

Syed Shah Ghulam Ghouse Mohiuddin And ... vs Syed Shah Ahmed Moriuddin Kamisul ... on 17 February, 1971

Equivalent citations: 1971 AIR 2184, 1971 SCR (3) 734, AIR 1971 SUPREME COURT 2184

Author: A.N. Ray

Bench: A.N. Ray, G.K. Mitter

PETITIONER:

SYED SHAH GHULAM GHOUSE MOHIUDDIN AND ORS.

Vs.

RESPONDENT:

SYED SHAH AHMED MORIUDDIN KAMISUL QUADRI(DEAD) BY L. Rs. AN

DATE OF JUDGMENT 17/02/1971

BENCH:

RAY, A.N.

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RAY, A.N.

MITTER, G.K.

CITATION:

1971 AIR 2184

1971 SCR (3) 734

ACT:

Minority and Guardianship-Muslim minor represented in arbitration proceedings and in Court by brother who was not appointed guardian by Court-Award and decree on award are vitiated.

Limitation Act, 1908, ss. 18 and 144-Renunciation of rights by co-owners in property in favour of one co-owner under wrong impression that it was endowed property-Property later discovered to be Matrooka property-Limitation for filing suit is governed by s. 144-Limitation Act 1908-Where knowledge of right to partition is held back by fraud limitation is extended under s. 18.

Adverse possession-Possession by one co-owner is not by itself adverse to other co-owners-These must be open denial of title to the parties entitled to the property by excluding and ousting them-Possession is not adverse to parties not aware of their rights.

HEADNOTE:

Shah Abdul Rahim was Sajjadasheer of a Dargah and Khankah in Hyderabad. He had four sons and two daughters. After his death in 1905 he was succeeded as Sajjadasheer by his eldest son Abdul Hai. Shah Abdul Rahim left Matrooka property apart from the properties appertaining to the Dargah and Khankah. The matter of the partition of Matrooka properties was referred to arbitrators. The appellant who was Abdul Rahim's youngest son was a minor at the time and was represented in the arbitration proceeding by his brother Nooruddin. The properties Exhibits B-1 to B-10 were acknowledged by the parties before arbitrators to be in the possession of Abdul Hai as Dargah and Khankah properties and any right or claim to them was renounced by Abdul Hai's brothers and sisters. The arbitrators gave their award on August 1, 1908 partitioning the properties. On August 13, 1908 there was a decree in the Darul Khaza Court confirming the aforesaid award. The properties B-1 to B-10 thereafter remained in the possession of Abdul Hai. In 1927 Abdul Hai got an adjudication from the Nizam's Government that the Dargah and Khankah properties consisted only of two villages and that properties B-1 to B-10 were not Dargah and Khankah properties. In 1938 Abdul Hai wrote a letter to the Nizam's government again asserting that properties B-1 to B-10 were his personal properties. The appellant filed a suit on 24th July 1941 for setting aside the decree dated August 13, 1908, passed by the Darul Khaza Court and for partition of the Matrooka properties left by his father including properties B-1 to B-10. He impeached the award and the decree on the ground that he was not represented by a lawful guardian. He claimed that the award and decree should be avoided because they were based on the wrongful representation of Abdul Hai that they were Dargah and Khankah properties. The trial court decreed the suit holding : (1) that the award and decree in question were obtained by fraud; (2) that the letter written by Abdul Hai in 1938 showed that he was aware of the Matrooka character of the properties but kept this fact from his brothers and sisters; (3) that the appellant

73 5

came to know the facts from the said letter of 1938 and the suit was not therefore barred by limitation. The High Court in appeal held (1) that the appellant was a minor and therefore reference to the arbitration and the award thereon were void; (2) that the decree passed by the Damalkhaza Court was not a nullity since the appellant did not file his suit within three years after attaining majority; (3) that the decree was not obtained by fraud; (4) that Abdul Hai asserted in 1927 that the properties in question were his personal properties and this assertion of title adverse to the appellant and his brothers and sisters became known to them in 1927 and for this reason also the suit was barred by

limitation. in' appeal by certificate to this Court,

HELD: The appeal must be allowed,

(i) The minority of the appellant was a fact found by the trial court and the High Court. The appellant's brother who represented him in the arbitration and court proceedings was not a legal guardian, nor was he appointed by the Court. The relinquishment of property by Nooruddin on behalf of the minor was not binding on the minor whose interests were not protected. The arbitration proceedings, the award and the decree of the Darul Khaza Court on the award were therefore void. [740 D, 741 E-F]

Mohd. Amin & Ors. v. Vakil Ahmed & Ors, [1952] S.C.R. 1133 and Imambandi v. Mutsaddi, 45 I.A. 73, referred to.'

(ii) The estate' of a deceased Mohammedan devolves on his heirs at the moment of his death. The heirs succeed to the estate as tenants in common in specific shares. When the heirs continue to hold the estate as tenants in common without dividing it and one of them subsequently brings a suit for recovery of the share the period of limitation for the suit does not run against him from the date of the death of the deceased but from the date of express ouster or denial of title and Art. 114 of Sch. 1 to the Limitation Act 1908 would be the relevant Article.

[741 H, 742 A]

(iii) The cause of action for partition of properties is a perpetually recurring one'. In Mohammedan Law the doctrine of partial partition is not applicable because the heirs are tenants in common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. In the present case the suit was for partition of properties which were by consent of parties treated as Dargah and Khankah but which were later discovered to be Matrooka properties in fact and therefore the declaration in the award and the decree on the award that those were Dargah and Khankah properties could not stand and the entire partition had to be reopened by reason of fraud in the earlier proceedings. [746 G-747 B]

Monsharam Chakravarty & Ors. v. Gonesh Chandra Chakravarty & Ors., 17 C.W.N. 521, referred to.

(iv) The decree of the Darul Khaza Court could not be an obstacle to, the claim of the appellant for partition of the properties, because the properties were admittedly not Dargah and Khankah properties but Matrooka Properties. If all parties- proceeded upon a basis that these , were Dargah and Khankah properties and that basis is wiped out by the adjudication by the Government of the Nizam, the parties are restored to their position as heirs to the Matrooka property. The award and the decree by reason of evidence of facts discovered since the judgment and the decree of the Darul Khaza Court could not be allowed to stand because the effect of the discovery of the facts was to make it "reasonably probable that the action will succeed". [744 H-745 B]

1100Sup CI/72

73 6

Birch v. Birch, [1902] Probate Division 131, referred to.

(v) When a plaintiff has been kept from knowledge by the dependent of the circumstances constituting the fraud, the plaintiff can rely upon s. 18 of the Limitation Act to escape from the bar of limitation. When Abdul Hai got the properties released by reason of the decision of the Government of the Nizam in the year 1927 the properties became divisible among the appellant and his brothers and sisters. The existence of the right of the appellant was kept concealed by Abdul Hai. The appellant was not aware of the right nor could he have with reasonable diligence discovered it. There was active concealment by Abdul Hai of the fact that the properties were not Dargah and Khankah having full knowledge of the fact. It was only in 1941 that the appellant came to know of the Matrooka character of the properties. [745 E, 746 E]

Rolfe v. Gregory, [1964] 4 DeG. J & S 576, Boman Chandra Datta v. Promotha Nath Ghose, L.L.R. 49 Cal. 886 and Rahimboy v. Turner, 20 I.A. 1. referred to.

(vi) On the facts of the case it was established that the fraud committed by Abdul Hai relates "to matters which prima facie would be a reason for setting the judgment aside". [747 E-F]

Halsbury's Laws of England, Third Edition, Vol. 22, para 1669 at p. 790. referred to.

(vii) The plea of adverse possession must also fail.

It was apparent that until the year 1927 the appellant and the other parties were already kept out of the knowledge of the true character of the properties. Even after 1927 it could not be said on the evidence On record that the appellant had any knowledge of the true character of the properties or of ouster or adverse possession of Abdul Hai. Possession by one co-owner is not by itself adverse to other co-owners. On the contrary possession by one co-owner is presumed to be the possession of all the co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present case there was no evidence to support this conclusion. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them. [745 F-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 219 of 1967. Appeal from the judgment and decree dated December 16, 1965 of the Andhra Pradesh High Court in C.C-C. Appeal No. 24 of 1969.

M. C. Chagla, R. Y. Pillai and N. Nettar, for the appellants.

C. K. Daphtary, Rameshwar Nath and Swaranjit Sodhi, for respondent No. 1 (A).

V. A. Seyid Muhammad and S. P. Nayar, for respondent No.

3. 7 3 7 The Judgment of the Court was delivered by Ray, J.-This is an appeal by certificate against the judge- ment dated 15 December, 1965 of the Andhra Pradesh High Court dismissing the appellants' suit and setting aside, the decree in favour of the appellant passed by the Additional Chief Judge, City Civil Court, Hyderabad on 18 October, 1958.

Shah Abdul Rahim a resident of the pity of Hyderabad died on 26 September, 1905 leaving behind him four sons Abdul Hai, Ghulam Nooruddin, Abdul Razak and Ghulam Ghouse Mohiuddin and two daughters Kamarunnissa Begum and Badiunnissa Begum. Shah Abdul Rahim had large movable and immovable properties. 'Me sons and the daughters entered into two agreements in the month of July, 1908 and appointed arbitrators to partition the Matrooka properties of Syed Shah Abdul Rahim. On 1 August, 1908 the arbitrators made an Award partitioning, the properties. On 13 August, 190 8 there was a decree in the Darul Khaza Court, Hyderabad confirming the Award of 1 August, 1908. The appellant filed the suit out of which the appeal arises on 24 July, 1941 for setting aside the decree dated 13 August, 1908 confirming the award and for partitioning certain Matrooka properties. In 1942, the suit was dismissed. An.. appeal was preferred to the High Court of Hyderabad. During the pendency of the appeal Abdul Hai died in 1950 and his legal representatives were brought on the record of the suit in the month of February, 1952. The appeal filed in the year 1943 was disposed of by the High Court of Andhra Pradesh in April 1957 remanding the case to the City Civil Court, Hyderabad. On 18 October, 1958 the Additional Chief Judge, City Civil Court, Hyderabad decreed the suit in favour of the appellant and cancelled the decree of the Darul Khaza Court dated 13 August, 1908. On appeal the Andhra Pradesh High Court on 15 December, 1965 set aside the decree passed by the Additional Chief Judge. The undisputed facts are these When Abdul Rahim died in 1905 Abdul Hai the eldest son was major. The appellant was a minor. There were two references to arbitration . Before the arbitrators the appellant a minor was represented by his brother Ghulam Nooruddin as the guardian. The parties to the arbitration agreements were Abdul Hai, Ghulam Nooruddin, Abdul Razak the appellant represented by his guardian Nooruddin, Qamarunnissa Begum and Badiunnisa Begum. It will appear from the award that before the arbitrators there was no dispute ,between the parties and the arbitrators did not think it necessary to frame any issues. Before the arbitrators the plaintiffs marked with the letter 'F' a plan showing properties attached to the Khankah and Dargah and those properties were market as Exhibits B-1 to B-10 and the plaintiffs relinquished their title-to properties marked Exhibits B-1 to B-10 and further stated "neither at present nor in future will they have any share and right in the said property". As to properties marked B-1 to B-10 the parties stated ,before the arbitrators that Abdul Hai was the Sajjada Nashin of the Dargah and was in possession of, the Dargah and khankah properties.

The award was made a rule of court within a short time upon a plaint filed by Nooruddin, Abdul Razak, the appellant represented by Nooruddin as the guardian and the two sisters Qamarunnisa Begum and Badiunnisa Begum. The defendant was Abdul Hai. The facts recited in the decree are these. Syed Shah Nooruddin a pious person of Hyderabad had his Khankah situated at Nampalli. The Dargah of the said pious man was also situated in the same locality. After Syed Shah

Nooruddin's death his son-in-law, Abdur Rahim became the Sajjada of the Khankah and the Dargah Shariff. The Sajjada had control over all the expenses ,of the Dargah and Khankah and the entire property attached to the Dargah and Khankah remained in possession of the Sajjadana, sheen and all the expenses of the Dargah and Khankah were met from the income. After the death of Abdur Rahim, Abdul Hai became the Sajjadanashen and was having control over the Dargah and Khankah. Abdur Rahim left three adult sons and one minor son and also two adult daughters. Apart from the property attached to the Dargah and Khankah Abdur Rahim left personal Matrooka properties. There might have been a dispute between the parties regarding the partition of these properties. But the parties settled the dispute by mutual consent and by agreement referred the matter to arbitration for the settlement of the dispute. 'The arbitrators made an award. The decree recited that the properties marked with the letter 'F' in the plan annexed to the award were Khankah and Dargah Shariff properties in the possession of the defendant Abdul Hai for meeting the expenses of the Khankah and no one has any right or claim over the property 'at present' or 'in future. The decree concluded by stating that the bargah and Khankah properties were not liable to partition and none ,of the plaintiffs "shall have any right or claim regarding the same".

The appellant impeached the award and the decree upon the award inter alia on the grounds that the award was void by reason of lack of lawful guardian on behalf of the appellant to protect ,and represent the rights and interests of the minor in the arbitration proceedings and in the proceedings resulting in the decree upon the award. The appellant also claimed that the award and the decree should be avoided because the properties marked Exhibits B-1 to B-10 were not Dargah and Khankah properties in fact and were treated in the award and the decree to be Dargah and Khankah on the wrongful representation of Abdul Hai. The, appellant in the year 1938 discovered for the first time the true and correct facts that the same were not Khankah and Dargah properties and therefore claimed the same as divisible upon partition amongst the heirs of Abdul Rahim.

The trial Court held that the award and the decree thereon were obtained by fraud and the decree was to be set aside. The reasoning given by the trial Court was that it was established one the evidence that Abdul Hai was in full possession and enjoyment of the whole of the property of Abdul Rahim including the property marked as Exhibits B-1 to B-10. In the letter dated 13, August, 1938 Exhibit P-8 Abdul Hai denied that the property was waqf property belonging to the Dargah and asserted that it was. owned and possessed by him and relinquished by his relatives. The letter was held by the trial Court to indicate that Abdul Hai knew that the property was the property of his father which he inherited along with his brothers and sisters and in spite of such knowledge and belief he caused it to be represnted before the arbitrators that the property belonged to the Dargali and that the same was in his possession as Sajjadanashen. The trial Court further held that the appellant came to know the real state of affairs from the letter of, Abdul Hai dated 13 August, 1938 and therefore the suit was not barred by limitation. The trial Court therefore passed a decree for cancellation of the decree passed upon the award and passed a preliminary decree for partition of the Matrooka properties including the properties marked as. Exhibits B-1 to B-10 in the award. In the High Court four questions were considered. First, whether apart from the appellant any other party was a minor at the time of the arbitration agreement and whether there was a dispute which could be referred to arbitration. Second, whether there was proof that at the time of the arbitration agreement and the award Abdul Hai made a fraudulent and false representation to his brothers and

sisters and made Them believe that the properties belonging to the Sajjadasheens were the properties of Dargah and Khankah which were not partible and by representation and fraud prevented the partition of those properties. Third, whether the appellant had knowledge that Abdul Hai had claimed the properties as the ancestral properties of the Sajjadasheens earlier than the time when the appellant said he had knowledge and whether the suit was barred by limitation. Fourth, what would be the effect of the filing of the written statement by the defendant No. 6 in the year 1958 and the omission of defendant No. 7 to file any written statement to obtain partition of the properties-in the event of the decree and the award being set aside The High Court held that the appellant was a minor but the ,other parties were not minors. The High Court Held that the reference to the arbitration and the award thereon were void The High Court held that the decree of the Darul Khaza Court upon the award was not a nullity and the present suit should have been filed within three years of the appellant obtaining majority. The High Court also held that the decree of the Darul Khaza Court was not obtained by fraud. The High Court held that Abdul Hai ,asserted in the year 1927 that the Dargah and the Khankah properties were his personal properties and from that date Abdul Hai asserted his title adverse to the appellant and the other plaintiffs and the appellant and the other plaintiffs knew in 1927 of the adverse claim of Abdul Hai. Therefore, the suit was barred by limitation.

The minority of the appellant is a fact found both by the trial ,Court and the High Court. It is an admitted fact that the appellant's guardian was his brother Nooruddin at the time of the arbitration proceedings and at the time of the decree on the award. The brother is not a lawful guardian under the Mohammedan Law. The legal guardians are the father, the executor appointed by the father's will, the father's father and the executor appointed by the will of the father's father. No other relation is entitled to the guardianship of the property of a minor as of right. Neither the mother nor the brother is a lawful guardian though the father ,or the paternal grand father of the minor may appoint the mother, brother or any other person as executor or executrix. In default ,of legal guardians a duty of appointing guardian for the protection and preservation of the minor's property is of the court on proper application. It was held by this Court in *Mohd. Amin & Ors. v. Vakil Ahmed & Ors.*(1) relying on the dictum in *Imambandi v. Mutsaddi*(2) that where disputes arose relating to succession to the estate of a deceased Mohammedan between his three sons, one of whom was a minor, and other relations, and a deed of settlement embodying an agreement in regard to the distribution of the properties belonging to the estate was executed by and between the parties, the eldest son acting as guardian for and on behalf of the minor son the deed was not binding on the minor son as his brother was not his legal guardian and the deed was void not only qua the minor, but with regard to all the parties including those who were sui juris. It is clear on the authority of this decision that the arbitration agreement and the award and the decree (1) [1952] S.C.R. 1133.

(2) 45 T.A. 73 are all void in the present case by reason of lack of legal guardian of the appellant. There is intrinsic evidence in the award, that the parties effected a settlement. Counsel on behalf of the respondent relied on a copy of an application in the Court of the Darul Khaza in the proceedings for passing the decree upon the award in support of the contention that the court appointed Nooruddin as the guardian of the appellant. It is stated in the application that the defendant No. 3 (sic) meaning thereby plaintiff No. 3 the present appellant is a minor and Nooruddin is the real brother and the appellant is under the guardianship of Nooruddin. The application was for

permission to Me the suit. There is no order for appointment of a guardian. Further, the Court in appointing the guardian of property of a minor is guided by circumstances for the welfare of the minor. There is no justification to hold that Nooruddin was either "the legal guardian or a guardian appointed by the Court. The decree which was passed on the award appears on an examination of the pleadings and the decree itself that the parties proceeded to have the decree on the basis of the award without any contest as and by way of mutual settlement. It will, appear from the decree that it was admitted by the parties that Abdul Hai was in possession of the Dargah and Khankah and that Abdul Hai alone was the Sajjadanashin of the Khankah. The relinquishment of property by Nooruddin on behalf of the minor is not binding on the minor. There was no legal sanction 'behind such compromise in the arbitration and in the proceedings resulting in a decree upon the award. There was no legal guardian. The rights and interests of the minor were also not protected particularly when there was conflict of interest between the minor and Abdul Hai. The arbitration agreement, the award and the decree of the Darul Khaza Court on the award are therefore void.

The High Court held that the appellants suit was barred by limitation by reason of knowledge of the appellant that Abdul Hai was in adverse possession since the year 1927 or 1928. In regard to the properties which the appellant claimed in the suit as liable to partition, it is established that all parties proceeded on the basis that Exhibits B-1 to B-10 in the award were not Matrooka properties but Dargah and Khankah properties. If, in fact, they are not Dargah and Khankah properties but Matrooka properties, these should be available to co-owners for partition unless there are legal impediments. The estate of a deceased Mohamedan devolves on his heirs at the moment of his death. The heirs succeed to the estate as tenants in common in specific shares. Where the heirs continue to hold the estate as tenants in common without dividing it and one of them subsequently brings a suit for recovery of the share the period of limitation for the suit does not run against him from the date of the death of the deceased but from the date of express ouster or denial of title and Article 144 of Schedule 1 to the Limitation Act, 1908 would be the relevant Article.

Counsel on behalf of the respondent submitted that there were two impediments to the appellant's claim for partition of the properties. One was that the decree passed by the Court of Darul Khaza upon the award was not obtained by fraud and could not be set aside by reason of limitation. The other was that the appellant came to know in the year 1927 that Abdul Hai adversely claimed properties as his own and therefore the appellant's claim was barred by limitation. The High Court held that the appellant was aware of the attachment of the personal and the Dargah and Khankah properties by the Government of the Nizam in the year 1927 as also release in the same year of the properties attached. The High Court held that when parties had knowledge of the attachment of the properties it could not be postulated that they would have no knowledge of the contentions of Abdul Hai as to release of the Dargah and Khankah properties on the ground that those were not Dargah and Khankah but personal properties of Abdul Hai. Knowledge of release of properties would not amount to ouster of the appellant from the property or of abandonment of rights. The evidence of the appellant was that in 1350 Fasli corresponding to the year 1941 the appellant came to know that a letter had been written by Abdul Hai to the Ecclesiastical Department of the Government of the Nizam in the year 1938 to the effect that the properties shown as Dargah and Khankah in the award F. and the decree were not Dargah and Khankah properties. The appellant also came to know from the same letter that all the properties including those stated to be Dargah and Khankah

properties in the award were attached by the Government of Nizam in the year 1927 and after enquiry by the Government of the Nizam all the properties were released in the year 1927. The appellant further came to know from that letter that Abdul Hai claimed the properties as his own. Thereupon the appellant demanded from Abdul Hai partition of the property as Matrooka. Abdul Hai asked the appellant to consult lawyer.

On the evidence it would be utterly wrong to speculate that the appellant knew of the contentions advanced in 1927 by Abdul Hai for the release of the properties by stating that they were not Dargah and Khankah properties. There was no sub section at the.

time of the examination of the appellant that he was aware in, 1927 of the contentions of Abdul Hai. The High Court relied on Exhibit A-38 a letter dated 19 October, 1927 written by the, appellant to Abdul Hai to impute knowledge of the attachment. and release of the properties. The appellant was never confronted with at letter. it was never suggested to the appellant that the letter could be construed as attributing to the appellant the knowledge of any adverse claim made by Abdul Hai with" regard to the properties. In that letter the appellant stated that. he was indebted to the elder brother Abdul Hai for his kindness... The appellant also stated that the expenditure incurred in connection with the litigation would be divided into four parts and the amount incurred on behalf of the appellant could be recovered from his account. This letter dated 19 October, 1927 does not at all have the effect of establishing that the appellant had knowledge of any adverse claim of the appellant. The appellant was never shown the letter to explain what litigation he referred to. No inference can be drawn against the appellant without giving him an opportunity to have his say in that matter. It is unfortunate that Abdul Hai died during the pendency of the suit and before the, trial. Not only his oral evidence but also the correspondence that Abdul Hai had with the Government of the Nizam in the year 1927 did not find way into the record of the suit. It would be totally misreading the appellant's letter of the, year 1927 as impressing the appellant with the knowledge of ouster by Abdul Hai of the appellant from the properties forming the subject matter of the suit.

There are two letter of great importance. One is dated 13 August, 1938 and marked Exhibit P-8 written by Abdul Hai to, the Director of Endowment, Government of Hyderabad and the other is dated 7 September, 1938 written by the Ecclesiastical Department of the Government of Hyderabad to the Secretary of the Endowments, Ecclesiastical Department of the Government of Hyderabad. The letter of Abdul Hai was written in answer to an application made about that time to the Government of the Nizam by One Sheikh Abdur Rahim a tenant against whom Abdul Hai had filed a suit for recovery of rent. Abdur Rahim made an allegation that the properties in respect of which Abdul Hai filed a suit were Dargah and Khankah properties. The complaint of Abdur Rahim was however dismissed and the matter was not allowed to be reopened on the strength of the orders of the Government recited by Abdul Hai in, his letter. In answer Abdul Hai recorded these facts. The Nizam in the month of April, 1927 appointed the Secretary of the Ecclesiastical Department and the Commissioner of Police to enquire and report as to which of the properties were attached to the Dargah and which were per-

sonal private properties. Another Commission was appointed by the Nizam to enquire into the proper use of the endowed properties. The Ecclesiastical Department by Letter dated 28 December, 1927 held that only the villages Debser and Sangvi were found to be under the Dargah. All properties of the parties which had been attached by the Nizam were released by letter dated 3 January, 1928 excepting the two villages. Abdul Hai by letter dated 16 January, 1928 to the Government of the Nizam stated that the properties marked Exhibits B-1 to B-10 in the award and the decree of the Court of Darul Khaza did not belong to the Dargah and Khankah. Abdul Hai further pointed out that the Nizam by a firman dated 11 November, 1927 had issued orders, saying that according to the opinion of the Council the Government's supervision should be lifted from the 'maash' referring thereby to the properties which had been attached by the Nizam and the same should be given over into the possession of Abdul Hai.

The other letter dated 5 January, 1939 from the Government, of the Nizam stated that only two villages were held to be Dargah and the Government of the Nizam had made thorough enquiries and held that there was no other Dargah and Khankah properties and the question could not be re-opened. It is established in evidence that the properties which were described as Dargah and Khankah properties before the arbitrators and the decree of the Darul Khaza Court are not Dargah and Khankah properties. Abdul Hai obtained an adjudication and an order of the Government of the Nizam in the year 1927 that only two villages of Debser and Sangvi belonged to the Dargah and the rest were not Dargah and Khankah properties. The appellant knew that there was litigation about the year 1927 about the properties. It is not in evidence as to what that litigation was or which properties were concerned there with because the letter was not shown to the appellant. Even if it be assumed that all parties treated the properties marked Exhibits B-1 to B-10 as Dargah properties upto the year 1927 and thereafter there was an adjudication on the representation of Abdul Hai that the properties were not Dargah and Khankah the parties would be entitled to the same. The only way in which the parties could lose their rights to the property would be on the finding that there was adverse possession or ouster. The decree of the Darul Khaza Court will not be an obstacle to the claim of the appellant for partition, of the properties, because the properties are admittedly not Dargah and Khankah properties but Matrooka properties. The arbitration proceedings were void by reason of lack of legal guardian of the appellant to enter into a compromise. The decree of the Darul Khaza Court is also invalid and not binding on the appellant for the same reason. If all parties proceeded upon a basis that these were Dargah and Khankah properties and that basis is wiped out by the Government of the Nizam the parties to their position as heirs to the Matrooka property. The award and the decree by reason of evidence of facts discovered since the judgement and the decree of the Darul Khaza Court cannot be allowed to stand because the effect of the discovery of the facts is to make it "reasonably probable that the action will succeed. In *Birch v. Birch*(1) the Court of Appeal held that a judgment will be set aside on the ground of fraud if evidence of facts discovered since the judgment raise a reasonable probability of the success of the action. The principle can be stated in the words of Westbury, L.C. in *Rolfe v. Gregory*(2) "when the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse--of time, or generally speaking by anything done or omitted to be done so long as he, remains, without any fault of his own, in ignorance of the fraud that has been committed. This decision was referred to by the Calcutta High Court in *Biman Chandra Datta v. Promotha Nath Ghose*(3) where the dictum of Westbury, L.C. was restated by holding that where a plaintiff had

been kept from knowledge, by the defendant, of the circumstances constituting the fraud, the plaintiff could rely upon section 18 of the Limitation Act to escape from the bar of limitation. In the present case, it is apparent that until the year 1927 the appellant and the other parties were clearly kept out of the knowledge of the true character of the properties. Even after 1927 it cannot be said on the evidence on record that the appellant had any knowledge of the true character of the properties or ouster or adverse possession of Abdul Hai. The reasons are that Abdul Hai never alleged against the appellant and the other parties openly that he was enjoying the properties to the total exclusion of the appellant and the other brothers. Possession by one co-owner is not by itself adverse to other co-owners. On the contrary, possession by one co-owner is presumed to be the possession of all the co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present there is no case to evidence to support this conclusion. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

(1) 1902 Probate Division 131 (2) [18 64] 4 DeG. J.& S. 576 (3) I.L.R. 49 Cal. 886 Section 18 of the Limitation Act, 1908 provides that when a person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, the time limited for instituting a suit against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person affected thereby. In *Rahim boy v. Turner*(1) Lord Hobliouse said "When a man has committed a fraud and has got property thereby it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit". Therefore if the plaintiff desires to invoke the aid of section 18 of the Limitation Act he must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge, of his right to sue or of the title whereon it is founded. In the present case, he have with reasonable diligence discovered it. There was active properties were Matrooka and not Dargah and Khankah. When Abdul Hai got the properties released by reason of the decision of the Government of the Nizam in the year 1927 the properties became divisible among the appellant and his brothers and sisters. The existence of the right of the appellant was kept concealed by Abdul Hai. The appellant was not aware of the right nor could lie have with reasonable diligence discovered it. There was active concealment by Abdul Hai of the fact that the properties were not Dargah and Khankah having full knowledge of the fact. It was only in 1941 (1350 Fasli) that the appellant came to know of the Matrooka character of the properties. It was then that the appellant also came to know that Abdul Hai had kept the character of properties concealed from the parties and entirely misstated and misrepresented the character of the properties by mis- leadin the parties and obtaining by consent an award and a decree thereon without any contest.

The cause of action for partition of properties is said to be a perpetually recurring one" See *Monsharam Chak-ravarty & Ors. v. Gonesh Chandra Chakravarty & Ors.* (2). In Mohammedan Law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. The share,,, of heirs under Mohamedan Law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and bounds in

accordance with the specific share of each heir being already determined by the law.

(1) 20 I.A.1 (2) 17 C.W.N.521 In the present case the suit is for partition of properties which were by consent of parties treated as Dargah and Khankah but which were later discovered to be Matrooka properties in fact and therefore the declaration in the award and the decree on the award that those were Dargah and Khankah properties cannot stand and the entire partition is to be lie-opened by reason of fraud in the earlier proceedings.

In the present case, the overwhelming evidence is that because of the representation of Abdul Hai that he was the Sajjadanashen and the properties marked Exhibits B-1 to B- 10 were Dargah and Khankah properties, that all the parties treated the properties as Dargah and Khankah before the arbitrators and in the decree upon the award. The very fact that there was never any contest indicates that the compromise and settlement between the parties was on the basis that the properties were Dargah and Khankah. It was absolutely within the knowledge of Abdul Hai as to what the true character of the properties was. The other parties did not have any opportunity of knowing the same. Abdul Hai knew the real character, concealed the true character and suggested a different character and thereby mislead all the parties. Again, when Abdul Hai approached the Government of the Nizam and got the properties released by asserting that they were not Dargah and Khankah properties in the year 1927. Abdul Hai did not inform the same to any of the parties. The unmistakable intention of Abdul Hai all along was to enjoy the properties by stating these to be Dargah and Khankah. When the parties came to know the real character of the properties even then Abdul Hai was not willing to have partition. On these facts it is established that the fraud committed by Abdul Hai relates "to matters which prima facie would be a reason for setting the judgment aside". That is the statement of law in Halsbury's Laws of England, Third Edition, Volume 22, paragraph 1669 at page

790. For these reasons we accept the appeal and set aside the judgment of the High Court and restore the judgment and decree of the trial court. The appellant will be entitled to costs of this Court. The parties will pay and bear their own costs in the High Court.

G.C

Appeal allowed.