

(1938) 12 AHC CK 0031
In the Allahabad High Court

Siraj Ahmad Khan and Others

APPELLANT

Vs

Gaya Prasad and Others

RESPONDENT

Date of Decision : 05-12-1938

Acts Referred:

Citation : AIR 1939 All 219 : (1939) 9 AWR 117

Hon'ble Judges : Verma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Verma, J.—This is a second appeal by the defendants, the suit having been substantially decreed by both the Courts below. The plaintiff-respondent by his plaint prayed: (a) for a perpetual injunction restraining the defendants first party from entering the plaintiff's enclosure in any manner and from holding any assembly ("jalsa") therein and from interfering in any manner with the plaintiff's possession; (b) for a perpetual injunction restraining the defendants first party from interfering in any manner with the plaintiff or his vendees whenever the latter wanted to erect any buildings inside the enclosure or to build its walls; (c) for a perpetual injunction restraining the defendants first party from taking possession over the puccachabutra situated near the bar ka tree inside the plaintiff's enclosure and from interfering with the plaintiff in connexion therewith, and (d) for the recovery of a sum of Rs. 150 as damages. The last relief has not been granted by the Courts below and no question with regard to it arises in this second appeal.

2. Briefly put, the plaintiff's case was that he had purchased the ahata (enclosure) in question, which was known as Bagh Nanda Hadi, under a sale deed dated 7th May 1928, that there were walls on all sides of this ahata and there was only one door towards the south, that the plaintiff had put up certain buildings towards the south of the enclosure which were occupied by tenants, that he had sold a portion of the northern ahata to the defendants second party who, with the permission of the Municipal. Board, had started building thereon,

that inside this enclosure there was a tomb which was the "samadh" of a Hindu Sadhu, that for the last seven or eight; months the defendants first party had been giving out that it was the grave of a Muslim and had forcibly entered the ahata by demolishing a portion of the western wall and had started singing qawalies and making noise and had prevented the defendants second party from building, and that the defendants first party had carried away materials worth Rs. 150 belonging to the plaintiff. It was on these allegations that the plaintiff sought the reliefs mentioned above. Seven out of the eight persons who were impleaded as the defendants first party contested the suit. Their allegations in the main were that the enclosure in question consisted of two separate portions, of which one was to the south and the other to the north; that the door of both these portions had originally been in the western wall of the enclosure but it had been closed by the plaintiff about a year or a year and a half before the suit; that the northern portion of the land was the "mazar" of Saiyed Ramzan Ali Shah Saheb Shahid on which "fatiha" was recited on Thursdays and a "chadar" was offered and an "urs" was held every year; that the plaintiff had no concern with the said "mazar" and had wrongly described it as the "samadh" of a Hindu Sadhu; that the whole of this land was wakf from time immemorial for urs, etc., and the plaintiff had no right in it, and that the plaintiff or his predecessors-in-title had not been owners of the northern portion of the land. It was further pleaded that the land really belonged to a, "dargah" and certain Articles of the Limitation Act were relied on. A customary easement was also claimed and estoppel and acquiescence were pleaded. It was also alleged by the defendants that they had not removed any materials belonging to the plaintiff.

3. It has been held by both the Courts below that the plaintiff is the owner of the land which is one single unit surrounded by a wall on all its sides with a door in the southern wall, that the allegation of the defendants that there had been a door in the western wall was not correct, that it was not correct that the land consisted of two parts, that the tomb in question is neither the "samadh" of a Hindu Sadhu nor is it the "mazar" of a Muslim Saint, but that it is the tomb of a Muslim, that there has never been any dedication or wakf and no "fatiha" or "urs" or "chadar" ceremony had ever been performed, that the defendants never had any right of entering upon this land or performing any ceremonies there, that the suit was not barred by limitation or acquiescence or estoppel and that the plaintiff had not proved that the defendants first party had removed any materials belonging to him. On these findings the suit has been decreed with regard to the reliefs (a), (b) and (c) and has been dismissed in respect of relief (d) mentioned above. The learned Counsel for the defendants-appellants has not sought to impugn the findings of fact recorded by the Courts below, nor has he advanced any arguments on the questions of limitation, estoppel and acquiescence. Relying however on the finding that the tomb in question is the grave of a Muslim, he has argued that the Courts below should have held that the defendants first party had a right to go into this enclosure and to prevent the plaintiff from desecrating the grave, and also to repair it. Reliance has been

placed on the case in *Nazira v. Sukhdarshan* (1936) A.L.J. 651 and it has been urged that the land upon which the grave stands should have been held to be wakf property and the injunctions prayed for by the plaintiff should not have been granted. In the case cited by the learned Counsel the grave in question was on a chabutra which was situated outside the house owned by the plaintiffs. Reference is made at the bottom of page 654 of the report to the map prepared by a Commissioner, and it is pointed out that there was a wall some three feet high at a point marked B in that map dividing the chabutra into two portions, DB and EB, and the dispute was about the portion EB. It is further pointed out at p. 655 that the documents relied upon by the plaintiffs were not sufficient in themselves to show the exact measurements of the chabutra belonging to the plaintiffs and would certainly not show that that chabutra extended to a spot which would include this tomb.

4. In the case before us the grave in question is situated inside an enclosure which on the findings clearly belongs to the plaintiff. All the allegations made by the defendant as to their having ever had any rights in respect of this grave have been found by the Courts below to be untrue. On the facts of the case before us and on the findings of fact, it is not possible to hold that any portion of the land inside this enclosure ever acquired the character of waqf or dedicated property. Reference may be made to the decision of their Lordships of the Privy Council in AIR 1936 83 (Privy Council) We are unable to hold that the defendants have made out any case at all for being allowed to enter this enclosure or to have any connexion with the tomb in question. The injunctions prayed for by the plaintiff do not, on the findings, infringe any rights of the defendants and we are unable to accept the contention that the Courts below have erred in any manner in granting these injunctions. For the reasons given above we dismiss this second appeal with costs.