

Syed Saulet Hussain and Others

Vs

Syed Ilmuddin (Dead) By Lrs. and Others

Civil Appeal No. 779 of 1980

(O. Chinnappa Reddy, K. Jagannatha Shetty JJ)

08.09.1987

JUDGMENT

JAGANNATHA SHETTY, J. –

1. The appeal and two special leave petitions concern the right to succeed to the office of Sajjadanashin to "Durgah Khawaja Saheb Ajmer". It is a venerable shrine of universal recognition. It is also called the Durgah Moinuddin Chisti Saheb. Moinuddin Chisti was a Persian born saint who later migrated to India. He settled down at Ajmer and died there at the age of 90 in the year 1233 AD. Ever since then, his tomb has been the centre of attraction for the people of all faiths. For Muslims in particular "It is admitted to be one of the most famous, if not the most famous, Mohammedan shrine in India".

2. There are two important offices in the shrine : (i) Sajjadanashin - the spiritual head and (ii) Mutwalli - the secular head. The hereditary descendants of the saint often laid claim to these two offices. The dispute as to the latter was taken even up to the Privy Council. In *Asrar Ahmed v. Durgah Committee* (AIR 1947 PC 1), the Privy Council said that the office of Mutwalli was not hereditary. We are not concerned with the office of Mutwalli. We are concerned two questions relating to the spiritual head of the shrine. Who is entitled to succeed to the office of Sajjadanashin ? And what is the right of Durgah Committee in the matter ?

3. The dispute relating to the office of Sajjadanashin started in 1947, when the last office holder - Syed Ali Rasool Khan migrated to Pakistan. Consequently, the need to appoint a new Sajjadanashin arose. On April 5, 1948, the Chief Commissioner of Ajmer appointed Hakim Inayat Hussain as Sajjadanashin. That appointment was challenged by a person called Syed Illamuddin. He claimed that the succession to the office of Sajjadanashin is governed by the rule of primogeniture. He was the rightful person entitled to hold the office. Hakim Inayat Hussain had no such right or title. With these and other allegations, Syed Illamuddin instituted Civil Suit No. 211/1948 for declaration of his right to succeed to the said office. The suit was instituted on May 18, 1948.

4. Civil Appeal No. 779 of 1980 by certificate, arises out of the above said suit. The suit had a chequered career. It was first instituted in the Court of Sub-Judge First Class, Ajmer. Since then, it went up and down from court to court. In fact it is coming for the second time before this Court. The trial court dismissed the suit on the preliminary ground that it was not maintainable. The bar of Section 119 of the Ajmer Land and Revenue Regulations was the reason given. The plaintiff, appealed to the District Judge who by judgment dated August 20, 1952 held that the suit was maintainable. The defendant challenged that decision in second appeal before the Judicial Commissioner, Ajmer. The Judicial Commissioner took a different view. By judgment dated

November 17, 1953 he upheld the view taken by the trial court and dismissed the suit. It was then the turn of plaintiff to appeal. He appealed to the Supreme Court. On March 7, 1961 the Supreme Court allowed the appeal and remitted the case to the trial court for disposal on the merits. Meanwhile, the Court of Sub-Judge had been abolished and the Munsiff, Ajmer City acquired the territorial jurisdiction to try the suit.

5. Interrupting the narration, we have to refer to some other intervening facts. There were allegations of mismanagement of the affairs of the Durgah and its endowments. There was a clamour from devotees all over for appointment of a Committee to review the administration of the Durgah. On January 14, 1949 the Government of India found the need to appoint a High Power Committee for the purpose. The Committee was appointed with Justice Gulam Hussain, Judge of the Allahabad High Court as Chairman. The Committee was authorised to inquire into and report about the administration of Durgah. The Committee was also authorised to recommend such measures as may be necessary to protect the interests of devotees. The Committee after a detailed enquiry submitted a report to the government. Accepting the report, the Government of India brought forward a legislation called the Durgah Khawaja Saheb Act, 1955 (Act 36 of 1955) which we may term as DKS Act. As required under that Act the Dargah Committee was constituted for the administrative control and management of Durgah endowments. The said Committee filed an application in the aforesaid suit to be impleaded as a party thereto. On September 30, 1964, the trial court allowed that application. The Dargah Committee was thus impleaded as party defendant in the suit.

6. The Durgah Committee resisted the suit, inter alia, contending that the suit had become infructuous and should be dismissed as such. It would be the responsibility of the Durgah Committee to make interim or permanent arrangement for the office of Sajjadanashin. That power is derived under Sections 13 and 21 of the DKS Act. The Durgah Committee also said that after the death of Hakim Inayat Hussain, his son Syed Sultan Hussain was appointed as interim Sajjadanashin.

7. The trial court overruled the objections raised by the Durgah Committee. Then followed the dispute as to valuation of the suit and the court fees paid thereon. That dispute was taken up to the High Court where by consent of parties the valuation was agreed upon. The plaintiff amended the plaint revising the valuation to Rs. 11,000. Consequently, the suit was withdrawn from the Munsiff Court and brought before the Court of Civil Judge, Ajmer.

8. The suit was resisted by Hakim Inayat Hussain on the ground among others that the plaintiff has no legitimate right to succeed to the office of Sajjadanashin. He was not the nearest male heir to Syed Rasool Ali Khan. The right to appoint Sajjadanashin by established usage, custom and tradition vests exclusively in the local representative of the government of the day. The court of law has no power to interfere with such appointment in any way whatsoever.

9. On December 14, 1970 the trial court non-suited the plaintiff on the merits of the matter. The plaintiff took up the matter before the High Court. The learned Single Judge of the High Court accepted the appeal and reversed the judgment of the trial court. He gave a declaration to the plaintiff that he was the nearest male heir to the last office holder, and therefore, entitled to succeed as Sajjadanashin. He, however, observed that the plaintiff has failed to prove that he was qualified to occupy the office of Sajjadanashin. He left the question of qualification for determination by the Governor of Rajasthan who is the competent authority under the DKS Act, to appoint Sajjadanashin. The judgment of learned Single Judge was rendered on August 9, 1974. Challenging

that judgment, the defendant preferred special appeal before a Division Bench of the High Court under Section 18 of the Rajasthan High Court Ordinance.

10. Pursuant to the observations in the judgment of learned Single Judge, the Governor of Rajasthan examined the qualifications of the plaintiff. The Governor was apparently satisfied with his qualifications and approved his appointment as Sajjadanashin. The government notification dated July 7, 1975 was issued recognising the plaintiff as such.

11. On October 23, 1975, the plaintiff died. His son Syed Zainul Abedin Ali Khan was brought on record in the pending special appeal before the Division Bench of the High Court. On March 7, 1980 Division Bench dismissed the special appeal affirming the judgment of learned Single Judge. Following that judgment, the government again issued a communication dated January 24, 1981 recognising Syed Zainul Abedin Khan as Sajjadanashin.

12. The litigation has thus descended on the second generation. The sons of the original parties to the suit continued the litigation. Syed Saulat Hussain challenging the judgment of Division Bench of the High Court preferred Civil Appeal No. 779 of 1980 with which we are now concerned.

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13. These two petitions arise out of the order of the High Court in Civil Reference No. 2 of 1978. It was a reference made by the Durgah Committee under sub-section (3) of Section 13 of the DKS Act. The events leading to the reference are these : We have earlier noticed that the plaintiff, Syed Illamuddin died on October 23, 1975. Thereafter his son, Syed Zainul Abedin Ali Khan appears to have approached the Durgah Committee for recognition as Sajjadanashin. Durgah Committee did not accede to his request. It decided to invite applications from persons who want to be appointed as Sajjadanashin. A public notice was accordingly issued under sub-section (1) of Section 13 of the DKS Act. In response to the said notice, as may as eleven applications were received by the Durgah Committee. Those applicants were not related to the plaintiff, or to the last office holder. The Durgah Committee, however, forwarded those applications to the Governor for making a reference to the High Court for decision. But the Governor did not make a reference to the High Court. He took a firm decision that Syed Zainul Abedin Ali Khan being the son of the last office holder (that is the plaintiff) was alone entitled to succeed to the office of Sajjadanashin and other applicants had no right to the said office. So stating, the Governor conveyed his decision to the Durgah Committee. The Durgah Committee, after much deliberations over the matter preferred to disagree with the Governor. It referred all the applications to the High Court for determination of rival claims of the candidates.

14. The High Court took up the reference for disposal after the dismissal of the aforesaid special appeal. The task of the High Court then became easier ever since there was little choice in the matter. Accepting the view taken in the special appeal, the High Court rejected the reference as not maintainable. The High Court made that order on July 4, 1980. The Durgah Committee and one of the applicants for the office have preferred the said two special leave petitions for appeal to this Court.

15. We may first consider the contentions urged by Mr. Krishnamurthy Iyer learned counsel for Durgah Committee. He urged that the decision of the High Court as to succession to the office of Sajjadanashin was based on the concession made by parties and is therefore not binding on the Durgah Committee. Counsel next contended that in view of Sections 13 and 21 of the DKS Act, the

Durgah Committee has power to appoint a proper person a Sajjadanashin. It is not bound to follow the customary rules of succession to the office. The selection of a suitable person need not be made only among the heirs of the last office holder. The selection could be made from the public as well, to better serve the devotees.

16. We do not think that we could accept these contentions. The Durgah Committee was a party to the suit. There the plaintiff and defendant in the first place, admitted that the office of Sajjadanashin is a hereditary office. Secondly, they proceeded with a common contention that the succession to the office is governed by the rule of primogeniture. The counsel for the Durgah Committee did not dispute this aspect either in the trial court or before the High Court. Nor he suggested any other mode of succession to the office. This is what the learned Single Judge of the High Court observed :

The counsel for the legal representatives of Hakim Inayat Hussain admitted that the office of the Sajjadanashin attached to the Durgah is a hereditary office. The learned counsel for the Durgah Committee did not argue on this point. Issue No. 1 was therefore decided in favour of the plaintiff. Issue No. 3 was not pressed by the parties dealing with issue Nos. 2 and 3. The learned Civil Judge observed that it was admitted that succession to the office of the Sajjadanashin was governed by the rule of primogeniture.....

I now turn to the merits of the case. It may be mentioned at the outset that it is not disputed before me that the office of Sajjadanashin or Dewan attached to Durgah is a hereditary office and successor to that office is governed by the rule of primogeniture. It is further not in dispute that the last Sajjadanashin Syed Aley Rasool Ali Khan was in the line of Syed Abdul Fateh and the plaintiff is in the line of Syed Abdul Fateh's brother Hisammuddin.

17. Apart from that, it was never in dispute in the long history of the shrine about the nature of the office and the rule of succession. Lord Simonds while tracing the history of the Shrine in Asrar Ahmed case (AIR 1947 PC 1) said :

It is not disputed that for many years from 1567 onwards (that is from the Farman of Akbar the Great) with certain intervals the hereditary descendant of the saint, variously called the Sajjadanashin or later Dewan, combined in his own person the two leading offices of the shrine, that of Sajjadanashin or spiritual head Mutwalli or secular head and manager. These alternative expressions are used to convey as nearly as possible the meaning of the original words. Nor is it disputed that in the reign of the Emperor Shah Jahan (1627-1658) the post of Mutwalli was separated from that of Sajjadanashin and had become a government appointment, whereas the Sajjadanashin remained and continued to be a hereditary descendant of the saint.

18. These observations have been approved by the Supreme Court in Durgah Committee, Ajmer v. Syed Hussain Ali ((1962) 1 SCR 383 : AIR 1961 SC 1402).

19. It is clear, therefore, that the nature of the office and the rule of succession to it always remained undisputed. It was occupied by a hereditary descendant of the saint. That was perhaps the reason for not asking the High Power Committee constituted by the Government of India in 1948 to inquire into it. The said Committee was constituted only to enquire into the maladministration of the Durgah and suggest remedies in the interests of devotees. The question of succession to the office of Sajjadanashin was expressly kept outside its purview. It would be evident if one peruses the terms of

reference made to the High Power Committee.

20. The Government of India had also recognised that Sajjadanashin has always been a descendant of the saint and that position should not be disturbed. This has been reflected in the speech of the Home Minister in the Parliament while piloting the Khawaja Saheb Bill which later became the DKS Act. This is what the Home Minister stated (Lok Sabha Debate Pt. II Vol. V July 25-August 13, 1985, p. 9391) :

So far as Sajjadanashin is concerned he is a religious office. He is a descendant of the Khawaja Sahib and therefore his position should be kept as it is and that position is not affected at all. Because he deals with the rituals he deals with the spiritual side of management and so far as that is concerned, it is entirely left to him.

21. Against this background, it was not illogical or improper for parties to the suit to proceed on the basis that the hereditary office of Sajjadanashin is entitled to be claimed by descendants of the saint by the rule of primogeniture. They have stated the obvious which appears to have been recognised over the generations. If there was no such rule or principle, the Durgah Committee ought to have stated so. Or it could have stated that it was not bound to follow the customary rule of succession. It could have asserted its right to make a choice of its own. It did not state anything of the kind in the courts below. It maintained a golden rule of silence. It is, therefore, now not open to the Durgah Committee to contend before us that it is not bound by the decision of the courts. The Durgah Committee is as much a party to the suit as others. It is as much bound by the decision as others. It is immaterial for our purpose whether the decision has been reached by concession of parties or by determination of the dispute.

22. This takes us to the second contention urged by Shri Krishnamurthy Iyer. He urged that Sections 13 and 21 of the DKS Act confer power on the Durgah Committee to appoint a suitable person of Sajjadanashin. We do not think that there is anything in the said sections to support the contention urged by the learned counsel. Section 13 provides :

13(1) Succession to the office of Sajjadanashin. - As soon as the office of the Sajjadanashin falls vacant, the Committee shall, with the previous approval of the Chief Commissioner, make such interim arrangements for the performance of the functions of the Sajjadanashin as it may think fit, and immediately thereafter publish a notice in such form and manner as may be determined by the Committee, inviting applications within one month of such publication from persons claiming to succeed to that office.

(2) Where only one person claims to succeed to the office of the Sajjadanashin and the Committee is satisfied as to his right to succeed, it shall, with the previous approval of the Chief Commissioner, pass an order in writing according recognition as Sajjadanashin to such person.

(3) Where more persons than one claim to succeed to the office of the Sajjadanashin, the Committee shall, after consultation with the Chief Commissioner, refer the dispute to the Judicial Commissioner of Ajmer for a decision regarding the claim to succeed to that office, and the Judicial Commissioner, after taking such evidence as he considers necessary and after giving an opportunity to the claimants to be heard in respect of their claims, shall communicate his decision to the Committee.

(4) The Committee, on the receipt of the decision, shall, with the previous approval of the Chief Commissioner, pass an order in writing in accordance with such decision declaring the person found entitled to succeed to the office of the Sajjadanashin and according recognition as Sajjadanashin to such person.

(5) An order passed by the Committee under sub-section (2) or sub-section (4) shall be final and shall not be questioned in any court.

Section 21 reads :

21. Transitional provisions. - The person holding the office of Sajjadanashin immediately before the commencement of this Act shall, on and from such commencement, continue to hold that office subject to the other provisions of this Act and to the final decision in the suit relating to that office which is pending on such commencement and to which the said person is a party.

23. Section 21 was intended to provide transitional arrangement to hold the office of Sajjadanashin. It enables the Sajjadanashin who was holding the office immediately before the commencement of the DKS Act to continue to hold that office. His right, however, was made subject to other provisions of the Act and to the final decision of the suit relating to that office. The suit referred to under Section 21 must be the suit out of which the present appeal arises. It was pending on the date of coming into force of the DKS Act. Hakim Inayat Hussain who was then acting as Sajjadanashin was the defendant in the suit. His continuance or otherwise was expressly made subject to the decision in the suit. Durgah Committee being also a party is no less bound by the decision therein. Section 13 of the DKS Act does not confer unlimited or absolute power to Durgah Committee. Sub-section (1) of Section 13 comes into operation when the office of Sajjadanashin fall vacant. It enables the Durgah Committee to make interim arrangement for the performance of functions of Sajjadanashin, pending recognising the legitimate successor to the office. It must, therefore, invite applications from person claiming to succeed to that office. If there is only one person to succeed to the office, the Committee shall with the previous approval of the Governor recognise him as Sajjadanashin. That is the mandate of sub-section (2) of Section 13. If there are more persons than one claiming to succeed to the office, the Durgah Committee shall follow the procedure provided under sub-section (3) of Section 13. The Committee after consultation with the Governor must refer the applications to the High Court for decision. On receipt of the decision of the High Court and with the previous approval of the Governor, the Durgah Committee under sub-section (4) shall accord recognition as Sajjadanashin to the person found entitled to succeed to the office.

24. The scope of provisions of Section 13 appears to be limited. The Durgah Committee is only entitled to accord recognition as Sajjadanashin to the person legitimately entitled to succeed to the office. The Durgah Committee cannot enlarge the scope of this power to invite applications from the public and select any person for appointment as Sajjadanashin. The power conferred under Section 13 is only to locate the legitimate heir to the office by the accepted rule of succession and recognise him as Sajjadanashin and not beyond that.

25. This takes us to the contention urged by Shri T. S. Desai, learned counsel for the appellant in C.A. No. 779 of 1980. He urged that plaintiff cannot be considered as the nearest male heir to the last holder of the office. According to the counsel, there are two other person Bashiruddin (PW 2) and Abdul Aziz (PW 3) who were nearer to the last holder of the office than the plaintiff. Suffice it to state that it has not escaped the attention of the High Court. The claims of these two persons were

also examined. The High Court has observed that Bashiruddin has himself stated that he did not consider himself nearest to the last office holder. It was further stated that he died issueless during the pendency of the suit.

26. So far as Abdul Aziz is concerned, the position is no better. He was illiterate and did not want to become Sajjadanashin. He appears to have relinquished his right in favour of the plaintiff. It is said that he also died during the pendency of the suit leaving behind none to succeed. In the circumstances, it cannot be said that the plaintiff is not legitimate person to succeed as Sajjadanashin.

27. In the result, the appeal and special leave petitions fail and are dismissed with costs.

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