
(1940) 08 BOM CK 0016

In the Bombay High Court

Case No : Letters Patent Appeals No's. 20 and 21 of 1939

Abdul Aziz Valad Haji Subhan

APPELLANT

Vs

Mahomed Ibrahim Ghatkari
 Hussainbi Haji Subhan Vs
Sayad Khairuddin Kutubuddin Kaji

RESPONDENT

Date of Decision : 19-08-1940

Acts Referred:

Citation : AIR 1941 Bom 238 : (1941) 43 BOMLR 126

Hon'ble Judges : Divatia, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Divatia, J.—This appeal has been preferred against the judgment of Mr, Justice Lokur confirming the decree of the lower Court. The appellants are some of the original defendants in a suit by the plaintiffs for partition of certain lands and for a declaration that they were entitled to the management of the devasthan called Peer Mahi Taj and its property as mujawars thereof. The property consists of two fields, survey Nos. 773 and 590. With regard to the first field the question was whether it was the private property of the mujawars or it belonged to the Peer. Both the lower Courts came to the conclusion on evidence that it belonged to the Peer and was not the private property of the mujawars. Mr. Justice Lokur agreed with that finding. There is no question of law involved in that finding.

2. With regard to survey No. 590, it is contended on behalf of the appellants that the plaintiffs were not receiving the income thereof for a very long time, and the defendants, therefore, who performed the service as mujawars, and who, it is admitted, devoted the income of that field for the shrine, were entitled to hold it to the exclusion of the plaintiffs. There was no plea of adverse possession in the lower Courts, and therefore, there was no issue upon it. The only issue framed was whether the plaintiffs were entitled to the injunction in respect of this survey number. The finding of the lower Court was that the plaintiffs were entitled in their turn to perform the duties as mujawars and as such they were entitled to

spend the income of this field for the purposes of the institution. The defendants admit that the income could not be appropriated by the mujawars as their private property. That being so, no question of adverse possession arises. The plaintiffs are held entitled to do service as mujawars by rotation, and they are entitled to realise the income and spend it for the purposes of the institution. It is clear, therefore, that Mr. Justice Lokur was right in holding that the plaintiffs are entitled to the relief sought by them.

3. The appeal is, therefore, dismissed with costs.

Letters Patent Appeal No. 21 of 1939.

4. The suit from which this appeal arises was instituted by the plaintiffs-respondents for a declaration that as heirs of one Dada Saheb Shaikh Mire they were entitled to the property in dispute which was assigned for service as mujawars of the shrine Peer Mahi Taj at Wai in the Satara District. Dada Saheb had a daughter named Bedar Begum who was married to one Kazi Kutubuddin. After Dada Saheb's death, his widow gifted the suit field to her son-in-law Kazi Kutubuddin. Later on Bedar Begum as well as Kutubuddin died. Plaintiff No. 1 was the son of Kutubuddin by his first wife, plaintiff No. 2 is his daughter by Bedar Begum, and plaintiff No. 3 is the husband of plaintiff No. 2. Their claim was resisted by the defendants mainly on the ground that the plaintiffs, who claim through females, were not entitled to mujawarki rights as no female could officiate as a mujawar. The material issue was whether the defendants proved the alleged custom of exclusion of females.

5. The trial Court as well as the appellate Court found that Dada Saheb was entitled to one-third share in the field and that the alleged custom had not been proved. They, therefore, gave a decree in favour of plaintiffs Nos. 1 and 2, and plaintiff No. 3 was not held to be an heir.

6. In second appeal, this decision was confirmed by Mr. Justice Lokur who held, following the decision in *Shahm Banoo v. Aga Mahomed Jaffer Bindaneem* (1906) L.R. 34 IndAp 46 and *Munnarvaru Began Sahibu v. Mir Mahapalli Sahib* (1918) ILR 41 Mad. 1033, that the duties which a mujawar had to perform in this particular shrine could be and were at one time performed by a female. He, therefore, dismissed the appeal. The defendants have now preferred this further appeal under the Letters Patent.

7. It has been found on evidence that the duties of a mujawar in this case consist of sweeping and cleaning the place, reading the Fatiha, offering prayers and incense, and looking after the general management of the shrine. The appellants contend that reading the Fatiha and offering prayers and incense are duties of a religious nature which, under the Mahomedan law, could not be performed by females. Mr. Desai, who appears for the appellants, has not been able to cite any provision of the Mahomedan law that a female has no legal right to perform any duty whatever of a religious kind. On the other hand, Ameer Ali in his Mahomedan Law bases the incapacity of females to perform certain religious

duties attached to an institution on the ground of custom and not any rule of Mahomedan theology or canonical law. Macnaghten in his work on Mahomedan law also bases it on the usage of the country. He considers the case of sajjadanashin who is in charge of the spiritual affairs of an endowment. In his opinion, although the office of a trustee could be held by a woman and its duties be discharged by proxy, the office of a superior such as that of sajjadanashin required peculiar personal qualifications. He says further on:

Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usages of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars, and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded.

8. These remarks are made not in reference to the position of a mujawar but to those religious or priestly offices which require certain special qualifications. The usage would, therefore, depend on the particular kind of duties and not on any abstract notion of a religious duty. A mujawar is described in Wilson's Glossary as "a servant or sweeper of a Mahomedan temple or shrine." His position is different from that of a mutawalli or a sajjadanashin. The former is a manager or a trustee of a wakf and the latter holds the position of a spiritual preceptor. So also an imam who holds the prayers at a congregation, and a mulla who officiates at religious services, like marriages, funerals, etc., are religious officials unlike a mujawar whose main duty is to take care of a shrine.

9. Mr. Desai relies upon two decisions in support of his case that a female cannot act as a mujawar. The first decision is in *Murzamalli v. Hidayatbi* (1901) 3 Bom. L.R. 772 in which the plaintiffs claimed the right to perform certain services in a mosque to the exclusion of females and deputies of females by virtue of a sanad granted to their ancestors. The plaintiffs there were not mujawars, but were grantees of land for the purpose of specified ceremonies, viz., imamat (preaching by being a priest), moujani (calling to prayer), and khitabat (reading the Koran at the mosque). The sanad expressly stated that they were to perform those duties from generation to generation in the male line and according to custom. It was held that females were excluded under the terms of the sanad as well as the usage of the country from performing duties of a purely spiritual nature. Moreover, the duties of preaching and calling to prayer as well as reading the Koran are distinguishable from merely reading Fatihas, i.e. certain suras from the Koran, and offering prayers and incense. The former kind of duties require special personal qualifications which are not necessary for the latter type. That decision, therefore, does not support the appellants' case.

10. The next case relied on is *Mujavar Ibrambibi v. Mujavar Hussain Sheriff* (1880) ILR 3 Mad. 95. It was held there that the plaintiff, who was a woman, was not entitled to perform the duties of a mujawar of a durga which were not of a secular nature. The duties in that case were reading the Fatiha, offering prayers and incense, etc. It is urged that those are the duties in the present case also

and that that decision is, therefore, a direct authority in favour of the appellants. But this is not correct. The decision was also based on the evidence that the office was never held by a female in that durga, and that there was a previous decision in respect of the same endowment in *Hussain Beebee v. Husmn Sherif* (1868) 4 M.H.C.. R. 23. where a claim advanced by the widow of a deceased mujawar was negated. In the present case, however, it has been found on evidence that defendant No. 1, who is herself a female, used to manage the shrine and defendant No. 5 has admitted that if any of them died without a male issue, his widow, daughter and sisters were entitled to get a share in the land of the Peer. It is also found that the mujawars of the Peer in the present case are not required to teach any doctrine or to come in contact with strangers whom women may not approach having regard to custom or usage. The Madras High Court itself has, in a later decision in *Munnawaru Begam Sahibu v. Mir Muhapalli Sahib* (1918) ILR 41 Mad. 1033, discussed this case and held that it was a decision on its own facts and that the learned Judges did not intend to lay down any general proposition of Mahomedan law that the Fatiha could not be said or that prayers and incense could not be offered by a woman. The case of *Munnawaru Begam Sahibu v. Mir Mahapalli Sahib* was that of a mujawar, and Abdur Rahim J., a distinguished Mahomedan Judge, was of the opinion that a religious office can be held by a woman under the Mahomedan law unless the duties were of such a religious nature which she cannot perform in person or by a deputy, that the burden of establishing that a woman was precluded from holding a particular office was on those who pleaded the exclusion, and that in the absence of anything in the rules by the founder, the usages of the institution were to govern the case. He followed the decision in *Shahar Bmoo v. Aga Mahomed Jaffer Bindaneem* (1906) L.R. 34 IndAp 46 where it was held that under the Mahomedan law there was no legal prohibition against a woman holding a mutawalliship when the trust by its nature involved no spiritual duties which a woman could not properly discharge in person or by a deputy. There is a clear distinction between merely reading the Fatiha, i.e. certain suras in the Koran, or offering prayers and incense on the one hand and preaching before a congregation or officiating at religious services on the other. The decisions in *Shekh Karimodin v. Nawab Mir Sayad Alamkhan* (1885) ILR 10 Bom. 119 and *Kaniz Zohra v. Saiyid Muztaba Husain* (1923) ILR 2 Pat. 819, on the position of a sajjadanashin, and *Biyamma v. Ahmadsaheb* (1934) 37 Bom. L.R. 257, relating to mullagiri rights, do not apply to the case of a mujawar whose case is governed by the observations of Abdur Rahim J. in *Munnawaru Begam Sahibu v. Mir Mahapalli Sahib* (1918) ILR 41 Mad. 1033.

11. It must be stated, moreover, that it has been held in *Shekh Karimodin v. Nawab Mir Sayad Alamkhan* that even in the case of a sajjadanashin although females may be excluded, it would not follow that males, who establish their descent from the propositus through females should also be excluded. Even assuming, therefore, that females would be excluded from mujawarship, the same remarks would apply to the position of a male person who claims descent

from a female. In any case, therefore, plaintiff No. 1 would come under this class. But, as I have observed above, the exclusion of females is not proved in the case of mujawarship.

12. In the present case, therefore, plaintiffs Nos. 1 and 2 are entitled to the reliefs granted to them on the ground that the Mahomedan law is not against the plaintiffs and the usage is admittedly in their favour.

13. The decision of Mr. Justice Lokur is, therefore, correct, and the appeal is dismissed with costs.

Broomfield, J.

14. I have nothing to add to what my learned brother has; said with regard to Letters Patent Appeal No. 20 of 1939.

15. In the other appeal the first question is whether females are competent to perform the duties of a mujawar, which consist, according to the finding of the Assistant Judge, in reading the Fatiha, offering prayers and incense and looking after the general management of the shrine. Mr. Justice Lokur has held that they are competent to perform these duties and to succeed to the office in due course of inheritance. Several cases have been cited in the argument. In some of these references have been made to Macnaghten's Precedents and Baillie's Digest of Mahomedan Law. We have examined these passages and we find that wherever it is stated in these authorities that females are incompetent to perform the duties of a religious office, that is said in connection with the office of a sajjadanashin, i.e. the spiritual head of an institution. It seems that there may be a considerable variety in the functions which may be performed by mujawars. Having regard to the literal meaning of the word these functions may be purely ministerial or menial. But some religious or quasi religious functions may be combined with the ministerial duties. Whether a female is or is not competent to hold the office must depend on the nature of these religious or quasi religious duties, that is to say, must depend on the evidence in each particular case.

16. There is no Bombay authority which is inconsistent with the view taken by Mr. Justice Lokur. *Mirzamalli v. Hidayatbi* 1901 3 Bom. L.R. 772 was not a case of mujawars. Some of the duties which had to be performed in accordance with the terms of the sanad were quite obviously religious duties of a kind which custom would not allow to be performed by females, for instance, imamat, which was translated in the report of that case as "preaching by being a priest", and kitabat, i.e. "reading the Koran at the mosque." Moreover, the Court in that case took the view that the terms of the sanad itself excluded females from inheritance quite apart from the nature of the duties to be performed. In *Biyamma v. Ahmadsaheb* (1934) 37 Bom. L.R. 257. I held that lands assigned for the remuneration of a village mulla cannot be inherited by a female heir, because the duties of a mulla, which are of a religious nature, cannot, according to Mahomedan law, be performed by a female. As appears from my judgment, it was admitted there that the female plaintiff was not capable of performing the duties. The only

question for decision was whether those duties could be performed by proxy.

17. Mr. Justice Lokur has relied, to some extent, on the decision of the Privy Council in *Shahar Banow v. Aga Mahomed Jaffer Bindaneem* (1906) L.R. 34 IndAp 46 I am not sure that that case helps very much because there their Lordships were dealing with the office of mutawalli, which is essentially a secular office, and mutawallis and mujawars would not necessarily be on the same footing. At the same time, there is certainly nothing in the Privy Council case which lends any support to the appellants' argument. Mr. Desai has relied on two Madras cases, *Hussain Beebee v. Hussain Sherif* (1868) 4 M.H.C.R. 23. and *Mujavar Ibrambibi v. Mujavar Hussain Sheriff* (1880) ILR 3 Mad. 95. The former case dealt with mujawars, but the mujawars there were priests, and different, therefore, from those with whom we are concerned. *Mujavar Ibrambibi v. Mujavar Hussain Sheriff* followed that case. There the facts were no doubt similar to those of the present case in respect of the duties to be performed by the mujawar, but the Court partly relied on evidence as to usage, and the decision might not have been the same if the evidence as to usage had been the same as in our case. Moreover, this case is dissented from, or at any rate explained away, in *Munnarvaru Begam Sahibu v. Mir Mahapdli Sahib* (1918) ILR 41 Mad. 1033. There we have the opinion of an eminent Mahomedan Judge which, I think, Mr. Justice Lokur was fully entitled to follow.

18. As my learned brother has pointed out, whatever the decision had been as to plaintiff No. 2, plaintiff No. 1, at any rate, would not be disqualified, as it was held in *Sheikh Karimodin v. Nawab Mir Sayad Alamkhan* that males claiming through females may succeed even to the office of sajjadanashin.

19. I agree that the appeal should be dismissed with costs.