SUPREME COURT OF INDIA

Gopal Krishnaji Ketkar

Vs.

Mahomed Jaffer Mohamed Hussein

C.A.No. 94 of 1951

(M. Patanjali Sastri, C.J.I., S. R. Das and Vivian Bose, JJ.)

22.05.1953

JUDGEMENT

BOSE, J. :

1. This is an appeal by the second plaintiff who is the adopted son of the first.

2. The suit is for a declaration that the second plaintiff is the guardian and 'vahivatdar' of the Darga in suit known as Haji Malang and that he alone is entitled to look after the Darga and manage it and control direct and perform its rites and rituals; also for a declaration that the second plaintiff is entitled to take the offerings placed before the tomb of Haji Malang throughout the year, as also the cash and other offerings now lying in the Kalyan Treasury under the orders of the District Magistrate of that place. A perpetual injunction is also asked for restraining the defendant from disturbing the second plaintiff in the exercise of those rights.

3. The suit has certain curious features. The plaintiffs are Brahmins while the Darga which they have the right to manage is a Muslim Shrine, and beside the tomb of the Muslim saint is the tomb of a Hindu princess. Offerings are made at both tombs by persons of all faiths. The first plaintiff died during the pendency of the suit and the defendant died during the pendency of the appeal. He laid no claim to the Darga but only claimed to be its rightful manager and Mutawalli. As he claimed no hereditary rights that a portion of the dispute died with him.

The only dispute which remains outstanding against the defendant's legal representatives, and that only in an indirect way, relates to the past offerings which were deposited in the Kalyan Trusury and which had accumulated to a sizeable figure during the pendency of litigation, and to a house claimed by the defendant. And even that only arises indirectly for this reason. In view of the dispute between the parties, the authorities stepped in under Ss. 145 and 147, Criminal P. C. and attached the offerings and on 24-2-1946 the District Magistrate of Kalyan ordered them to be kept in the Kalyan Treasury and directed that they should be handed over to whichever party would be found to be entitled to them by a civil Court. That is one of the plaintiffs' reasons for bringing this suit.

4. The shrine has a curious, and in some respects legendary, history. Its origin is lost in antiquity but the Gazetteer of the Bombay Presidency tells us that the tomb is that of Muslim saint who came to India as an Arab missionary in the thirteenth century. His fame was still at its height when the English made their appearance at Kalyan, near where the tomb is situated in the year 1780. As they only stayed for two years, their departure in the year 1782 was ascribed to the power of the dead

saint.

5. The Peshwas were then in power in that region and as the departure of the English left them a clear field they sent a thank offering under the charge of one Kashinath Pant Ketkar, a Kalyan Brahmin who the plaintiffs say was one of their ancestors. The tomb was then in disrepair, so Kashinath started to repair it and according to the tradition, was miraculously assisted by the dead saint who, without human aid, quarried and dressed the large blocks of stone which now cover the tomb.

6. It seems however that Kashinath was not content to repair the tomb. He also wanted to manage it and this led to friction with the Kalyan Muslims who resented Brahmin Management of a Muslim Shrine. The situation gained piquancy by reason of the fact that there was already a Muslim in charge as the tomb's heareditary manager. His name was Hydad.

7. Matters came to a head in 1817 and the dispute came before the Collector who, with the wisdom of a Solomon, declared that the dead saint should settle the affair. He decided that the only way of ascertaining the saint's wishes was by casting lots. This was done and three times the lot fell on the representative of Kashinath; and so, in the clear headed and simple manner of the time, the matter ended and Kashinath's representative was proclaimed guardian of the tomb. The plaintiffs claim that their family have been in management ever since.

8. The suit was filed by Radhabai, the second plaintiff's adoptive mother, as well as the adopted son Gopal Krishna Ketkar. But there was no contest between them. They explained in their plaint that the rights claimed resided in the second plaintiff and said that the first plaintiff had only been joined as a matter of caution and in order to avoid technical objections.

9. The plaintiffs do not set out any title beyond the fact of 'de facto' management and apart from reciting the facts of management, only say vaguely that "the guardianship and management of the said Darga has been vested in the plaintiffs' family from the time of their remote ancestors."

10. The plaintiffs' complaint against the defendant is this. They say that the service which the tomb requires can be divided into two parts. One is the service during the Urus or annual festival. The other is the service rendered during the rest of the year. But the plaintiffs say that in both cases they, that is to say, first the adoptive mother and then the adopted son, used to make special arrangements. As the service during most of the year (excluding the Urus period) was not heavy, the first plaintiff Radhabai used to ask some Muslim to perform the service for her and the return she arranged for his maintenance.

11. This went on down to the year 1920. In that year the defendant asked that he might be permitted to do what we might term the non-Urus part of the service. Radhabai agreed and in return for the performance of these services Radhabai allowed the defendant to collect the non-Urus portion of the offerings and to keep them for his maintenance. When they were not sufficient for the purpose, Radhabai used to eke them out with rations of food. Latterly she stopped sending him food as the offerings had increased and so the need had ceased.

12. As regards the Urus period the plaintiffs' case is that Radhabai used to collect them for herself "as she chose". When the second plaintiff was adopted he stepped into Radhabai's shoes and continued the same practice.

13. The plaintiffs' case is that in the years 1945 and 1946 the defendant started to interfere and tried

to prevent the plaintiffs from collecting the offerings. This led to proceedings under S. 145 Criminal P. C. and the authorities stepped in as already explained, and that in turn led to the filing of this suit.

14. The defendant denied all the above allegations but he gave no better explanation of the rights he claimed then did the plaintiffs. All he said was that as a matter of fact he had been in management as Mutawalli since 1902-03 and therefore he had the right to continue in management. He claimed no right, other than as Mutawalli, either to the Darga or to the dharamashalas attached to it, but he claimed that a house which stands there was built by him out of his own funds and is his own property.

15. In plaint, neither of the plaintiffs laid any claim to hereditary managership; all they claimed was that the guardianship and management had as a matter of fact been in the family from the time of their remote ancestors. But somewhat curiously the issue asks -

"Whether the plaintiff proves that he is the 'hereditary' manager or guardian of the suit Darga and acted as such?"

The learned trial Judge found this issue in the plaintiff's favour though there is nothing in the Judgement to indicate the evidence on which he based this conclusion. But he did not go as for as that in decree. There he limited himself to saying that the second plaintiff is the guardian and Vahiwatdar. He also found that the second plaintiff is entitled to 'all' the offerings 'all' the year round including those made during the Urus.

16. As regards the defendant's rights, the learned Judge holds that he was an employee of the plaintiff and that he was first employed by Radhabai round about the year 1917. The defendant claimed that he had been there some forty years before suit and he put forward a story to the effect that the saint had appeared to him in a dream when he was living in Ajmer and had told him to take charge of the Darga. He claimed that his right to the mujwarship flowed from this dream. This fantastic claim was negatived.

17. On appeal the High Court upheld these findings, that is to say, the learned Judges pointed out that the plaintiffs had not claimed in the plaint any right to hereditary managership but only to 'de facto' managership. They attempted to prove a higher right as hereditary managers at the evidence stage but this was negatived. The learned Judges also held that the defendant was permitted to go to the Darga with the consent of the first plaintiff and that he was there in a permissive capacity, though whether as a servant or otherwise it was not necessary to decide. They then reached the conclusion that the plaintiff is entitled to the collections 'on behalf of the institution'.

18. The learned Judges summed up their conclusions as follows :

(1) "that the plaintiffs .... are entitled to keep with them 'for the purpose of the Institution' the offerings which are made 'during the course of the Urus';

(2) "So far as the offerings 'other than those made at the time of the Urus' .... they were taken away by the defendant. We do not wish to say anything in this appeal with regard to the offerings which are made at other times";

(3) "The plaintiffs are entitled to receive charge 'in the first instance' of the offerings which were made before the Darga";

(4) 'With regard to the right to serve the institution we express no opinion."

19. The Court proposed to pass an order that the second plaintiff was entitled to the collections on behalf of the institution. But at that stage the learned Judge said -

"The plaintiffs, however, did not quite clearly say by their plaint that the suit which they had filed was filed by them 'on behalf of the Darga' and in their capacity as the 'de facto' managers. The learned advocate who appears on behalf of the plaintiffs, however, asks up to permit him to amend the plaint so as to make it clear that the suit which they had filed is a suit filed on behalf of the Darga as its 'de facto' managers. We think that the amendment ought to be allowed."

We are informed by the learned Solicitor-General that the judgment was temporarily halted at that stage to enable the plaintiffs to amend. An application for amendment in the alternative was put in and allowed but when that was done the learned Judges decided that in consequence of the amendment the defendant would be entitled to file a supplementary written statement and the learned Judges concluded -

"The decree of the lower Court will be set aside and the suit remanded to the lower Court for further disposal in accordance with the law."

20. Radhabai died during the pendency of the suit and the second plaintiff appealed here. His main grievance is that the suit has been remanded.

21. Much ground was covered during the course of the arguments but the points which are really at issue are simple.

22. In the first place, on the facts we have the finding of the High Court that the claim which the plaintiffs put forward in the evidence, and which they had also made before suit, to hereditary managership is not established. As a matter of fact, it was not urged in the plaint and it should not have been put in issue. Next, there is a concurrent finding that the plaintiffs and their family have been in 'de facto' management. The first Court does not say for how long but the High Court holds that they have been there from at least 1886-87 and in all probability from 1817. We think, on the strength of Exs. P-67 and P-68, that the High Court's conclusion that the plaintiffs and their family had been managing from at least 1886-87 can be accepted. Thirdly, there is a concurrent finding that the defendant was there in a permissive character and had no independent rights of his own.

23. From this flows a matter of dispute : who has the right first, to collect the offerings and second, to the use and benefit of them? There appeared to be some doubt whether the plaintiff had a right to the entire offerings or only to those collected during the Urus days. But now that the defendant is dead the question loses its significance. The defendant did not claim these offerings for himself. All he claimed was

"the right to collect the offerings and spend them for the upkeep and benefit of the Darga, mosque and pilgrims etc."

If this is the case, then the money must be kept for those purposes and can only be handed over to the person or person authorised to administer them for those purposes. It cannot be given to the defendant's legal representative because, as we have seen, the defendant did not claim any hereditary right and so whatever rights of management he had died with him. That puts the defendant's legal representatives out of court and the only question which remains is : Has the

second plaintiff any right to them?

24. Now this is not a case in which we can apply either the Hindu or the Muhammadan law. It is not a case which comes under either category. The building is a composite structure in which the bodies of a Muslim saint and a Hindu princes are buried side by side. There is no suggestion that she was ever converted to Muhammadanism. The defendant describes the tombs as follows :

"In the suit Darga there are two tombs, the second tomb being called Mayi's tomb. In it is buried the dead body of a Hindu Raja's daughter treated by Bawa Malang as his own daughter. But the Darga is known as the Darga of Bawa Malang."

25. The offerings are made by persons of all faiths and to emphasize its cosmopolitan character we have the following description given by the plaintiffs :

"Round about the Darga many people die every year .... Anyone that dies there, whether Hindu, Muslim or Parsee if he has no heirs is buried there".

The management has been in Hindu hands assisted by Muslims, though under what rights or on what terms is vague.

26. It is evident then that this cannot be governed either by the Hindu or the Muhammadan law. It must be governed either by its own special custom or by the general law of public religious and charitable trusts.

27. We are unable to pronounce on the question to custom because, for one thing, no custom has been pleaded and for another, whatever has been pleaded is vague and indefinite and that cannot form the foundation for a finding. The plaintiffs say vaguely that the right of management resides "in their family" but that predicates that somebody has the right and power to make a selection. Who that is, unless it is the Collector because he once intervened, it is impossible to ascertain. All we know is that the first Hind manager was Kashinath Pant and that he displaced a Muslim, Hydad, in the year 1817.

Even if we accept the fact that Kashinath was one of the plaintiffs' ancestors (the fact is disputed) there is long gap from 1817 down in 1886 skipping three generations according to the plaintiffs' tree. Then Radhabai's husband acted as manager and after him the management went, not to his widow Radhabai but to his brother's widow Laxmibai. From her it went to Radhabai and from Radhabai to the second plaintiff.

28. The nest question is about the offerings. Even if it be accepted that the plaintiffs have the right to collect them, it is by no means clear for whose benefit and use and for what purposes. In a notice which the plaintiffs gave to the defendant before suit (dated 4-4-46) the plaintiffs clamed the right to utilise the income "according to their sweet will". There was no suggestion there that they were bound to spend any of it on the trust; on the contrary, they seemed to look upon the whole thing as their private property; also they claimed a hereditary right "from generation to generation".

29. In the plaint they soft-pedalled this considerably but in the evidence the second plaintiff claimed the right to any balance which might remain after meeting the "expenses". But as he also claimed the right, as manager, to determine the extent of the expenses, the resultant position is not satisfactory seeing that a public trust appears to be concerned.

30. Now, a 'de facto' manager or a trustee' 'de son tort' has certain rights. He can sue on behalf of the trust and for its benefit to recover properties and moneys in the ordinary course of management. It is however one thing to say that because a person is a 'de facto' manager he is entitled to recover a particular property or a particular sum of money which would otherwise be lost to the trust, for the on its behalf and for its benefit, in the ordinary course of management; it is quite another to say that he has the right to continue in 'de facto' management indefinitely without any vestige of title, which is what a declaration of this kind would import. We hesitate to make any such sweeping declaration.

31. It is evident from the case of both sides that the Darga is not private property. It was in existence some 700 years before the plaintiffs' ancestors came on the scene and a Muslim was in management in 1817. After this length of time after what happened, and especially as a Hindu princes was buried besides the Muslim saint, it might be legitimate infer that there was some lawful origin, of which the traces are now lost, for management by a Hindu; and it may be fair and proper that whoever manages should be permitted to retain a portion of the offerings for himself. But it is quite evident that the property was not handed over to the plaintiffs' ancestors as a personal gift, nor of course would the Collector have power to do that.

All he did was to settle a dispute and, with or without authority, to decide that Kasinath Pant had the right to manage; and that was all that Kasinath Pant claimed. Ever since, until that notice of 4-4-46, no adverse right, even to the offerings, has ever been set up. Then comes the admitted fact that the public have taken an interest in the place and that a dharamshala and so forth were built by members of the public including a Parsee; also that the place is very largely visited, particularly during the Urus time. That being so, we think it undersirable that things should be allowed to drift in this uncertain way, no one knowing where the legal rights of management lie or of what they consist; no one knowing how the rights are to devolve or how the large charitable offerings which are collected are to be distributed and used.

32. We are told by the learned Solicitor-General that a suit under S. 92, Civil P. C. is under contemplation. Without in any way prejudicing matters which will arise there, we make the following order.

We direct -

1. That the present arrangement regarding the collection and disposal of the offerings continue for a period of six months from the date of this judgment.

2. That in the interval the offerings so collected, as well as those already in deposit, be not handed over to the second plaintiff except to the extent necessary for meeting the expenses. The legal representatives of the defendant have no right at all to those offerings.

3. If such a suit is instituted within the said period, then the said offerings and collections be disposed of in accordance with such scheme as may then be framed, and in accordance with such directions as may be given in that suit.

4. If no such suit is instituted within the said six months, then the second plaintiff, as the person in 'de facto' management of the Darga from 13-11-1938, the date of his adoption, till the date of suit, 7-10-1946, will be entitled to receive the offerings now lying in deposit in the Treasury for and on behalf of the Darga and for its benefit and in future to collect all the offerings all the year round for and on behalf of the Darga and for its benefit until he is displaced by a person with better title or

authority derived from the Courts.

33. We set aside the order of remand. In our opinion, it was unnecessary. Though the plaintiff's had claimed personal rights to the offerings before the suit, they did not put forward such a claim in the plaint, and though they did not ask for the relief in proper form the facts on which a relief in proper from could be given were all set out. The amendment was accordingly of a purely formal character. If the learned High Court Judges felt that there was any need for a reply by the defendant to the amendment, they should themselves have called for one and then determined whether, and if so how far, further proceedings were called for.

34. Each side will bear its own cost. We refrain from giving the second plaintiff any costs because, having set up a personal right to the offerings before the suit and having dropped that right in the plaint, he revived a personal claim to the "remainder" after meeting the "expenses" in his evidence.

35. A certified copy of this judgment will be sent to the Advocate-General of Bombay.

Order accordingly.

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