Syed Shah Ghulam Ghouse Mohiuddin and Others

Vs

Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died) By 1. Rs. and Others

Civil Appeal No. 219 of 1967

(G. K. Mitter, A. N. Ray JJ)

17.02.1971

JUDGMENT

RAY, J. -

1. This is an appeal by certificate against the judgment, dated December 15, 1965, of the Andhra Pradesh High Court dismissing the appellants' suit and setting aside the decree in favour of the appellant passed by the Additional Chief Judge, City Civil Court, Hyderabad on October 18, 1958.

Shah Abdul Rahim a resident of the city of Hyderabad died on September 26, 1905 leaving behind him four sons Abdul Hai, Ghulam Nooruddin, Abdul Razak and Ghulam Ghouse Mohiuddin and two daughters Qamarunnissa Begum and Badiunnisa Begam. Shah Abdul Rahim had large movable and immovable properties. The sons and the daughters entered into two agreements in the months of July, 1908 and appointed arbitrators to partition the Matrooka properties of other Shah Abdul Rahim. On August 1, 1908 the arbitrators made an award partitioning the properties. On august 13, 1908, there was a decree in the Darul Khaza Court, Hyderabad confirming the award of August 1, 1908. The appellant filed the suit out of which the appeal arises on July 24, 1941 for setting aside the decree, dated August 13, 1908, confirming the award and for partitioning certain Matrooka properties. In 1942, the suit was dismissed. An appeal was preferred to the High Court of Hyderabad. During the pendency of the appeal Abdul Hai died in 1950 and his legal representatives were brought on the record of the suit in the month of February, 1952. The appeal filed in the year 1943 was disposed of by the High Court of Andhra Pradesh in April, 1957 remanding the case to the City Civil Court, Hyderabad. On October 18, 1958 the Additional Chief Judge, City Civil Court, Hyderabad decreed the suit in favour of the appellant and cancelled the decree of the Darul Khaza Court, dated August 13, 1908. On appeal the Andhra Pradesh High Court on December 15, 1965 set aside the decree passed by the Additional Chief Judge.

2. The undisputed facts are these : When Abdul Ranhim died in 1905 Abdul Hai the eldest son was major. The appellant was a minor. There were two references to arbitration. Before the arbitrators the appellant a minor was represented by his brother Ghulam Nooruddin as the guardian. The parties to the arbitration agreements were Abdul Hai, Ghulam Nooruddin, Qamarunnissa Begum and Badiunnisa Begum. It will appear from the award that before the arbitrators there was no dispute between the parties and the arbitrators did not think it necessary to frame any issues. Before the arbitrators the plaintiffs marked with the letter 'F' a plan showing properties attached to the Khankah and Dargah and those properties were marked as Exhibits B-1 to B-10 and the plaintiffs relinquished their title to properties marked Exhibits B-1 to B-10 and further stated "neither at present nor in future will they have any share and right in the said property". As to properties

marked B-1 to B-10 the parties stated before the arbitrators that Abdul Hai was the Sajjada Nashin of the Dargah and was in possession of the Dargah and Khankah properties.

3. The award was made a rule of court within a short time upon a plaint filed by Nooruddin, Abdul Razak, the appellant represented by Nooruddin as the guardian and the two sisters Qamarunnissa Begum and Badiunnisa Begum. The defendant was Abdul Hai. The facts recited in the decree are that Syed Shah Nooruddin a pious person of Hyderabad had his Khankah situated at Nampalli. The Dargah of the said pious man was also situated in the same locality. After Syed Shah Nooruddin's death his son-in-law, Abdur Rahim became the Sajjada of the Khankah and the Dargah Shariff. The Sajjada had control over all the expenses of the Dargah and Khankah and the entire property attached to the Dargah and Khankah remained in possession of the Sajjadanasheen and all the expenses of the Dargah and Khankah were met from the income. After the death of Abdur Rahim, Abdul Hai became the Sajjadanasheen and was having control over the Dargah and Khankah. Abdur Rahim left three adult sons and one minor son and also two adult daughters. Apart from the property attached to the Dargah and Khankah Abdur Rahim left personal Matrooka properties. There might have been a dispute between the parties regarding the partition of these properties. But he parties settled the dispute by mutual consent and by agreements referred the matter to arbitration for the settlement of the dispute. The arbitrators made an award. The decree recited that the properties marked with the letter 'F' in the plan annexed to the award were Khankah and Dargah Shariff properties in the possession of the defendant Abdul Hai for meeting the expenses of the Khankah and no one has any right or claim over the property 'at present' or 'in future. The decree concluded by stating that the Dargah and Khankah properties were not liable to partition and none of the plaintiffs "shall have any right or claim regarding the same".

4. The appellant impeached the award and the decree upon the award inter alia on the grounds that the award was void by reason of lack of lawful guardian on behalf of the appellant to protect and represent the rights and interests of the minor in the arbitration proceedings and in the proceedings resulting in the decree upon the award. The appellant also claimed that the award and the decree should be avoided because the properties marked Exhibits B-1 to B-10 were not Dargah and Khankah properties in fact and were treated in the award and the decree to be Dargah and Khankah on the wrongful representation of Abdul Hai. The appellant in the year 1938 discovered for the first time the true and correct facts that the same were not Khankah and Dargah properties and therefore claimed the same as divisible upon partition amongst the heirs of Abdul Rahim.

5. The Trial Court held that the award and the decree thereon were obtained by fraud and the decree was to be set aside. The reasoning given by the Trial Court was that it was established on the evidence that Abdul Hai was in full possession and enjoyment of the whole of the property of Abdul Rahim including the property marked as Exhibits B-1 to B-10. In the letter, dated August 13, 1938, Exhibit P-8 Abdul Hai denied that the property was Waqf property belonging to the Dargah and asserted that it was owned and possessed by him and relinquished by his relatives. The letter was held by the Trial Court to indicate that Abdul Hai knew that the property was the property of his father which he inherited along with his brothers and sisters and in spite of such knowledge and belief he caused it to be represented before the arbitrators that the property belonged to the Dargah and that the same was in his possession as Sajjadanasheen. The Trial Court further held that the appellant came to know the real state of affairs from the letter of Abdul Hai, dated August 13, 1938 and therefore the suit was not barred by limitation. The Trial Court therefore passed a decree for cancellation of the decree passed upon the award and passed a preliminary decree for partition of the Matrooka properties including the properties marked as Exhibits B-1 to B-10 in the award.

6. In the High Court four questions were considered. First, whether apart from the appellant any other party was a minor at the time of the arbitration agreement and whether there was a dispute which could be referred to arbitration. Second, whether there as proof that at the time of the arbitration agreement and the award Abdul Hai made a fraudulent and false representation to his brothers and sisters and made them believe that the properties belonging to the Sajjadanasheen were the properties of Dargah and Khankah which were not partible and by representation and fraud prevented the partition of those properties. Third, whether the appellant had knowledge that Abdul Hai had claimed the properties as the ancestral properties of the Sajjadanasheen earlier than the time when the appellant said he had knowledge and whether the suit was barred by limitation. Fourth, what would be the effect of the filing of the written statement by the defendant No. 6 in the year 1958 and the omission of defendant No. 7 to file any written statement to obtain partition of the properties in the event of the decree and the award being set aside.

7. The High Court held that the appellant was a minor but the other parties were not minors. The High Court held that the reference to the arbitration and the award thereon we void. The High Court held that the decree of the Darul Khaza Court upon the award was not a nullity and the present suit should have been filed within three years of the appellant obtaining majority. The High Court also held that the decree of the Darula Khaza Court was not obtained by fraud. The High Court held that Abdul Hai asserted in the year 1927 that the Dargah and the Khankah properties were his personal properties and from that date Abdul Hai asserted his title adverse to the appellant and the other plaintiffs and the appellant and the other plaintiffs knew in 11927 of the adverse claim of Abdul Hai. Therefore, the suit was barred by limitation.

8. The minority of the appellant is a fact found both by the Trial Court and the High Court. It is an admitted fact that the appellant's guardian was his brother Nooruddin at the time of the arbitration proceedings and at the time of the decree on the award. The brother is not a lawful guardian under the Mohammedan Law. The legal guardians are the father, the executor appointed by the father's will, the father's father and the executor appointed by the will of the father's father. No other relation is entitled to the guardianship of the property of a minor as of right. Neither the mother nor the brother is a lawful guardian though the father or the paternal grand-father of the minor may appoint the mother, brother or any other person as executor or executrix. In default of legal guardians a duty of appointing guardian for the protection and preservation of the monor's property is of the court on proper application. It was held by this Court in Mohammad Amin and Others v. Vakil Ahmed and Others, (1952 SCR 1133 : AIR 1952 SC 358 : 1952 SCJ 545.) relaying on the dictum in Imambandi v. Mutsaddi (45 IA 73 : AIR 1918 PC 11.) that where disputes arose relating to succession to the estate of a deceased Mohammedan between his three sons, one of whom was a minor, and other relations, and a deed of settlement embodying an agreement in regard to the distribution of the properties belonging to the estate was executed by and between the parties, the eldest son acting as guardian for and on behalf of the minor son the deed was not binding on the minor son as his brother was not his legal guardian; and the deed was void not only qua the minor, but with regard to all the parties including those who we sui juris. It is clear on the authority of this decision that the arbitration agreement and the award and the decree are all void in the present case by reason of lack of legal guardian of the appellant. There is intrinsic evidence in the award that the parties effected a settlement.

9. Counsel on behalf of the respondent relied on a copy of an application in the Court of the Darul Khaza in the proceeding for passing the decree upon the award in support of the contention that the court appointed Nooruddin as the guardian of the appellant. It is stated in the application that the defendant No. 3 (sic) meaning thereby plaintiff No. 3 the present appellant is a minor and

Nooruddin is the real brother and the appellant is under the guardianship of Nooruddin. The application was for permission to file the suit. There is no order for appointment of a guardian. Further, the Court in appointing the guardian of property of a minor is guided by circumstances for he welfare of the minor. There is no justification to hold that Nooruddin was either the legal guardian or a guardian appointed by the Court.

10. The decree which was passed on the award appears on an examination of the pleadings and the decree itself that the parties proceeded to have the decree on the basis of the award without any contest as and by way of mutual settlement. It will appear from the decree that it was admitted by the parties that Abdul Hai was in possession of the Dargah and Khankah and that Abdul Hai alone was the Sajjadanasheen of the Khankah. The reliquishement of property by Norrudidin on behalf of the minor is not binding on the minor. There was no legal sanction behind such compromise in the arbitration and in the proceedings resulting in a decree upon the award. There was no legal guardian. The rights and interests of the minor were also not protected particularly when there was conflict of interest between the minor and Abdul Hai. The arbitration agreement, the award and the decree of the Darul Khanza Court on the award are therefore void.

11. The High Court held that the appellant's suit was barred by limitation by reason of knowledge of the appellant that Abdul Hai was in adverse possession since the year 1927 or 1928. In regard to the properties which the appellant claimed in the suit as liable to partition, it is established that all parties proceeded on the basis that Exhibits B-1 to B-10 in the award were not Matrooka properties but Dargah and Khankah properties. If, in fact, they are not Dargah and Khankah properties but Matrooka properties, there should be available to co-owners for partition unless there are legal impediments. The estate of deceased Mohammedan devolves on his legal impediments. The estate of a deceased Mohammedan devolves on his heirs at the moment of his death. The heirs succeed to the estate as tenants in common in specific shares. Where the heirs continue to hold the estate as tenants in common without dividnding it and one of them subsequently brings suit for recovery of the share the period of limitation for the suit does not run against him from the date of the death of the deceased but from the date of express ouster or denial of title and Article 144 of Schedule I to the Limitation Act, 1908 would be the relevant article.

12. Counsel on behalf of the respondent submitted that there were two impediments to the appellant's claim for partition of the properties. One was that the decree passed by the Court of Darul Khaza upon the award was not obtained by fraud and could not be set aside by reason of limitation. The other was that the appellant came to know in the year 1927 that Abdul Hai adversely claimed properties as his own and therefore the appellant claim was barred by limitation. The High Court held that the appellant was aware of the attachment of the personal and the Dargah and Khankah properties by the Government of the Nizam in the year 1927 as also realease in the same year of the properties attached. The High Court held that when parties had knowledge of the attachment of the properties it could not be postulated that they would have no knowledge of the contentions of Abdul Hai as to release of the Dargah and Khankah properties on the ground that those were not Dargah and Khankah but personal properties of Abdul Hai. Knowledge of release of properties would not amount to ouster of the appellant from the property or of abandonment of rights.

13. The evidence of the appellants was that in 1350 Fasli corresponding to the year 1941 the appellant came to know that a letter had been written by the Abdul Hai to the Ecclesiastical Department of the Government of the Nizam in the year 1938 to the effect in that the properties shown as Dargah and Khankah in the award and the decree were not Dargah and Khankah

properties. The appellant also came to know from the same letter that all the properties including those stated to be Dargah and Khankah properties in the award were attached by the Government of the Nizam in the year 1927 and after enquiry by the Government of the Nizam all the properties were released in the year 1927. The appellant further came to know from the letter that Abdul Hai claimed the properties as his own. Thereupon the appellant demanded from Abdul Hai partition of the property as Matrooka. Abdul Hai asked the appellant to consult lawyer.

14. On the evidence it would be utterly wrong to speculate that the appellant knew of the contentions advanced in 1927 by Abdul Hai for the release of the properties by stating that they were not Dargah and Khankah properties. There was no suggestion at the time of the examination of the appellant that he was aware in 1927 of other contentions of Abdul Hai. The High Court relied on Exhibit A-38, a letter, dated October 19, 1927, written by the appellant to Abdul Hai to impute knowledge of the attachment and release of the properties. The appellant was never confronted with the letter. It was never suggested to the appellant that the letter could be construed as attributing to the appellant the knowledge of any adverse claim made by Abdul Hai with regard to the properties. In that letter the appellant stated that he was indebted to the elder brother Abdul Hai for his kindness. The appellant also stated that the expenditure incurred in connection with the litigation would be divided into four parts and the amount incurred on behalf of the appellant could be recovered from his account. This letter, dated October 19, 1927, does not at all have the effect of establishing that the appellant had knowledge of any adverse claim of the appellant. The appellant was never shown the letter to explain what litigation he referred to. No inference can be drawn against the appellant without giving him an opportunity to have his way in that matter. It is unfortunate that Abdul Hai dies during the pendency of the suit and before the trial. Not only his oral evidence but also the correspondence that Abdul Hai had with the Government of the Nizam in the year 1927 did not find way into the record of the suit. It would be totally misreading he appellant's letter of the year 1927 as impressing the appellant with the knowledge of ouster by Abdul Hai of the appellant from the properties forming the subject-matter of the suit.

15. There are two letters of great importance. One is, dated August 13, 1938 and marked Exhibit P-8 written by Abdul Hai to the Director of Endowment, Government of Hyderabad and the other is, dated September 7, 1938, written by the Ecclesiastical Department of the Government of Hyderabad to the Secretary of the Endowments, Ecclesiastical Department of the Government of Hyderabad. The letter of Abdul Hai was written in answer to an application made about that time to the Government of the Nizam by one Sheikh Abdur Rahim a tenant against whom Abdul Hai had filed a suit for recovery of rent. Abdur Rahim made an allegation that the properties in respect of which Abdul Hai filed a suit were Dargah and Khankah properties. The complaint of Abdur Rahim was however dismissed and the matter was not allowed to be reopened on the strength of the orders of Government recited by Abdul Hai in his letter. In answer Abdul Hai recorded these facts. The Nizam in the months of April, 1927 appointed the Secretary of the Ecclesiastical Department and the Commissioner of Police to enquire and report as to which of the properties were attached to he Dargah and which were personal private properties. Another Commission was appointed by the Nizam to enquire into the proper use of the endowed properties. The Ecclesiastical Department by letter, dated December 28, 1927 held that only the villages Debser and Sangvi were found to be under the Dargah. All properties of the parties which had been attached by the Nizam were released by letter, dated January 3, 1928, to excepting the two villages. Abdul Hai by letter, dated January 16, 1928, to the Government of the Nizam stated that the properties marked Exhibits B-1 to B-10 in the award and the decree of the Court of Darul Khana did not belong to the Dargah and Khankah. Abdul Hai further pointed out that the Nizam by a Firman, dated November 11, 1927, had issued orders saying that according to the opinion of the Council the Government's supervision should be

lifted from the 'maash' referring thereby to the properties which had been attached by the Nizam and the same should be given over not the possession of Abdul Hai.

16. The other letter, dated January 5, 1939, from the Government of the Nizam stated that only tow villages were held to be Dargah and the Government of the Nizam had made thorough enquiries and held that there was no other Dargah and Khankah properties and the question could not be re-opened.

17. It is established in evidence that the properties which were described as Dargah and Khankah properties before the arbitrators and the decree of the Darul Khaza Court are not Dargah and Khankah properties. Abdul ined an adjudication and an order of the Government of the Nizam in the year 1927 that only tow villages of Debser and Sangvi belonged to the Dargah and the rest were not Dargah and Khankah properties. The appellant knew that there was litigation about the year 1927 about the properties. It is not in evidence as to what that litigation was or which properties were concerned therewith because the letter was not shown to the appellant. Even if it be assumed that all parties treated the properties marked Exhibits B-1 to B-10 as Dargah properties up to the year 1927 and thereafter there was an adjudication on the representation of Abdul Hai that the properties were not Dargah and Khankah the parties would be entitled to the same. The only way in which the parties could lose their rights to the property would be on the finding that there was adverse possession or ouster.

18. The decree of the Darul Khaza Court will not be an obstacle to the claim of the appellant for partition of the properties, because the properties are admittedly not Dargah and Khankah properties but Matrooka properties. The arbitration proceedings were void by reason of lack of legal guardan of the appellant to enter into a compromise. The decree of the Darul Khaza Court is also invalid and not binding on the appellant for the same reason. If all parties proceeded upon a basis that these were Dargah and Khankah properties and that basis is wiped out by the adjudication by Government of the Nizam the parties are restored to their position as heirs to the Matrooka property. The award and the decree by reason of evidence of facts discovered since the judgment and the decree of the Darul Khaza Court cannot be allowed to stand because the effect of the discovery of the facts is to make it "reasonably probable that the action will succeed". In Birch v. Birch (1902 Probate Division 131.) the Court of Appeal held that a judgment will be set aside on the ground of fraud if evidence of facts discovered sine the judgment raise a reasonable probability of the success of the action. The principle can be stated in the words of Westbury, L. C. in Rolfe v. Gregory ((1864) 4 DeG J and S 576.). "When the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the he party defrauded is not affected by lapse of time, or generally speaking by anything done or omitted to be done so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed". This decision was refereed to by the Calcutta High Court in Biman Chandra Datta v. Promotha Nath Ghose (ILR 49 Cal 886 : AIR 1922 Cal 157.) where the dictum of Westbury, L. C. was restated by holding that where a plaintiff had been kept from knowledge, by the defendant, of the circumstances constituting the fraud, the plaintiff could rely upon Section 18 of the Limitation Act to escape from the bar of limitation. In the present case, it is apparent that until the year 1927 the appellant and the other parties were clearly kept out of other knowledge of the true character of the properties. Even after 1927 it cannot be said on the evidence on record that the appellant had any knowledge of the true character of the properties or of ouster of adverse possession of Abdul Hai. The reason are that Abdul Hai never alleged against the appellant and the other parties openly that he was enjoying the properties to the total exclusion of the appellant and the other brothers. Possession by one co-owner is not by itself adverse to other co-owners. On the contrary, possession by one co-owner is presumed to be the possession of all the co-

owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present case there is no evidence to support this conclusion. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

19. Section 18 of the Limitation Act, 1908 provides that when a person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of other title on which it is founded, the time limited for instituting a suit against other person guilty of the fraud shall be computed form the he time when the fraud first became known to other person affected thereby. In Rahinmboy v. Turner (20 IA 1 : 17 Bom 341.) Lord Hobhouse said "when a man has committed a fraud and has got property thereby it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit". Therefore if the plaintiff desires to invoke the aid of Section 18 of the Limitation Act he must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. In the present case, the right to sue arose when the appellant came to know that the properties were Matrooka and not Dargah and Khankah. When Abdul Hai got the properties released by reason of the decision of the Government of the Nizam in the year 1927 the properties became divisible among the appellant and his brothers and sisters. The existence of the right of the appellant was kept concealed by Abdul Hai. The appellant was not aware of the right nor could be have with reasonable diligence discovered it. There was active concealment by Abdul Hai of the fact that the properties were not Dargah and Khankah having full knowledge of the fact. It was only in 1941 (1350 Fasli) that the appellant came to know of other Matrooka character of the properties. It was then the appellant also came to know the Abdul Hai had kept the character of properties concealed from the parties and entirely misstated and misrepresented the character of the properties by misleading the parties and obtaining by consent an award and a decree thereon without any contest.

20. The cause of action for partition of properties is said to be a "perpetually recurring one" (See Monsharam Chakravarty and others v. Gonesh Chandra Chakravarty and others. (17 CWN 521 : 16 IC 383.) In Mohammedan law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to other definite fraction of every part of his estate. The shares of heirs under Mohanmmedan law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and bounds in accordance with the specific share of each heir being already determined by the law.

In the present case the suit is for partition of properties which were by consent of parties treated as Dargah and Khankah but which were later discovered to be Matrooka properties in fact and therefore the declaration in the award and the decree on the award that those were Dargah and Khankah properties cannot stand and the entire partition is to be re-opened by reason of fraud in the earlier proceedings.

21. In the present case, the overwhelming evidence is the because of the representation of Abdul Hai that he was the Sajjandansasheen and the properties marked Exhibits B-1 to B-10 were Dargah and Khankah properties, that all the parties treated the properties as Dargah and Khankah before the arbitrators and in the decree upon the award. The very fact that there was never any contest indicates that the compromise and settlement between the parties was on the basis that the properties were Dargah and Khankah. It was absolutely within other knowledge of Abdul Hai as to what the

true character of other properties was. The other parties did not have any opportunity of knowing the same. Abdul Hai knew the real character, concealed the true character and suggested a different character and thereby misled all other parties. Again, when Abdul Hai approached the Government of the Nizam and to other properties released by asserting that they were not Dargah and Khankah properties in the year 1927. Abdul Hai did not inform the same to any of other parties. The unmistakable intention of Abdul Hai all along was to enjoy the properties by standing those to be Dargah and Khankah. When the parties came to know other real character of other properties even then Abdul Hai was not willing to have partition. On these facts it is established that the fraud committed by Abdul Hai relates "to matters which prima facie would be a reason for setting the judgment aside". That is the statement of law in Halsbury's Laws of England, Third Edition, Volume 22, Paragraph 1669 at page 790.

22. For these reasons we accept the appeal and set aside the judgment of the High Court and restore the judgment and decree of the Trial Court. The appellant will be entitled to costs of this Court. The parties will pay and bear their own costs in the High Court.

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