
(1980) 03 RAJ CK 0016

In the Rajasthan High Court

Case No : Civil Special Appeal No. 131 of 1974

Syed Saulat Hussain

APPELLANT

Vs

Syed Ilmuddin and Others

RESPONDENT

Date of Decision : 07-03-1980

Acts Referred:

Dargah Khwaja Saheb Act, 1955 — Section 13, 21
Rajasthan High Court Ordinance, 1949 — Section 18
Specific Relief Act, 1963 — Section 42

Citation : AIR 1981 Raj 29 : (1980) RLW 69 : (1980) WLN 141

Hon'ble Judges : C.M. Lodha, C.J.; N.M. Kasliwal, J

Bench : Division Bench

**Advocate : D.C. Sharma, N.B.L. Bhargava and S.N. Bhargava, for the Appellant;
D.K. Soral, H.M. Parekh, N.L. Pareek and R.S. Purohit, for the Respondent**

Final Decision : Dismissed

Judgement

Lodha, C.J.—This is a special appeal u/s 18 of the Rajasthan High Court Ordinance from the judgment and decree dated August 9, 1974, by the learned single Judge, whereby the learned Judge allowed the appeal filed by the plaintiff Syed Hmuddin and set aside the judgment and decree dated December 14, 1970, passed by the Civil Judge, Ajmer, in Civil Suit No. 271 of 1948 and granted "a declaratory decree in favour of the plaintiff against the defendant to the effect that so far as nearness in propinquity to the last Sajjadanashin is concerned, the plaintiff is the rightful person entitled to hold the office of the Sajjadanashin of the Durgah Khwajah Sahib of Ajmer and that Hakim Inayat Hussain had no right or title to hold the said office as against the plaintiff".

2. The case has a chequered history Inasmuch as the suit was filed as far back as May 18, 1948, in the Court of the Sub-Judge, First Class, Ajmer. It was dismissed on May 9, 1951, on the preliminary ground that the suit was not maintainable in view of Section 119 of the Ajmer Land and Revenue Regulations. Aggrieved by the judgment and decree of the trial Court, the plaintiff filed appeal

to the District Judge, Ajmer, who, by his judgment dated August 27, 1952, set aside the judgment and decree by the trial court and held that Section 119 of the Ajmer Land and Revenue Regulations No. 11 of 1377 did not bar the jurisdiction of the Civil Court to try the suit Thereupon, the defendant filed second appeal in the court of the then Judicial Commissioner, Ajmer, who, by his judgment dated Nov. 17, 1953, held that the jurisdiction of the Civil Court was barred and, in this view of the matter, he set aside the judgment of the District Judge and restored that of the trial Court. Dissatisfied with the judgment of the Judicial Commissioner, the plaintiff went in appeal to the Supreme Court by certificate and the Supreme Court, by its judgment dated March 7, 1961, allowed the appeal, set aside the judgment of the trial Court and remitted the case to the trial court for fresh decision in accordance with law. Meanwhile the court of the Sub-Judge had been abolished and the Munsiff, Ajmer City, acquired jurisdiction to try the suit. It is also important to note that during the pendency of the aforesaid litigation, Durgah Khawaja Sahib Act of 1955 (36 of 1955) (which will hereinafter be referred to as "the Act") came into force and the Durgah Committee constituted under the Act filed an application to be impleaded as a party to the suit. This application was allowed on September 30, 1964, and the Durgah Committee, Ajmer, was impleaded as a defendant. In its written statement, the Durgah Committee pleaded that on the death of Hakim Inayat Hussain, responsibility for making interim arrangement for the performance of the functions of the Sajjadanashin had devolved upon it u/s 13(1) of the Act and, consequently, it had appointed Syed Saulat Hussain, son of Hakim Inayat Hussain, as interim Sajjadanashin and further that this appointment had been approved by the Governor of the State of Rajasthan vide notification dated July 27, 1964, with effect from the date of the death of Hakim Inayat Hussain (Ex. A, B, page 416). The Committee further pleaded that u/s 13 of the Act, it had the authority to make permanent arrangements for the office of the Sajjadanashin. Thus, in short, its plea was that the suit had become infructuous. The learned Munsiff, by his order dated October 13, 1964, overruled the objection raised by the Committee and held that the suit was triable by the civil court. By another order dated December 12, 1964, the Munsiff also rejected the plea that the suit had been undervalued and the court-fee paid on it was insufficient. A revision was taken to the High Court from the orders of the Munsiff dated October 13, 1964, and December 12, 1964. Jagat Narayan J., as he then was, by his order dated August 25, 1966, allowed the revision application with the consent of the parties to this extent only that the plaintiff may amend his plaint so as to value the suit at Rs. 11,000/-, and the suit be withdrawn from the court of the Munsiff, Ajmer, and be transferred to the court of the Civil Judge, Ajmer. Accordingly, the plaintiff amended the plaint and the suit was transferred to the court of the Civil Judge Ajmer who, after recording the evidence produced by the parties, dismissed the suit by his judgment and decree dated December 14, 1970. As already stated above, the plaintiff filed appeal before the High Court which has been allowed by S. N. Modi J., sitting singly and this is the special appeal from the judgment and decree by Modi J.

3. Plaintiff Syed Illmuddin's case, as set out in the plaint, is that the last Sajjadanashin Diwan Syed Alley Rasul Ali Khan of the well known Durgah Khawaja Sahib, Ajmer, migrated to Pakistan in September 1947, resulting in the Office becoming vacant. His case is that the office of the Sajjadanashin is hereditary and the plaintiff being the nearest qualified male relation in the male-line of Diwan Syed Alley Rasul Khan is entitled to succeed to the said office according to the rule of primogeniture but the defendant Hakim Inayat Hussain Khan (since deceased) had illegally assumed the charge of the office of the Sajjadanashin on May 6, 1948, in pursuance of the order of the Chief Commissioner, Ajmer. He has, therefore, prayed that a declaration be granted in his favour that he is entitled to hold the office of the Sajjadanashin and to receive emoluments and perquisites attached thereto. It was further prayed that the defendant be restrained from exercising the rights and the privileges of the office.

4. Inayat Hussain Khan, defendant, denied the plaintiff's claim and pleaded that the right to appoint to the office of the Sajjadanashin vests exclusively in the local representative of the Government and that the person who is declared as Jagirdar of Dilwara, Hokran and Kishanpura under the Ajmer Land and Revenue Regulations ipso facto gets recognition as Sajjadanashin. The defendant also denied that the plaintiff is the nearest qualified male relation entitled to succeed to the office of Sajjadanashin by the rule of primogeniture.

5. It may be relevant to state here that so far as the effect of the order of the Chief Commissioner dated May 5, 1948 (Ex. A. 5) recognising Inayat Hussain as Sajjadanashin or the Diwan of the Durgah is concerned, the dispute has been set at rest by the judgment of the Supreme Court dated March 7, 1961. wherein it has been held that the Chief Commissioner had no power to decide the question of succession to the office of the Sajjadanashin and the perquisites attached thereto though it may be that the Chief Commissioner had the power to decide as to the succession to the Jagir. In this view of the matter, the order of the Chief Commissioner dated May 5, 1948, cannot stand in the way of the plaintiff for establishing his right to succeed to the office of Sajjadanashin of the Durgah.

6. Therefore, the only question, which now falls for determination, is whether the plaintiff has succeeded in establishing his right to succeed to the office of the Sajjadanashin.

7. Mr. M. B. L. Bhargava, learned counsel for the appellant, has, however, raised a preliminary objection to the maintainability of the suit on the ground that the plaintiff has prayed only for a declaratory decree to the effect that he is entitled to hold the office of Sajjadanashin and to receive all emoluments and perquisites attached thereto and further that the defendant may be restrained from receiving emoluments and perquisites attached to the said office by means of a permanent injunction. His contention is that even though in para No. 8 of the plaint, the plaintiff has admitted that the defendant had taken charge of the office of Sajjadanashin on May 6, 1948, and had started performing various

religious duties and functions attached to the said office, yet he has not prayed for consequential relief for possession of the office. In this connection. Mr. Bhargava has relied upon Erfan Mandal v. Samiruddin Mandal (1912) 15 Ind Gas 552, Strinivasa Ayyangar v. Strinivasa Swami ILR(1892) Mad 31 , Kandaswami Thambiran Vs. Vagheesam Pillai, wrongfully styling himself as Ponnambala Desikar, and Dumpala Rama-chandra Reddy v. Dumpala Kanta Reddy (1972) 2 AWR 255: (AIR 1973 Andh Pra 189).

8. In Erfan Mandal v. Samiruddin Mandal (1912) 15 Ind Cas 552 (Cal), the plaintiff asked for a declaration that a certain Wakfnamah was invalid and that the defendant had not acquired any valid title as Mutwalli under that document, and that if the Wakfnamah be valid, then the defendant had not been legally appointed Mutwalli. But the plaintiff did not ask for recovery of possession or for the removal of the defendant and the appointment of a trustee duly appointed. It was held that u/s 42 of the Specific Relief Act, the suit was incompetent as the plaintiff, being able to seek further relief, had not done so. It was also observed that further relief referred to in the proviso to Section 42 of the Specific Relief Act, is further relief in relation to the legal character or right to any property to which the plaintiff is entitled and whose title to such character or right the defendant denies or is interested in denying, and it must be relief appropriate to and consequent on the right or title asserted.

9. In Strinivasa Ayyangar v. Strinivasa Swami (ILR (1892) 16 Mad 31), three disciples of a Mutt brought a suit, with the consent of the Advocate General, u/s 539 of the Code of Civil Procedure, alleging that the defendant was in possession of the Mutt under a false claim of title as the successor to the late Jheer, and praying that it he declared that he was not the duly appointed succeesor to the late Jheer, and that an appointment to the vacant office of Jheer be made by the Court, but no consequential relief was asked for. It was held that the suit was not maintainable for the reason that relief consequential on the declaration sought u/ s 42 of the Specific Relief Act was not asked tor.

10. In Kandaswami v. Vagheesam (AIR 1941 Mad 822) (FB), it was held that the plaintiff, who is asking for a declaration of his title to the office of a Mahant and who is not in possession of its properties, must, by reason of Section 42, ask for possession. His failure to do so vitiates his suit. It was observed that the office of a Mahant cannot be separated from the properties which form the endowments of the office.

11. In Dumpala Ramachandra Reddy Vs. Dumpala Kanta Reddy and Others, it was observed that if at the time of institution of a declaratory suit, the plaintiff could successfully seek for the other relief of delivery of possession or recovery of money, it is not permissible for him to seek only for a declaration without asking for the other requisite relief.

12. Now, in the present case, it may be pointed out that the defendant had not raised any such objection in the written statement nor any issue had been

framed on the point. It is, therefore, too late in the day for the defendant to raise an objection that the suit is not maintainable. The case had gone right up to the Supreme Court on the question of maintainability and the ground that consequential relief had not been claimed and therefore the suit is not maintainable, was never relied upon. Thus the appellant is not entitled to be heard on this point at this belated stage. Apart from that, the learned single Judge has granted a decree in favour of the plaintiff in the following terms :--

"So far as nearness in propinquity to the last Saliadanashin is concerned, the plaintiff is the rightful person entitled to hold the office of the Sajjadanashin of the Durgah and that Hakim Inayat Hussain had no right or title to hold the said office as against the plaintiff."

13. The learned single Judge has also pointed out that the appointing authority is the Governor of Rajasthan. The question whether the plaintiff could have asked for any further relief at the time of institution of the suit is not a pure question of law but is a mixed question of fact and law. The defendant has placed no material on the record to show that the plaintiff could have asked for further relief at the time of institution of the suit. It has also come on the record that after the decree by the learned single Judge, the Governor of Rajasthan has passed the consequential order on May 7, 1977 in accordance with the decree by the learned single Judge and asked the Committee to grant recognition u/s 13(2) of the Act. At this stage it may also be mentioned that even the defendant's plea in his written statement is that the right to appoint Sajjadanashin vests exclusively in the local representative of the Government and such appointment has always been made by an executive order. Thus, having regard to the facts and circumstances of the present case, the principle regarding not claiming consequential or further relief laid down in the cases relied upon by Mr. Bhargava has no application to the present case, and accordingly, we overrule this objection.

14. Another contention raised on behalf of the appellant is that the Durgah Committee alone was competent to appoint Sajjadanashin. In this connection, reliance has been placed on Section 13 of the Durgah Khawaja Saheb Act, 1955, which reads as under:--

"13. Succession to the office of Sajjadanashin. --

(1) 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."

15. On the other hand, learned counsel for the respondent has placed reliance on Section 21 of the Act, which reads as under, --

"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."

16. On a plain reading of Section 21, it is clear that 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.

17. The Act came into force in 1955 A. D. Hakim Inayat Hussain died on September 25, 1959, when the appeal was pending before the Supreme Court. The Supreme Court, after the death of Inayat Hussain directed that the legal representatives of Inayat Hussain be impleaded as parties to the lis. Now, if Section 13 were applicable, the suit would have come to an end with death of Inayat Hussain and appointment of his son Syed Saulat Hussain as Sajjadanashin. But it is important to remember that appointment of Saulat Hussain was only an interim arrangement and that is why the Supreme Court remanded the case and gave a direction to proceed with the suit. Besides that, Section 13 is a general provision dealing with succession to the office of Sajjadanashin whereas Section 21 is a special provision to deal with a situation where a suit relating to the office is pending on commencement of the Act and the person holding the office of Sajjadanashin immediately before the commencement of the Act is a party to it. We are, therefore, of opinion that the suit is governed by Section 21 of the Act and not by Section 13 of the Act.

18. Another point urged by the learned counsel for the appellant is that Syed Illamuddin is not the nearest male descendant of the last holder of the office. It has also been argued that Syed Bashiruddin and Abdul Aziz were nearer to the last holder than the plaintiff.

19. It may be pointed out, in the first Instance, that the trial court found that the office of Sajjadanashin attached to the Durgah is a hereditary office. This position was conceded to on behalf of the defendants in the trial court as well as before the learned single Judge. In this connection, we may reproduce here the relevant portion from the judgment of the learned single Judge,--

"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 Issues Nos. 2 and 3. The learned Civil Judge observed that it was admitted that the succession to the office of the Sajjadanashin was governed by the Rule of primogeniture."

20. Even, before the learned single Judge, it was not disputed that the office of Sajjadanashin is hereditary and succession to that office is governed by the rule of primogeniture. Reference may be made to the following observations by the learned single Judge at page 42 of the Paper Book,--

"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 the 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 Rasul Ali Khan was in the line of Syed Abdul Fatah and the plaintiff is in the line of Syed Abdul Fatah's brother Nizamuddin."

21. Thus the fact that the office of Sajjadanashin is hereditary and is governed by the Rule of Primogeniture is a matter beyond dispute. However, an objection has been raised that P. W. 2 Bashiruddin and P. W. 3 Abdul Aziz were nearer male relations to Syed Aley Rasul Ali Khan and, therefore, in 1947 when the succession opened, the plaintiff was not entitled to succeed in preference to P. W. 2 and P. W. 3. However, a look at the pedigree table contained at page 99 of the paper book would show that the last Sajjadanashin -- Syed Aley Rasul Ali Khan was in the line of Syed Abdul Fatah, and the plaintiff is in the line of Syed Abdul Fatah's brother Nizamuddin. It is also clear that if Haider Ali was elder to Imam Ali, P. W. 2 Bashiruddin was the nearest male relation of the last Sajjadanashin but in case Imam Ali was elder to Haider Ali, P.W. 3 Abdul Aziz was the nearest male relation of Syed Aley Rasul Ali Khan in the year 1947. But so far as Inayat Hussain is concerned, it is admitted that he was not the nearest male relation of Syed Aley Rasul Ali Khan in the year 1947. It is also not in dispute, as observed by the learned single Judge, that the plaintiff Illamuddin was nearer to Syed Aley Rasul Khan than the defendant Hakim Inayat Hussain according to the rule of

primogeniture. It is, however, pertinent to point out that P. W. 2 Bashiruddin has himself stated that he did not consider himself to be nearer to the last holder than the plaintiff. It is also to be noted that P. W. 2 Bashiruddin died issueless during the pendency of the suit. P. W. 2 Abdul Aziz has admitted that he is illiterate and did not want to become Sajjadanashin. He has further stated that he had relinquished his right in favour of the plaintiff Illamuddin. Abdul Aziz also died during the pendency of the suit without leaving any heir. Thus, when both these persons were produced as witnesses, and they stated that they did not want to become Sajjadanashin, it does not lie in the mouth of the defendants to say that they were entitled to succeed as Sajjadanashin. In this view of the matter, the defendants cannot take advantage of the fact of Bashiruddin and Abdul Aziz being nearer to the last Sajjadanashin.

22. It was next urged by Mr. Bhargava that the suit is time-barred under Article 124 of the old Limitation Act (= Article 107 of the new Limitation Act). In support of this contention, he has placed reliance on Haripada Roy Vs. Gopinath Roy and Others, where it was observed that where a person holds the office of the Shebait for 12 years and adversely, Article 124, Limitation Act, applies and where the office is thus extinguished by adverse possession, the right to claim Pala (turn) must also share the same fate. It is sufficient to point out that no such objection was taken by the defendants either in the written statement or in any of the lower courts nor there is any issue on the point. The question whether the defendant's possession was adverse or not is not a pure question of law and such a plea cannot be allowed to be raised at this belated stage. Even on merits, we do not see any force in this plea as Inayat Hussain or his legal representative never held the office by adverse possession.

23. It was also faintly argued by Mr. Bhargava that the plaintiff is not qualified to be appointed as Sajjadanashin. It is true that the learned single Judge has observed in his judgment that the plaint and the written statements as also the evidence led by the parties are silent as to what qualifications are needed for the office of Sajjadanashin and therefore it is difficult to say whether the plaintiff was or is qualified to hold the office of Sajjadanashin. It is sufficient to point out that there are no statutory qualifications prescribed for Sajjadanashin. Consequently, if the defendant thought that the plaintiff was not qualified to hold the office of Sajjadanashin, it was for him to have taken this plea, but he did not do so and therefore in absence of such a plea or evidence to the contrary, it cannot be said that the plaintiff is not qualified to hold the office of Sajjadanashin. In *Diwan Ghulam Rasul v. Ghulam Qutab-ud-din* (1942) 44 PLR 476 : (AIR 1942 Lah 142), it was observed that there is no bar to the nomination of even a minor to succeed to the office of Sajjadanashin of a Sufi shrine.

24. Lastly, it was urged that the order passed by the Governor on May 7, 1977, directing the Durgah Committee to accord recognition to Syed Zainul Abaidin as Sajjadanashin u/s 13(2) of the Durgah Khawaja Sahib Act, was illegal and void. It may be pointed out that this order was passed after the decision of the case by

the learned single Judge and the memo of the special appeal has not been so amended as to incorporate an attack on this order. Apart from this, it appears to us that it is only a consequential executive order in consonance with the decree passed by the learned single Judge and if the decree of the learned single Judge stands, no just exception can be taken to the order of the Governor dated May 7, 1977.

25. The result of the foregoing discussion is that we do not see any force in this appeal and hereby dismiss it, but make no order as to costs.