Mohd Zainulabudeen (Since Deceased) by Lrs.

Vs

Sayed Ahmed Mohideen and Others

Civil Appeal No. 3160 of 1983

(K. N. Singh, N. M. Kasliwal JJ)

15.12.1989

JUDGMENT

KASLIWAL, J. -

1. This civil appeal by the plaintiffs is directed against the judgment of High Court of Judicature at Madras in Second Appeal Nos. 650 and 894 dated November 17, 1981.

2. Mohd. Zainulabudeen and Yasin Bi filed a suit for declaration that they were entitled to be in enjoyment and possession of Saint Syed Moosa Shah Khadiri Dargah in Madras for a period of 27 days in all in the months of February, March, June, July, October and November and to restrain the defendants from interfering with the plaintiffs' aforesaid right and management in the Dargah. The case of the plaintiffs as set up in the plaint was that the Dargah in question was being managed by the members of the family of one Sayed Mohideen Sahib. Sayed Mohideen had two sons Sayed Ismail Sahib and Sayed Gulam Dastagir Sahib. As per judgment in C.S. No. 116 of 1909 the right of management was divided between the sons each taking six months for himself. According to this arrangement the branch of Sayed and Ismail Sahib used to remain in management for the months of January, April, May, August, September and December and the branch of Gulam Dastagir Sahib for the other six months, namely, February, March, June, July, October and November. The present suit relates to the controversy between the descendants of the branch of Gulam Dastagir Sahib. According to the plaintiffs after the death of Sayed Gulam Dastagir the right and management of the Dargah according to Muslim law devolved on his two sons and one daughter, namely, Sayed Gaffer Sahib, Sayed Mohideen and Fathima Bee in proportion of 2 : 2 : 1 respectively. The plaintiffs alleged that thus Fathima Bee had 1/5 share in 6 months i.e. 36 days. Fathima Bee left surviving one son and two daughters. The plaintiffs who are one son and one daughter of Fathima Bee as such are entitled to 3/4 share i.e. 27 days, as another daughter Zahurunnissa was not interested in claiming her right has been impleaded as defendant 2. After the death of Fathima Bee, the plaintiffs being her son and daughter associated themselves in the management of the Dargah with their material uncles and the sons of the material uncles and were getting share of the income of the Dargah. According to the plaintiffs this arrangement was going on for several years ever since the death of Fathima Bee in 1957. However on account of some dissensions, defendant 1 Sayed Mohideen (since deceased) and another defendant being the son of another deceased material uncle were preventing the plaintiffs from exercising their right and enjoying the income of the Dargah. The plaintiffs served a notice on March 23, 1972 calling upon the defendants to recognize the right of management of the plaintiffs in the Dargah. The defendants sent a reply on April 22, 1972 stating that the plaintiffs claiming through female were not entitled to any right in the management or share in the offerings in the Dargah and even if they were entitled to any right or claim the same was barred by limitation.

3. Sayed Mohideen (since deceased) defendant 1 in the suit filed a written statement and took the plea that his father Sayed Gulam Dastagir was a Mujawar and was receiving the offerings by right of inheritance. Sayed Ismail being cousin brother of Sayed Gulam Dastagir as such he was also a Mujawar along with Sayed Dastagir Sahib. Fathima Bee the daughter of Sayed Gulam Dastagir had no right of Mujawar as the right was given only to the male members and not to the females. Fathima Bee as such was not entitled to claim any right of Mujawar. The widows of Sayed Gulam Dastagir also could not claim any right of Mujawar thus neither Wazir Bee widow of Sayed Ismail nor Mohideen Bi the widow of Sayed Gulam Dastagir could take upon the management of the Dargah as they were female members. According to the defendants no female members got the right of direct management of the Dargah and the judgment in Suit No. 116 of 1909 also negatived the right of any management by Wazir Bee and Mohideen Bi. It was admitted that through Fathima Bee was alive but she was not a party to the aforesaid suit. It was however pleaded that the claim of Fathima Bee was not recognized in the above suit. It was further alleged in the written statement that Fathima Bee never participated in the management of the Dargah. According to Muslim law females were excluded from performing the duties of the offices of Peshimam Khatib and Mujawar. It was further alleged that Fathima Bee never enjoyed the right to the Hundial collection of the Dargah and even if she had got any right, the same was lost as she did not claim any right till her death. Fathima Bee never asserted any right during her lifetime nor received any share in the offerings. Her right, if any, was extinguished within 12 years after the death of her father Sayed Gulam Dastagir. It was further alleged that as Fathima Bee had no right or claim of share in the Mujawarship and was also ousted from the enjoyment of any share in the Hundial collections, the plaintiffs who were claiming through Fathima Bee were also not entitled to any relief. Defendants 2 to 6 adopted the written statement filed by defendant 1. So far as defendants 7, 8 and 10 were concerned, they filed a written statement taking the plea that the family members were recognized as sharers in the management of the Dargah and they were also sharing the income. It was further alleged that even the answering defendants were paying such share to their sister Ahamadunnissa (defendant 10) in the Hundial collection of the Dargah. Defendant 7 (Answer Bi) filed a Suit No. 7518 of 1971 in the Court of 4th Assistant City Civil Court and her right to manage was recognized for 9 day in a year. Hence it was false to state that the females were not entitled to claim management. It may be mentioned at this stage that defendant 1 Sayed Mohideen died during the pendency of the suit and defendants 12 to 19 were added as his legal representatives.

4. The trial court decreed the suit and in the operative part held that the plaintiffs were entitled to manage the Dargah for 27 days in February (viz. from February 1 to February 27).

5. Defendants 3 to 6 and 12 to 19 filed appeals aggrieved against the judgment of the trial court while defendant 7 in the suit filed cross objections in respect of a particular portion of the decree. Learned City Civil Court, Madras affirmed the judgment and decree of the trial Court except some modifications in the relief as mentioned below :

> "The plaintiffs are entitled to the reliefs of declaration that they are entitled to be in management of the suit Dargah for a period of 27 days in a year during the months of February-March, June-July and October-November each year and that the said 27 days shall be February 1 to 6, June 1 to 6 and October 1 to 6 for plaintiff 1 and 9 days from July 1 to 9 for plaintiff 2 and that the plaintiffs are entitled to the relief of possession of the said right to be in management of the Dargah and to be in enjoyment of the Hundial income during the said period. The cross-objections of defendant 7 is dismissed."

6. Different sets of defendants filed Second Appeals Nos. 650 and 894 of 1981, and both these second appeals were disposed of by the High Court by order dated November 17, 1981. The High Court allowed the second appeals and while setting aside the judgments and decrees of the courts below dismissed the suit filed by the plaintiffs. The High Court took the view that the courts below proceeded upon an erroneous assumption as if it was the duty of the defendants to prove by what hostile assertions of title and possession ouster has been established. In the view of the learned Judge by allowing inaction, more so when it was coupled with sharing of profits in not claiming the profits at any point of time, there would arise a clear presumption of ouster. The High court laid great emphasis on the circumstance that Fathima Bee till her death in 1957 did not care to make a demand of her right or share at any point of time. It was further observed that after the decree in Civil Suit No. 116 of 1909, it was only male heirs who were exercising their rights. The High Court in this regard further referred to the statement of PW 1 himself and drew the conclusion that after the death of his mother nobody was employed as an agent. Only at the time when he consulted the Vakil he came to known that his mother had 36 days' share in the Mujawarship. Before that he did not do anything concerning the share of the Hundial collections. The demand was from 1960 to 1972. But nothing was paid. He knew that he had rights even before. The High Court on the basis of the above evidence of PW 1 observed that it was clear that the mother of PW 1 was aware of the filling of Civil Suit No. 116 of 1909. Irrespective of that, insofar as there was absolutely no evidence whatsoever to show at any point of time till her death in 1957 that Fathima Bee ever made a demand or asked for a share of the Hundial collections as such it should be held that her rights had become barred. The High Court in these circumstances held that if really the rights of Fathima Bee had become barred by her not exercising the rights, the plaintiffs themselves can have no independent right to claim.

7. It may be mentioned at the outset that there is no controversy now as regards the period of 27 days falling to the share of the plaintiffs and on the question that females are also entitled in the right and management of Dargah according to Muslim law. Thus the only controversy now left to be determined is whether the High Court was right in holding that the rights of Fathima Bee had become barred by limitation by ouster and as such the plaintiffs who were also claiming through Fathima Bee had lost their right by ouster ?

8. It would first be necessary to make it clear as to what is the impact of the decree dated August 11, 1910 passed in Civil Suit No. 116 of 1909, so far as the present litigation is concerned. A perusal of the judgment in the above case goes to show that Sayed Moosa Sahib and Wazir Bi filed a suit against Sayed Gaffar Sahib, Sayed Mohideen Sahib and Mohideen Bi for a declaration that the plaintiffs and the defendants were entitled to perform the duties of Mujawar of the Dargah in turns and they were entitled to collect and receive the offerings, gifts and other emoluments of the Dargah as well as the collection of the hundi box in the Dargah and appropriate the same in two equal moieties and to settle a scheme for managing the said Dargah so as to equalize the amount of income and emoluments to be collected and appropriated by both the parties during their respective turns. In the said case a decree was passed that plaintiff 1 and defendants 1 and 2 were entitled to perform the duties of Mujawar of the Dargah in question in turns. A scheme was also drawn for collecting and receiving the offerings, gifts and other emoluments of the said Dargah as well as the collections of the hundi box and apportion the same in two equal moieties and that Sayed Moosa Sahib, plaintiff 1 was entitled to one half and Sayed Gaffar Sahib and sayed Mohideen, defendants 1 and 2 were entitled to the other half of the collections, offerings, gifts and other emoluments. A great capital has been raised on the basis of the above decree by the learned counsel for the defendant-respondents that no share was given to the female members in the above decree, namely, to Wazir Bi and Mohideen Bi and from this it was clear that the females were totally excluded from

the right or claim of any share in the management or offerings in the Dargah.

9. We do not find much substance in the above contention. In the above judgment the controversy whether females were entitled to any right or management of the offerings in the Dargah was neither raised nor decided. Fathima Bee through alive but was not a party in the aforesaid litigation and any judgment given in that suit cannot be held as res judicata or binding on Fathima Bee or the present plaintiffs.

10. Mr. Krishnamurthy Iyer, learned counsel for the defendant-respondents contended that he was not arguing that the aforesaid judgment and decree were res judicata or binding on Fathima Bee, but his submission was that it should be taken as a circumstance in proving ouster of Fathima Bee from the right or management of the Dargah or any claim in the offerings. In our view as already mentioned such judgment cannot be considered as an ouster of Fathima Bee coupled with other circumstances which clearly show that there was no ouster in the facts of the present case.

11. It is an admitted case of the parties that Sayed Gulam Dastagir Sahib had a right of management in the Dargah in question for six months (180 days) in the months of February-March, June-July and October-November. Gulam Dastagir had one daughter Fathima Bee and two sons and as such Fathima Bee got 1/5 share and which came to 36 days out of aforesaid 180 days. Thus Fathima Bee was a co-sharer in the right of management and possession of the Dargah as well as the offering and hundial collection. Now, before considering the question of ouster of Fathima Bee, it would be important to consider the pleadings of the defendants in this regard. Learned counsel for the defendant-respondents in this regard have drawn our attention to paragraph 19 of the written statement filed by defendant 1 Sayed Mohideen, Para 19 of the written statement reads as under :

> "Neither Fathima Bee till her death nor the plaintiffs from her death till now had possession or management of the Dargah. None of them had at any time received a share in the hundial collection or offerings. Further there has been expressed denial of Fathima Bee's title at the time of the judgment of the High Court in 1909, if she did not have a title according to Muslim personal law that title was denied, and she was expressly ousted out from the enjoyment of any share in the hundial collections. From her death till now the plaintiffs have not received any share in the hundial collections."

12. A perusal of the above pleadings show that the defendants are claiming ouster on the basis of expressed denial of Fathima Bee's title at the time of the judgment of the High Court in 1909 and another ground taken is that neither Fathima Bee nor the plaintiffs had at any time received a share in the hundial collection or offerings nor had possession or management of the Dargah. The defendants are totally mistaken in taking the ground that there was any expressed denial of Fathima Bee's title in that litigation. At the risk of repetition it may be stated that neither Fathima Bee was a party in that suit nor any such question was raised or decided that females were not entitled to any share in the management or offerings of Dargah. Thus there was no question of any expressed denial of Fathima Bee's title in that litigation. It appears that the defendants were carrying a mistaken impression all along that females under the Muslim law were not entitled to any right of management or possession in a Dargah and on that account they were pleading an ouster of Fathima Bee as well as the plaintiffs. Such pleading cannot be considered as an ouster in fact of a co-sharer from a joint right. It is well settled that where one co-heir pleads adverse possession against another co-heir then it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The possession of one co-heir is considered in law, as possession of all the

co-heir. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. Thus it is a settled rule of law as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster. Thus in order to make out a case of ouster against Fathima Bee or the plaintiffs, it was necessary for the defendants to plead that they had asserted hostile title coupled with exclusive possession and enjoyment to the knowledge of Fathima Bee. The written statement filed by the defendants in the present case is totally lacking in the above particulars and thus apart from the want of evidence, there is no proper pleading of ouster in the present case. Thus it is clear that neither in the written statement nor in reply to the notice of the plaintiffs any stand was taken that right of Fathima Bee or plaintiffs was specifically denied on any particular occasion so as to put them on notice that from that date the possession of the defendants would be adverse to the interest or right of the plaintiffs or Fathima Bee. We are supported in the above view by a decision of this Court in P. Lakshmi Reddy v. L. Lakshmi Reddy ((1957) SCR 195 : AIR 1957 SC 314).

13. It is further proved from the evidence led by the plaintiffs that Fathima Bee was being looked after by her brothers and she was in fact being paid portions of the income from the Dargah and that account she was satisfied in allowing the brothers to enjoy the offices of Mujawar on her behalf also. Defendant 13 who has been examined as DW 1 has admitted that Fathima Bee was living and was being looked after by Sayed Gaffar and who had arranged for and met the expenses of the marriage of the two plaintiffs. This clearly goes to show that relations between Fathima Bee and her brothers were cordial and as such there was no question of any knowledge to Fathima Bee that she was being ousted from her right or share in the Dargah. No evidence has been led by the defendants to show that such right was openly denied by the brothers which would be considered as an ouster. The first appellate court has considered all these aspects in detail after discussing the entire evidence placed on record and had clearly recorded the finding that there was no proof of ouster in the present case. The High Court in our view committed a serious error in reversing the above finding and in taking a wrong approach in holding ouster on the basis of judgment and decree given in Suit No. 116 of 1909 and on the ground that Fathima Bee had not made a demand or asked for her share of the hundial collections at any point of time till her death in 1957.

14. Mr. Krishnamurthy Iyer, learned counsel for defendants 12 to 19 submitted that according to decree given by first appellate court the period of 27 days from February 1-6, June 1-6 and October 1-6 for plaintiff 1 and 9 days from July 1-9, for plaintiff 2 acts onerous to his defendants 12 to 19 and it must be fixed in a manner which may be equitable to all the parties. The appellants and their counsel Shri Tarkunde on the other hand submitted that their share of 27 days may be fixed jointly and so far as their own proportion of 18 to 9 days is concerned they will make their arrangement inter se. After hearing learned counsel for the parties and considering the entire facts and circumstances of the case, we uphold that decree passed by the first appellate court with the following modification in the arrangement of days in the management of the Dargah in question.

15. The plaintiffs would be entitled to such management from June 17 to 30 and July 1 to 13 and in the next year from June 18 to 30 and July 1 to 14. This arrangement would continue by rotation of each year. To be more precise the plaintiffs would be entitled to have the management of the suit Dargah from June 17 to 30 and July 1 to 13 in the year 1990 and June 18 to 30 and July 1 to 14 in the year 1991 and they shall continue to follow such cycle by rotation every year.

16. For the reasons stated above, we set aside the judgment and decree of the High Court dated November 17, 1987 and restore that of the trial court as affirmed by the first appellate court with

modifications as stated earlier.

17. Parties to bear their own costs.

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