

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal, Saiyid Asghar Ali Khan, Appellant, v. Saiyid Kurshed Ali Khan, and Saiyid Muzaffar Ali Khan, Respondents, from the High Court of Judicature for the North-Western Province, Allahabad ; delivered 13th July 1899.*

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Present at the Hearing :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

SIR EDWARD FRY.

[*Delivered by Lord Watson.*]

This is a suit, brought in June 1892, by the Appellant, against his elder brother-german, the Respondent, Saiyid Kurshed Ali Khan, and his son, the Respondent Saiyid Muzaffar Ali Khan, for a share of the movable effects which are said to have belonged to their mother Mussamat Khair-un-nissa, who died in the year 1890, and to have passed, on that event, into the possession of the two Respondents. It is not disputed that, for some time before, and at the time of her death, Khair-un-nissa, lived at Jansath in the house of her son Kurshed Ali; and that he was only resident there occasionally, because he held the post of Tehsildar at Sikandra Rao, a place at a considerable distance from Jansath.

The Appellant produced, in support of his claim, a document No. 5 (A), which has become the central feature of the present case. It is headed, "List of the ornaments and articles

“ which were with Mussammat Khair-un-nissa,  
“ and in respect whereof she had made a will  
“ that they would be divided among her three  
“ sons.” The heading is followed by a detailed  
inventory of jewels and other articles, and an  
estimate of their respective values, amounting  
in all to Rs. 20,428. 9. 3. The document is not  
dated, but it purports to be signed by “ Saiyid  
“ Kurshed Ali.”

The third son of Khair-un-nissa predeceased  
her, leaving two sons, one of full age, named  
Saiyid Karbalai Husain, and another who was a  
minor.

The Appellant states in his evidence, that the  
document in question, with the signature  
attached, was given to him at Jansath, by  
Kurshed Ali, within a day or two after their  
mother's death, in order to inform him of what  
ornaments and other articles Khair-un-nissa  
died possessed, and in order that it might  
serve as the basis of a future settlement.

The defence pleaded by the Respondents  
mainly consisted in these two averments: (1)  
that Khair-un-nissa did not die possessed of any  
ornaments or other movable effects; and (2)  
that the alleged signature of Kurshed Ali to the  
document No. 5 (A) was a forgery.

The Appellant and the Respondent Kurshed  
Ali, being the surviving sons, were according to  
Mohammedan law, the legal heirs of Khair-un-  
nissa; and, if it had been true that she had  
directed a tripartite division among her three  
sons, the result might have been to bring in  
testamentary to share with the legal heirs in the  
distribution of her estate. But the Appellant  
does not now pretend, although he appears at  
one time to have asserted, that Khair-un-nissa  
ever made a will, and he obtained from the  
Subordinate Judge a decree, which in this  
Appeal he asks their Lordships to restore, for

one half of the movable effects specified in the document No. 5 (A). It seems to be the fair result of the evidence on both sides, that, at the time when he is said to have given the document to the Appellant, Kurshed Ali had never heard of his mother having made a will; and it is exceedingly strange that he should have invented and signed a statement to that effect, which was manifestly to his own prejudice. It is also shown, according to the evidence, including that of the Appellant, that there was enmity between the two brothers. The Appellant says that Kurshed Ali never settled any matter amicably without the intervention of the Court. Why, in these circumstances, he should have voluntarily given the Appellant a document admitting his liability, and the extent of it, has not been satisfactorily explained.

It is also a circumstance by no means favourable to the Appellant, that between the alleged giving of the document by Kurshed Ali, in June 1892, and the raising of the present suit, more than two years afterwards, nothing should have been heard of the List No. 5 (A). The Appellant states that, in the interval, he made repeated applications to Kurshed Ali for a settlement of his claim, but he does not venture to allege, that, on these occasions, any reference was made to the document No. 5 (A), which he now says was given him as the basis of settlement. Then in the plaint which he brought, there is no mention of the document, and, as is pointed out by the learned Judges of the High Court, it is not even included in the list of documents required by Section 59 of the Code of Civil Procedure.

Again, it is proved by trustworthy evidence, that Khair-un-Nissa made an application, under the Act XXXV. of 1858 for the appointment of a guardian to take charge of her property, which

was successfully resisted by her sons, Kurshed Ali and the Appellant. They then concurred in stating that Khair-un-nissa had "no property whatever." The circumstance might be of comparatively trivial importance, were it not that in this suit the Appellant has averred, and has endeavoured to prove that his mother was possessed of property, and that it has been found, by the concurrent judgments of both Courts, that he has failed in the proof. The Appellant does not now rely upon any evidence, to shew that Khair-un-nissa had effects of her own, except the signature of Kurshed Ali to the List No. 5 (A).

Their Lordships do not think it necessary to notice in detail the evidence led by the parties. In their opinion it is sufficient to advert to some of its salient features, and to the numerous contradictions which characterise it.

In his plaint the Appellant avers that Khair-un-nissa died "in the month of June 1890." The Appellant, when examined as a witness, states, "It strikes me that she died on 6th June 1890," and again, "I do not remember exactly "on what date Mussummat Khair-un-nissa died, "but I think she died on 6th June 1890." No other witness is examined as to the precise date of the old lady's decease, and it is impossible to fix the date with any degree of certainty. But it is proved, with tolerable certainty, that Kurshed Ali was at Sikandra Rao during the whole of June 1890, with the exception of the 1st and 2nd days of the month; and in that view, the account given by the Appellant as to his receiving the document No. 5 (A) at Jansath must be false.

The Appellant was not present when the document was signed. His witnesses, who consist chiefly of his own servants, state that they saw Kurshed Ali sign, that Karbalai Husain was there and saw him sign, but they differ in their

account of the other persons who were present on the occasion. Fida Husain, the Appellant's servant by whom they all say that the document signed by Kurshed Ali was written out, was not called as a witness. There was no reason why the Respondents should have called a witness who, in their view, had been actively participant in a forgery; but the omission of his name, without cause assigned, from the list of witnesses examined for the Appellant, is calculated to suggest that the Appellant did not expect to benefit by his testimony.

Kurshed Ali, himself, denies that he ever signed the document No. 5 (A). Karbalai Husain said,—“No list of goods left by Khair-un-nissa was prepared in my presence. Kurshed Ali Khan did not put his signature on the “list.” The same witness explains that he never saw the document in question, until it was sent to him by the Appellant in the year 1892 with the verbal intimation “that he (Asghar Ali Khan) was to bring a suit, and that I also “should bring a suit in respect of my share. “I allowed my karinda to bring a suit.” He further explains that he withdrew his suit, because, on receiving interrogatories, not knowing how to answer them, he applied to the Appellant, who simply informed him that the List No. 5 (A) had been written by Fida Husain. Upon the evidence of the witnesses examined for the Respondents, the observation is sufficient, that it is not reconcileable with the testimony of the Appellant's witnesses who speak to the signature of the list by Kurshed Ali.

The Subordinate Judge of Saharanpur delivered his judgment and decree on the 26th April 1893. He, in the first place, came to the conclusion that, on the assumption that Khair-un-nissa died on the date sworn to by the

Appellant, it was clear that Kurshed Ali was not at Jansath on the 7th June, the day on which the Appellant says that he signed the list. In the second place, the learned Judge rejects the conclusion that, apart from the List No. 5 (A), there was evidence to show that, at the time of her death, Khair-un-Nissa had the assets described in the plaint. Then the learned Judge at once proceeds to give the Appellant decree for recovery of one-half of the ornaments and other articles specified in the List No. 5 (A); and alternatively, in the event of the Respondent not giving up these articles to the Court for partition, within 15 days, for the sum of Rs. 10,214. 3. 7½, being one-half of their value as estimated in the said list.

The decree was based upon the assumption, (1), that the signature of the Respondent, Kurshed Ali, to the document No. 5 (A) was genuine, (2), that the document proved that the ornaments and other articles specified came into the possession of Kurshed Ali upon the death of his mother, and (3), that there was "no evidence of any bequest" by the deceased. The reasons which the learned Judge assigns for his decision are brief, and by no means satisfactory. He infers, with good reason, that the Appellant was mistaken as to the date of his mother's death, and then proceeds, without explaining why, to state:—"Under these circumstances I am persuaded to think that Mussummat Khair-un-nissa died in May 1890, when Kurshed Ali was in Jansath, and it was then that Kurshed Ali Khan had put down his signature on the list alluded to above."

The belief thus expressed by the learned Judge appears, so far as their Lordships can discern, to rest, not upon trustworthy evidence, but upon the merest conjecture. In confirmation of it, he

refers to five of the Appellants witnesses, who swore that they saw Kurshed Ali sign, and then observes, with little relevancy—“It is in the presence of such men that “an act like that ascribed to Kurshed Ali Khan “is done. It was impossible for the Plaintiff to “bring witnesses from Paris or Washington to “see Kurshed Ali sign.” The impossibility may be granted, and the preceding observation might have been legitimate, if on the whole evidence, it had appeared that the testimony of the witnesses to whom the learned Judge refers, was probable, consistent and uncontradicted. The very reverse is the case. It is true that the learned Judge rejects the testimony of Karbalai Husain, upon the ground that he withdrew the suit which he had brought for a share of his grandmother’s property, founded on the document No. 5 (A), which was given to him for that purpose by the Appellant. But he takes no notice whatever either of the fact that Khair-un-nissa did not make a will, which was the sole ground of Karbalai Husain’s claim, or of the improbabilities of the Appellant’s case, and of the contradictions in which the evidence abounds. In fairness to the learned Judge it ought to be added that his opinion was confirmed by a comparison of the signature impeached, with admittedly genuine signatures of Kurshed Ali. But the same comparison was made by the Judges of the High Court, with the aid of a magnifying glass, which disclosed discrepancies in the writing, which strongly suggested, if they did not absolutely prove, that the alleged signature of Kurshed Ali Khan to the document No. 5 (A) was a forgery.

The case was carried, by Appeal, to the High Court of the North-Western Provinces; and, on the 23rd November 1895, Banerji and Aikman

JJ., as might have been anticipated, reversed the decision of the Subordinate Judge, and dismissed the Appellant's suit, with costs in both Courts. Their Lordships refer to, and do not think it necessary to repeat the reasons assigned by the learned Judges, in which they unhesitatingly concur.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from. The Appellant must pay to the Respondents their costs of this Appeal.

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