PETITIONER:
MOHD. ZAINULABUDEEN (SINCE DECEASED) BY L.RS.

Vs.

RESPONDENT:
SAYED AHMED MOHINDEEN AND ORS.

DATE OF JUDGMENT15/12/1989

BENCH:
KASLIWAL, N.M. (J)
BENCH:
KASLIWAL, N.M. (J)
SINGH, K.N. (J)

CITATION:
1990 AIR 507 1989 SCR Supl. (2) 519
1990 SCC (1) 345 JT 1989 (4) 563
1989 SCALE (2)1381

ACT:
Indian Limitation Act, 1963: Adverse possession--Claim of Among co-heirs there must be evidence of an essertion of hostile title coupled with possession and enjoyment

HEADNOTE:
Mohd. Zainulabdeen and Yasin By filed a suit for declaration that they were entitled to be in enjoyment and possession of Saint Syeed Moosa Shah Khadiri Dargah in Madras for 27 days and to restrain the defendants from interfering with tile plaintiffs' aforesaid right and management in the Dargah.

In reply the defendant No. 1 alleged that in the management of the Dargah, female members had no right nor could they claim the right of Mujawar. It was also alleged that Fathima Bee through whom the Plaintiffs were claiming never enjoyed the right to Hundial collection of the Dargah and share in the Mujawarship and even if she had any right the same was lost as she did not claim any right till her death and therefore the Plaintiffs were also not entitled to any relief. Defendants 7, 8 and 10 however in their written statements admitted family members to be sharer in the income and management of the Dargah and they also admitted that they were paying such share to their sister Ahamadunnissa (10th defendant) in the Hundial collections and that the City Civil Court in suit No. 7518 of 1971 had also recognised the right of 7th defendant Anser Bi to management of the Dargah for 9 days in a year. Thus it was false to contend that the females were not entitled to claim management.

The trial court decreed the suit of the Plaintiffs and held that they were entitled to manage the Dargah 1or 27 days in a year. Defendants 3 to 6 and 12 to 19 filed appeals against the judgment of the trial court.The City Civil Judge, however, affirmed the judgment of the Trial Court with some modifications in the relief.

Different sets of defendant filed two second appeals before the High Court and both were disposed of by the High Court by its judgment and Order dated 17th November, 1981 whereby it reversed the
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judgments and decrees of the courts below and dismissed the suit filed by the Plaintiffs.

This Court came to the conclusion that there is no controversy as regards the period of 27 days falling to the share of the Plaintiffs and the right of the females to the management of the Dargah according to Muslim law. As regards the question of right of Fathima Bee having become barred by limitation by ouster and that as such the Plaintiffs too had lost that right, this Court, while setting aside the Judgment and Decree of the High Court and restoring that of the Trial Court as modified by the First Appellate Court,

HELD: It iS well settled that where one co-heir pleads adverse possession against another co-heir it is not enough to show that one out of them was 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-heirs. The co-heir in possession cannot render his possession adverse to the other co-heirs not in possession merely by any secret hostile animus on his own part in derogation of the other co-heirs title. [526G-H; 527A]

It is a settled rule of law as between co-heirs that 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. [527A]

The High Court in the instant case committed a serious error in reversing the finding of the lower Appellate Court and in taking a wrong approach in holding ouster on the basis of the 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. [527G]

P. Lakshmi v.L. Lakshmi Reddy, [1957] SCR 195, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3 160 of 1983.

From the Judgment and Order dated 17.11.1981 of the Madras High Court in Second Appeals Nos. 650 and 874 of 1981.

V.M. Tarkunde, Ms. S. Khanna, Jagmohan Khanna and A.S. Khan for the Appellants.

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T.S. Krishnamurthy, K.R. Choudhary, S.M. Amiad Nainar and S. Thananjayan for the Respondents.

The Judgment of the Court was delivered by

KASLIWAL, J. This Civil Appeal by the plaintiffs is directed against the Judgment of High Court of Judicature at Madras in Second Appeal Nos. 650 & 894 dated 17th November, 1981.

Mohd. Zainulabdeen 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 & 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. 116 of 1909 the right of management was divided between the two sons each taking six months for himself.

According to this arrangement the branch of Sayed 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 decendants 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 Gaffar 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 No. 2. After the death of Fathima Bee, the plaintiffs being her son and daughter associated themselves in the management of the Dargah with their maternal uncles and the sons of the maternal uncles and were getting share of the income of the Dargah. According to the plaintiffs this arrangement was going on for several years eversince the death of Fathima Bee in 1957. However on account of some dissensions, the first defendant Sayed Mohideen (since deceased) and another defendant being the son of another

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deceased maternal uncle were preventing the plaintiffs from exercising their right and enjoying the income of the Dargah. The plaintiffs served a notice on 23.3.1972 calling upon the defendants to recognize the right of management of the plaintiffs in the Dargah. The defendants sent a reply on 22.4.1972 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.

Sayed Mohideen (since deceased) defendant No. 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 inheritence. Sayed Ismail being cousin brother of Sayed Gulam Dastagir as such he was also a Mujawar along with Sayed Gulam 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 though Fathima Bee was alive but she was not a party to the aforesaid suit. It was however pleaded that 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 life-time 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 Nos. 2 to 6 adopted the written statement filed by the first defendant. So far as the defendants Nos. 7, 8 & 10 were concerned, they filed a written statement taking the plea that the

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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 (lOth defendant) in the Hundial collection of the Dargah. The 7th defendant (Anser Bi) filed a suit No. 75 18 of 1971 in the Court of 4th Assistant City Civil Court and her right to manage was recognised for 9 days 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 No. 1 Sayed Mohideen died during the pendency of the suit and defendants Nos. 12 to 19 were added as his legal representatives.

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).

The defendants Nos. 3 to 6 and 12 to 19 filed appeals aggrieved against the Judgment of the Trial Court while 7th defendant 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 the first plaintiff and 9 days from July 1 to 9 for the second plaintiff 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 the 7th defendant is dismissed."

Different sets of defendants filed second appeals Nos. 650 & 894 of 1981, and both these second appeals were disposed of by the High Court by order dated 17th November, 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.

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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 circumstances 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 P.W. 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 know 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 P.W. 1 observed that it was clear that the mother of P.W. 1 was aware of the filing of Civil Suit No. 116 of 1909. Irrespective of that, in so far 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.

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?

It would first be necessary to make it clear as to what is the impact of the decree dated 11.8.1910 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 Mohi-deen Bi for a declaration that the plaintiffs and the de-fendants 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 collec-

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tion of the hundi box in the Dargah and appropriate the same in two equal moities 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 the 1st plaintiff and the 1st & 2nd Defendants 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 moities and that Sayed Moosa Sahib, the 1st plaintiff was entitled to one half and Sayed Gaffer Sahib and Sayed Mohideen, the 1st and 2nd defendants 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.

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 for decided. Fathima Bee though 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.

Mr. Krishnamurthy Aiyer, learned counsel for the defendantrespondents 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 circumstances in proving ouster of Fathima Bee from the fight 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.

It is an admitted case of the parties that Sayed Gulam Dastagir Sahib had a fight 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 1/5th 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

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offerings 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 1st defendant 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".

A perusal of the above pleading 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 ques-

tion 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-heirs. 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
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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 the 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 rights of the plaintiffs of Fathima Bee. We are supported in the above view by a decision of this Court in P. Lakshmi v. L. Lakskmi Reddy, [1957] SCR 195.

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 on that account she was satisfied in allowing the brothers to enjoy the office of Mujawar on her behalf also. The 13th defendant who has been examined as D.W. 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 had 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.

Mr. Krishnamurthy Aiyer, learned counsel for defendants Nos.
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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 First plaintiff and 9 days from July 1-9, for the second plaintiff 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 and 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 the decree passed by the First Appellate Court with the following modification in the arrangement of days in the management of the Dargah in question.

The plaintiffs would be entitled to such management from 17th. to 30th June and 1st to 13th July and in the next year from 18th to 30th June and 1st to 14th July. 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 17th to 30th June and 1st to 13th July in the year 1990 and 18th to 30th June and 1st to 14th July in the year 1991 and they shall continue to follow such cycle by rotation every year.

For the reasons stated above, we set aside the judgment and decree of the High Court dated 17th Nov. 1987 and restore that of the Trial Court as affirmed by the First Appellate Court with modifications as stated earlier.

Parties to bear their own costs.

R.N.J.

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