' suit was not warranted by law and is hereby set aside. Coming to the question of costs, we think that in this case the parties should bear their own costs in all Courts and we so direct. Let the record be sent down at once to the Court below for compliance with the order for the return of the plaint to the plaintiffs for presentation to the proper Court.