

**(1938) 11 AHC CK 0014****Allahabad High Court****Case No:** None

Abdul Majeed and Others

APPELLANT

Vs

Emperor

RESPONDENT

**Date of Decision:** Nov. 9, 1938**Citation:** AIR 1939 All 182**Hon'ble Judges:** Allsop, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

@JUDGMENTTAG-ORDER

Allsop, J.

This is an application in revision against an order passed by the District Magistrate of Benares under the provisions of Section 144, Criminal P.C. This order prevented the applicants from interfering with the performance of certain Taziadari ceremonies by Shamsul Haq and others on a platform in front of a building which was, at least at one time, known as the Imambara of Allah Rakhu. It seems to be admitted that Allah Rakhu built this Imambara many years ago and that the applicants are his descendants through one Shah Mohammad. In the year 1928, two Sunnis and two Shias instituted a suit u/s 92, Civil P.C., against some of the applicants. There were two sets of defendants in that suit, one alleged to be the descendants of Shah Mohammad and the other alleged to have been entrusted by a descendant of Shah Mohammad's with the management of a trust created by him. The cause of action alleged in the plaint was that the defendants had prevented the performance of Moharram ceremonies in the years 1924, 1925 and 1926. The suit was of course based upon the allegation that this Imambara was a public trust. It was held by the learned District Judge who dismissed the suit that the property was not a waqf at all and in any event it was certainly not a public waqf. This Court in appeal took the same view. The judgment is reported in [Muhammad Yusuf and Others Vs. Muhammad Shafi and Others](#). This Court in its judgment quoted a

passage from Mr. Mayne's book on Hindu Law and Usage. This passage deals with trusts for religious purposes. Mr. Mayne mentions that the owner of property may use such property for religious purposes and that the community does not thereby get any right in the property. He said:

It is like a private chapel in a gentleman's park, and the fact that the public have been permitted to resort to it will not prevent its being closed, or pulled down, provided there has been no dedication of it to the public. It will pass equally unencumbered to his heirs, or to his assignees in insolvency

2. The learned Judges of this Court said:

We are inclined to think that this is the position as regards the Imambara in dispute; but if there was a dedication at all, we have no hesitation in agreeing with the Court below that the trust was not of a public nature such as is contemplated by Section 92, Civil P.C.

3. It seems that this Court was by no means certain that there was any dedication. The suit having been dismissed the matter was taken up by one Shamsul Haq and some of his supporters, the allegation being that there were some other descendants of Allah Rakhu's who were of the Hanafi sect and who were entitled to perform Moharram ceremonies in this Imambara. I am told that Shamsul Haq made an application in 1936 that he should be allowed by the authorities to use the Imambara for certain ceremonies in connexion with the Moharram, that he was not allowed to do so, that he attempted to use force and ultimately there was a riot. I am told that Shamsul Haq or members of his party or his supporters were convicted of offences against the peace and punished. In 1937 however an order was passed by the District Magistrate u/s 144, Criminal P.C., that the applicants should not prevent Shamsul Haq from performing these Moharram ceremonies on the platform in front of the Imambara. The same order was repeated in 1938. There seems to be no doubt that the applicants are in possession of this Imambara. Prima facie it seems to me that the authorities should not assist a trespasser who wishes to trespass upon the property of another without having obtained any decree from a Civil Court, but I notice that Shamsul Haq or other members of his party MO not represented in these proceedings. I do not think that I can pass any order in the sense in which the applicants wish me to pass one, without hearing what Shamsul Haq has got to say. I therefore direct that the applicants shall implead Shamsul Haq and any others who appear to be interested in this dispute. I allow them a period of one month in which to take the necessary steps and I direct that this case Shall come up after the vacation. (After Shamsul Haq had been impleaded, his I lordship made the following final order on 9th November 1938.) I pass this order in continuation of my previous order of lath May 1938 in which I explained the facts out of which this application has arisen and directed that notice should be served upon Shamsul Haq and others who wore interested in the result. I may mention that I have been informed that there hi a slight inaccuracy in the previous order. It was

there said that the District Magistrate of Benares passed an order in the year 1937 u/s 144, Criminal P.C. I am now told that the real fact is that the order passed in that year was one u/s 107, Criminal P.C. The matter is not of any importance. Shamsul Haq and the others who have recently been impleaded have not put in any appearance and the result is that I have heard only one side of the question. I have read the note upon this dispute submitted by the District Magistrate. It seems to me that the applicants have been held to be in possession of certain property in which the general public have no interest at all and that they object to the use of their property for the performance of certain Moharram ceremonies. Certain other persons claiming some right in the property as the descendants of Allah Rakhu wish now to perform the ceremonies in accordance with their private right. The learned District Magistrate in his note has rightly said that the proper course for these people is to approach the Civil Court and to obtain a declaration of their right. It seems that they did institute a civil suit but that the plaint was returned to them because the suit was not cognizable by the learned Munsif in whose Court it was instituted. I am told that they appealed to the District Judge against the Munsif's order and that that appeal has now been dismissed.

4. If the Hanafis proceed with the civil suit it should be possible for them to obtain an order from the Civil Court upon the question whether they should be allowed to perform Tazia ceremonies while this suit is proceeding or it may be possible for the other side to obtain an injunction against the Hanafis. If they do not proceed : with the civil suit I do not see how the Magistrate can properly pass any order allowing them to enter upon land, admittedly in possession of another person, and perform ceremonies upon it against that person's wish. In any event, if the Magistrate feels that he ought to do so in the interests of the public peace it is at least necessary that he should hold some enquiry u/s 147, Criminal P.C., in order to discover for himself pending any decision by a Civil Court whether the Hanafis have any right to the user of the land in the manner in which they desire to use it. There is some mention of proceedings u/s 147, Criminal P.C., in the Magistrate's note. It does not appear how these proceedings ended or whether they have been completed at all. If it was established in these proceedings that the Hanafis had a right to user, there is no doubt ground for enforcing that right in the interests of public peace, but if the proceedings resulted-in a decision against the Hanafis, then the right of user should certainly not be enforced. It is clear that the applicants cannot be compelled to allow their property to be used in a way in which they do not wish that it should be used unless it is established that others have a right of user. It cannot be the intention of the law that a Magistrate should compel the owner of property to submit to trespass upon it merely because the trespasser is prepared to use force.

5. The order of the Magistrate which is under revision has ceased to have effect and it is therefore unnecessary to set it aside. I merely express the opinion that the Magistrate should not enforce any use of this private property against the persons in possession thereof unless it is established either by a decree of a Civil Court or as

the result of some enquiry u/s 147, Criminal P.C., that the persons-claiming the right to use it have justification for their claim. The position now appears to be that the Hanafis have not established any right to use the property which is in the possession of the applicants, and that they probably hope from year to year to get orders at the last moment against which the applicants, owing to want of time, have no possible redress. This state of affairs should certainly not be allowed to continue. Having made these remarks I dismiss the application because there is no object in setting aside the Magistrate's order.