
(1914) 01 CAL CK 0023

Calcutta High Court

Case No: Appeal from Original Decree No. 518 of 1909

Sreemutty Ayatannessa
Bibi

APPELLANT

Vs

Kulfu Khalifa and
Others

RESPONDENT

Date of Decision: Jan. 15, 1914

Final Decision: Allowed

Judgement

Carnduff, J.

This is an appeal preferred by the Plaintiff against the dismissal of her suit on the preliminary ground that it was not maintainable without the consent of the Advocate-General, as required by sec. 92 of the Code of Civil Procedure. The Plaintiff claims to be the rightful mutwalli of a religious and charitable endowment by virtue of a towliatnama executed by the founder, her deceased husband. The Defendants, she declares, have no right whatever to interfere with the management of the trust, and are, in fact, trespassers, who have wrongfully intervened, had their names registered under the Land Registration Act, 1876, in respect of the must property and usurped the management of it. She now seeks to obtain the possession to which she claims to be entitled under the deed of endowment. She complains of no breach of trust, and she does not ask for any direction as to the administration of the trust.

2. The Subordinate Judge in the Court below has argued that the Defendant now in possession is trustee de facto, if not de jure; that the suit is for his removal; and that it is one in which the direction of the Court may be necessary for the administration of the trust. He has held, therefore, relying upon the decisions in *Neti Rama Jogiah v. Venkata Charulu* I. L. R. 26 Mad. 451 (1902), and *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* I. L. R. 24 Cal. 418 (1897), that sec. 92 of the Code applies, and that the suit must be dismissed.

3. Assuming, as we must do for the purposes of this appeal, that the Defendants are what the Plaintiff represents them to be, I think that a suit such as this for the removal of a

trespasser in possession of trust-property is not a suit of the kind contemplated by the section. Nor, in my opinion, does it help the trespasser to call him a trustee de facto. A dacoit might be that, and the provision was surely never intended to protect him from being sued too readily.

4. The first ruling cited by the learned Subordinate Judge has been distinguished by the Court in *Budree Das Mukim v. Chooni Lal Johurry* 10 C. W. N. 581 : s. c. I. L. R. 33 Cal. 789 (1906), while the second has been dissented from in the same case and also in the earlier case of *Budh Singh Dudhuria v. Niradbaran Roy* 2 C. L. J. 43, 439 (1905). These decisions were, no doubt, under sec. 539 of the Code of 1882, and it is true that cl. (a) of sec. 92, sub-sec. (1), of the new Code regarding a suit to obtain a decree "for removing any trustee," and sub-sec. (2) are new. But these additions do not, so far as I can see, alter the law on the point; and I find that in a very recent case, namely, *Muhammad Abdul Majid Khan v. Ahmed Said Khan* ILR 35 All 459 (1918), which was decided under the present Code, the Allahabad High Court has followed *Budree Das Mukim v. Chooni Lal Johurry* 10 C.W.N. 58 S.C. ILR 33 Cal 789 (1906).

5. I think, therefore, that this appeal must be allowed, the decree of the learned Subordinate Judge discharged, and the suit remanded to the Court below for disposal on the merits.

6. The costs of the appeal I would make costs in the cause, and I would declare that the Appellant is entitled to a certificate under sec. 13 of the Court Fees Act, 1870.

Richardson, J.

I agree.

The case seems to me to be governed by the observations made in *Budree v. Chooni* 10 C.W.N. 58 S.C. ILR 33 Cal 789 (1906).