

APPELLATE CIVIL.

Before Mr. Justice LeDesjard and Mr. Justice Martineau.

GANGA PURI (PLAINTIFF)—Appellant,

versus

MOHAN LAL AND OTHERS (DEFENDANTS)

Respondents.

CIVIL APPLA. NO. 327 OF 1919.

Civil Procedure Code, Act V of 1908, section 92—whether applicable to a suit by a Mahant or trustee to enforce his own rights.

Held, that where a plaintiff is suing not for the purpose of protecting the interests of the public but in order to enforce his own right as a Mahant or trustee, the suit does not fall within the purview of section 92 of the Code of Civil Procedure.

Budres Dos Mukim v. Choant Lal Jharry (1), per Woodroffe J., followed.

First appeal from the decree of Lala Jaswant Das, Subordinate Judge, 1st class, Lahore, dated the 18th December 1918, dismissing the plaintiff's claim.

M. S. BHAGAT and AMIN CHAND, for Appellant,
TIRATH RAM, for Respondents.

The judgment of the Court was delivered by—

MARTINEAU J.—The property in dispute in the present case was also the subject matter of a previous suit which was brought by three barbers of Lahore on behalf of the barber community for the ejection of Shiv Charan, who was the manager of the property. Shiv Charan died during the pendency of that suit, and his minor sons and widow were brought on the record as his representatives. The first Court decided that case in the plaintiffs' favour, but on appeal the Divisional Judge, Mr. Agnew, on the 18th February 1914, dismissed the suit, holding that the property was *wakf*, that Shiv Charan was a constructive trustee, and that under section 92 of the Civil Procedure Code, the suit was not maintainable without the permission of the Collector. The persons who had brought that suit and one other then applied to the Collector for permission to bring a suit, but they subsequently withdrew the application.

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In the present case the defendants are the same persons who were impleaded as Shiv Charan's representatives in the previous case, but the plaintiff is one Bhawani Gir, who alleges that after the death of Shiv Charan he was appointed by the brotherhood of the barbers of Lahore as *Mubunt* of the institutions to which the property is attached, that he is entitled to possession of the property, and that the defendants are trespassers.

The Subordinate Judge has held that the plaintiff, being a nominee of the barber community, can have no greater rights than the community itself on whose behalf the former suit was brought, and that as the former suit was continued against the present defendants after Shiv Charan's death, and it had been admitted in the application to the Collector that the defendants were *Pujaris*, and representatives of Shiv Charan, the plaintiff cannot now treat them as trespassers. He has accordingly dismissed the suit as being, like the former one, not maintainable without the Collector's permission. The plaintiff has appealed and the appeal must succeed.

The plaintiff is suing, not for the purpose of protecting the interests of the public, but in order to enforce his own right as a *Mubunt* or trustee, and a suit of this nature does not fall within the purview of section 92 of the Civil Procedure Code, as was held by Woodroffe J. in *Budree Das Mukim v. Choon Lal Jhurry*(1), where the learned Judge said :—

"In my opinion the present suit, so far as it is brought by the plaintiffs in their individual capacity as trustees to enforce their individual claim to be such trustees of the temple in suit, is not within the scope of the section. The public may be interested in seeing that their alleged appointees have the administration of this trust, but this right of the public and of the plaintiffs, *qua* members of that public, is not the same as the right of the plaintiffs considered not as members of the public, but as trustees suing to enforce their own personal right of management."

Further, it is admitted that section 92 of the Civil Procedure Code does not apply to a suit brought against trespassers, as the plaintiff alleges the defendants to be,

(1) (1903) I. L. R. 33 Cal. 733, 353.

and we cannot agree with the lower Court that the plaintiff is in any way precluded from suing them as trespassers. In the first place, he was not a plaintiff in the former suit, nor did he join in making the application to the Collector, and in the second place the present defendants were impleaded in the former suit merely as the legal representatives of Shiv Charan and not in their personal capacities.

Mr. Agnew's judgment is no bar to the present suit, and we hold that the suit is not one to which section 92 of the Civil Procedure Code applies. We accordingly accept the appeal, set aside the decree of the lower Court, and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, for decision on the merits. The Court fee paid on the memorandum of appeal will be refunded and other costs will be costs in the case.

A. N. C.

*Appeal accepted, case
remanded.*

APPELLATE CIVIL.

Before Mr. Justice A. L. R. and Mr. Justice Campbell.

RAM NARAIN AND MOTI SINGH (PLAINTIFFS)

Appellants,

versus

Mst. HAR NARINJAN KAUR AND OTHERS

(DEFENDANTS) Respondents.

Civil Appeal No. 892 of 1918.

Custom—Succession—Sodhi family of Anandpur, Tahsil Una, District Hoshiarpur—whether widow of a deceased proprietor is entitled to maintenance only—Special family custom—necessary proof of—Hindu Law.

Held, that the onus probandi lies heavily upon a party setting up a special family custom which is opposed to both Hindu Law and general agricultural custom and he must prove by clear and unambiguous evidence that such custom is ancient, invariable and definite.

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 March 10.