Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussammat Hayat-un-Nissa and others v. *Sayyid Muhammad Ali Khan, from the High Court of Judicature for the North-Western Provinces, Bengal; delivered 8th February* 1890.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

This suit relates to the immoveable estate of Wazir-un-Nissa, a Mahommedan lady, who died childless and intestate on the 26th October 1881. Her father, Ghulam Ali, died without male issue in the year 1838, leaving three widows, two of whom were childless. Besides the deceased, whose succession is now in dispute, Ghulam Ali had another daughter, Kulsum, married to Iradat Ali, there being one son of their marriage, who died in minority; and eventually Iradat Ali became entitled, as heir of his minor son, to his wife's share of her father's estate. After the death of Kulsum, Iradat Ali became the husband of Aswat-un-Nissa, one of the parties to this appeal.

The Appellants, Plaintiffs in the suit, are the female descendants of Basawan Ali, the maternal uncle of the deceased Wazir-un-Nissa. The

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Defendant in the suit, and Respondent in this appeal, is Muhammad Ali Khan, a collateral relative of the deceased in the ascendant line. The common ancestor of the parties was Karamat Said, whose younger son was father of Daud Ali, the father of the Respondent. The elder son of Karamat had two sons, Kasim, the father of Ghulam Ali already mentioned, and Farzand, who died without issue. The Appellants are Mahommedans, and so were Karamat and all his descendants, and the case must be decided according to the principles of Mahommedan law. But the rules of that law applicable respectively to Shia and Sunni succession are different; and, therefore, the true heirs of Wazir-un-Nissa can only be discovered by first ascertaining to which of these rival sects the deceased belonged at the time of her death. The Appellants allege that she was a Shia, the Respondent that she was a Sunni. It is admitted that, according to the Shia rule, the Appellants are her legal heirs; and it is also matter of admission that, according to the Sunni rule, the Respondent, being a paternal ascendant tracing his connection with the deceased through an unbroken line of males, is entitled to take her estate to the exclusion of the Appellants, whose relation to her is through a female. Whether the deceased was, in point of fact, a Shia or a Sunni, is the single issue presented for decision.

Wazir-un-Nissa was for many years the wife of Sayyid Hadji, a staunch member of the Shia sect, who died in the beginning of the year 1865. The case made by the Appellants in their pleadings and evidence is to the effect that Karamat and all his descendants were Shias; that Wazir-un-Nissa was the daughter of a Shia, and brought up as a Shia; that she married a husband of her own sect, and ever after his death continued to adhere to the faith and to practise the ceremonies of that sect. On the

other hand, the case presented in the Respondent's evidence is that Ghulam Ali and his daughter Wazir-un-Nissa were Sunnis; that she was under the necessity of suppressing her true faith during the subsistence of her marriage, and of conforming outwardly to that of her husband; and that, on his decease, she resumed observance of the rites peculiar to the Sunni sect, and lived and died a member of it.

Upon all points material to the issue thus raised, with one or two exceptions, the oral evidence adduced by the parties is in direct conflict. There is evidence of a more reliable character, which may be used to test the value of the oral testimony, but even that evidence is not wholly consistent. The onus of proving that the deceased was a Shia rests in the first instance with the Appellants, because they are seeking to eject the Respondent, who is in possession, and has been duly registered as owner in the books of the Revenue authorities. The Subordinate Judge gave decree for the Appellants in terms of their plaint, but his decision was reversed on appeal by the High Court, consisting of Chief Justice Petheram and Mr. Justice Mahmood, who dismissed the suit, with costs. In his elaborate opinion the Subordinate Judge rests his judgment mainly on the evidence of the Appellants' witnesses. He refers by name to two of these, whom he describes as respectable and literate men, viz., Mirsa Abid Ali Beg, the Subordinate Judge of Mainpuri, and Maulvi Tafazzul Husain, the Pesh Imaum of the Shias, by whom prayers are read to the congregation. There can be no reason to doubt that the learned Judge rightly describes the character of these witnesses, but the first of them does not state to which sect Wazir-un-Nissa belonged; and the second, although he was acquainted with her husband, did not know Wazir-un-Nissa, and his belief that she

was a Shia was derived from "women of his brotherhood." On the other hand, the learned Judges of the High Court placed little reliance upon the statements of witnesses to the effect that the deceased was a Shia or a Sunni, being of opinion that certain facts, as to which there is no conflict of testimony, were sufficient, when taken in connection with the written evidence, to indicate that Wazir-un-Nissa, although she appeared to be a Shia during her married life, was in reality a Sunni.

The oral evidence is not only contradictory but vague, and it is obvious that the bulk of the witnesses speak with little knowledge or from hearsay. But one part of it which is not open to that observation, is unquestionably favourable to the Respondent's case. It shows that, after her husband's death, Wazir-un-Nissa made a journey to Ajmere, in order to visit a Sunni shrine, in the company of a 'pir,' or spiritual guide of the Sunni sect, whose office and its functions are unknown among the Shias. It also shows that on her way to Ajmere the deceased partook of the holy meals, which are intended for Sunnis, in the house of the pir. These facts were hardly disputed in the argument addressed to us for the Appellants; but the Subordinate Judge, who is conversant with the religious customs of both sects, disposes of them by the observation, that "thousands of Hindus "and Mahommedans, both Shias and Sunnis, "especially women who are not acquainted with "their religion, visit the shrine without changing "their creed." The learned Judge makes no reference to the length of the pilgrimage, or to the companionship in which it was made. Mr. Justice Mahmood, who has no less knowledge of Mahommedan sects, says that the fact of the deceased having availed herself of the pious services of a pir, implies a state of things which has no existence

among the Shias, and that "it may safely be "asserted that, if Wazir-un-Nissa had been a "Shia, she would never have gone to Ajmere as "she did." The opinions thus expressed by the learned Judges are not necessarily inconsistent. According to that of the Subordinate Judge, the deceased, being a Shia, might very well have visited the Ajmere shrine if she was a woman unacquainted with the distinctive tenets of her sect; but he does not go so far as to say that she would, even in that case, have resorted to the ministrations of a Sunni pir. In any aspect of them, the facts create an inference adverse to the Appellants. The most favourable inference of which they are susceptible is, that Wazir-un-Nisssa, after her husband's death, did that which would naturally be expected of a devout Sunni; but that she might possibly have acted as she did, if she was an ignorant professor of Shia principles. On the other hand, if the opinion of Mr. Justice Mahmood be taken as correct upon this point (and there is nothing in the opinion of the Subordinate Judge which necessarily controverts it), these facts show that at the time of her pilgrimage Wazir-un-Nissa professed her adherence to the Sunni faith. There is also oral evidence, not so clear or reliable as that which relates to the Ajmere pilgrimage, but tending in the same direction, to the effect that the deceased, during her widowhood, regularly observed the eleventh day of each month, and held Maulud Sharif meetings in her house, these being admittedly Sunni rites.

The facts proved, with respect to the religious observances of the deceased Wazir-un-Nissa after her husband's death, all support the conclusion that she was a Sunni at the time of her own decease. It is, however, possible that these circumstances might be explained away, and, at all

events, the evidence in support of some of them, which is not without contradiction, would be materially weakened if it were established that her father was a Shia, in which case there would be a very strong presumption that she was educated in his faith, and continued in it until her marriage. That fact, if proved, might cast upon the Respondent the onus of showing that on the dissolution of her marriage, she left the Shia and joined the Sunni sect. It is therefore necessary to refer to the period antecedent to her widowhood, and to the evidence which bears upon it. The oral testimony as to the sect of her father, Ghulam Ali, is vague, and directly conflicting; and the written evidence, which is not free from conflict, becomes the only reliable test of the truth of the statements made by witnesses on the one side or the other.

Their Lordships do not attach much weight to the litigations in 1805 and 1810, between Kasim, the paternal grandfather of Wazir-un-Nissa, and his brother, Farzand, with respect to the succession to their father. In the first of them Kasim founded on a deed of gift from his father, which Farzand alleged to be invalid; and the question of its validity was referred by the Sudder Judge to the kazi and the muftis of his Court, who returned an opinion that the gift was bad. The judgment of the Court went in favour of Kasim, upon grounds which did not involve any question as to the validity of the deed. In the second of them, which raised the same controversy, the Court merely repeated its former judgment. It is admitted that the opinion of the kazi and muftis was founded upon a principle peculiar to Sunni law, which denies effect to a gift of lands in which the shares of the donees are not specially defined. The Respondent relies upon the terms of that opinion as evidencing the agreement of the parties to

the suit that their father, Shah Ali, was a Sunni. But it must be kept in view that, at the date of these proceedings, the only course of succession recognized by the Native Courts was that of the Sunnis, which had been the general law of the country from the time when it first came under Mahommedan rule; and it is by no means certain that the Sudder Court, or litigants before it, always paid regard to, or understood their rights under the Shia law.

The observation just made does not apply to the state of the law in 1838, when the estate of Ghulam Ali was divided. Long before that time the supremacy of Sunni law had disappeared, and it must have been generally known that the Shia rule governed the succession of Shias, and the Sunni rule that of Sunnis. If Ghulam Ali was a Shia, his two childless widows had no right of inheritance, and were only entitled to maintenance from his estate. If he was a Sunni, then these widows were proper heirs, entitled to a share of his estate along with his other representatives, who were the same according to the rule of either sect. That Ghulam Ali's succession was treated by all parties interested as that of a Sunni, and that his childless widows received the shares which the Sunni law allots to them, appears to be established by the evidence. There is in process an attested copy of the official report made to the Collector of Revenue on the occasion of Ghulam Ali's death, in which it is stated that these two widows, along with the two daughters of the deceased, Kulsum and Wazir-un-Nissa, and their mother, were his heirs at law. Vilayat Husain, a witness for the Appellants, states that "Husaini Begum, wife of "Ghulam Ali Khan, also received a twenty-"fourth share out of her husband's property; "other wives also received shares in the same

" proportion." Now it is significant that Husaini was one of the childless wives, and that one twenty-fourth is the exact proportion to which each of the three widows was entitled in terms of Sunni law. That each of the widows got that share of her husband's estate is not contradicted, but two of the Appellants' witnesses allege that they did not inherit it, and that it was given them in compromise of their claim of dower under the Shia law. On the face of it the statement is improbable, and it is disproved by the written evidence. There is a sale deed, dated the 11th July 1877, by Kulsum, one of the childless widows, by which she made over to Sheikh Imam-ud-din her interest in property " held conjointly " with Sayyad Iradat Ali, Abid Ali, and Mussumat " Wazir-un-Nissa, muafi-holders, of which the " 24th share belongs to me, as inherited from " my husband, and up to this moment I am in " possession thereof." That was followed in September 1877 by a pre-emption suit, at the instance of Iradat Ali, which he was entitled to bring, as in right of his minor son, on the ground that the interest sold by Kulsum came to her by inheritance from her husband, Ghulam Ali. There would have been no pretext for such a claim, if Kulsum had acquired her share by purchase, and not by inheritance. An ingenious argument was addressed to us by the Appellants' Counsel for the purpose of showing that the deed of sale and the copy plaint were not duly filed, and were not proved to be genuine; but both documents have been transmitted as part of the record in this appeal, and were founded on, in the judgment of the High Court. Besides, the fact that such a suit was brought is elicited by the Appellants themselves on cross-examination. In these circumstances it is impossible to reject the documents *quantum valeant*, and it is obvious that, if the Appellants meant to discredit them,

Iradat Ali, who is husband of one of them, ought to have been called as a witness.

The fact that Ghulam Ali's succession was, immediately after his decease, treated as that of a Sunni by all parties interested, who were also those most nearly connected with him by ties of blood or affinity, would be well nigh conclusive, if it stood alone, as to the sect of which he was a member; and, in the absence of other evidence, would naturally lead to the conclusion that, before her marriage, Wazir-un-Nissa was also a Sunni. But the Appellants rely upon a judicial statement made on behalf of Wazir-un-Nissa herself, in 1864, as evidencing the contrary. In the beginning of that year, Daud Ali, the Respondent's father, brought a suit for redemption of a mortgage granted by Farzand, his own cousin, and paternal uncle of Ghulam Ali. In that suit Iradat Ali and the deceased Wazir-un-Nissa intervened and claimed the right of reversion, on the ground that they, and not Daud Ali, were the legal heirs of the mortgagor, under the rules of the Imamia, which is the Shia sect. The rights of the parties claiming the reversion did not depend upon their own religion, but upon that of Farzand the mortgagor; but in the written statement lodged for them it was broadly averred that not only Farzand, but all the parties to the suit, belonged to the Imamia sect. In answer to that averment Daud Ali stated that "although the "parties belong to the Imamia sect, yet in the "family of the parties the distribution of in-"heritance takes place according to the rules "of the Sunni sect, and the same are still acted "upon."

Had Daud Ali contented himself with the admission that Farzand was a Shia, his statement would have been sufficient for the purposes of the suit. But he does not dispute the

allegation that the parties to the suit, including Wazir-un-Nissa, were Shias. If the assertion made by the interveners had been deliberately sanctioned by Wazir-un-Nissa, it would prove her to be a Shia at the time when it was made, and might also suggest the inference that she had been brought up as a member of the Shia sect. But there is no evidence to show that Wazir-un-Nissa personally authorized the statement which was made on her behalf. The probability is that it was made by Iradat Ali, either at his own hand and for his own purposes, or with the authority of her husband. The latter was alive at the time, and she was outwardly at least, conforming to his religion, which was undoubtedly that of a Shia. It has already been noticed that Iradat Ali must be taken to have admitted, in 1838, against the interest of his family, which was virtually his own interest, that Ghulam Ali was a Sunni and that begets a presumption that his daughter was also a Sunni until the time of her marriage. In the absence of any explanation from Iradat Ali, it cannot be assumed that the statement made in 1864 was meant to contradict that inference, or to go beyond the assertion that at the time when it was made Wazir-un-Nissa was a Shia.

In these circumstances, their Lordships have come to the conclusion that the evidence applicable to the period preceding the death of her husband tends, though not strongly, to the inference that, from her birth until her marriage, Wazir-un-Nissa was a Sunni. It is not matter of dispute that, during the whole period of her married life, her outward acts and observances amounted to a profession of the Shia faith. What the just inference from these facts would have been, had she died on the same day as her husband, it is not necessary to consider. The evidence applicable to the period

following the dissolution of her marriage appears to their Lordships to point strongly to the conclusion that, throughout her widowhood, she was a member of the Sunni sect, having returned to the religion of her youth, and discarded that which was temporarily imposed upon her by the necessities of her position as a Shia wife. They will accordingly humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The Appellants must bear the costs of this appeal.