The holding of religious opinion is a matter of personal faith, and ordinarily it may not be easy to determine what the nature of that faith may be, yet in a case like the present, where the question lies between two sects so sharply divided in ritual and observances, performance of prayers, and public declarations of faith as the Sunni and the Shia, it is readily capable of being determined by definite evidence of action, conduct, and observance.

[Case Brief] H.H. Mir Abdul Hussain Khan vs Mussammat Bibi Sona Dero

Case name	H.H. Mir Abdul Hussain Khan vs Mussammat Bibi Sona Dero
Citation	(1918) 20 BOMLR 528
Court	The Hon'ble Bombay High Court
Bench	Lordships W Phillimore, Bart, Buckmaster, J Edge, A. Ali
Decided on	30 October, 1917
Relevant Act/Sections	Section 26 of the Bombay Regulation of 1827, Mohammedan Law

- **Brief Facts and Procedural History:-**

1. On the **30th January, 1907**, Mir Hussein Ali Khan of Talpur died intestate, leaving neither widow nor child. His nearest surviving relations were the plaintiff, Abdul Hussein, the son of his brother by the half-blood, one sister, the first defendant upon the record, and his sister's son, who is the second defendant. His estate, consisting exclusively of personal property, and largely of what we should call personal effects, is of great value, and doubtless also, from the character of many of the articles, of great personal interest to his relations.
2. The deceased was a member of the family of Talpur Mirs of Sind, who were a branch of the large Baluchi tribe. He was a Mahomedan, and, if Mahomedan law governed the question, the rights of the parties would vary accordingly whether the deceased was a member of the Shia or of the Sunni sect. If the former, the sister would inherit the whole estate; if the latter, the plaintiff would be entitled to a half.
3. There remains therefore for consideration only the question of custom, and upon this the Court of First Instance and the Court of Appeal have differed, the District Court holding that the custom was established, and the Court of the Judicial Commissioner of Sind deciding that it was not. It is from this latter decision that the present appeal proceeds

- **Issue before the Court:**

1. Whether the rights of inheritance are to be determined according to Mahomedan law or not?
2. Whether the custom upon which the appellant relies wherein in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals, was proved?

- **Ratio of the Court:**

1. The plaintiff alleges, however, that the rights of inheritance are not to be determined according to Mahomedan law, but that they are regulated by a custom well-known and distinctly ascertained, by which, notwithstanding the provisions of the Koran, women are excluded from any share in the inheritance of a paternal relation, he further alleges that, if this contention does not prevail, the deceased was a Sunni and not a Shia, and that he is therefore entitled to the more limited rights to which reference has been made.
2. The Court stated that although the holding of religious opinion is a matter of personal faith, and ordinarily it may not be easy to determine what the nature of that faith may be, yet in a case like the present, where the question lies between two sects so sharply divided in ritual and observances, performance of prayers, and public declarations of faith as the Sunni and the Shia, it is readily capable of being determined by definite evidence of action, conduct, and observance. For reasons which their Lordships consider as conclusive, both the Judicial Commissioner, before whom the case was first tried, sitting as District Judge, and the Court of the Judicial Commissioner of Sind, before whom the appeal was heard, have decided that the deceased was of the Shia persuasion, and with this finding their Lordships see no reason to interfere.
3. Further, the appellant alleges that, by Section 26 of the Bombay Regulation of 1827, which has by notice been extended to the District of Sind, a presumption ought to be made in favour of the existence of a usage or custom where it is known that that usage or custom is prevalent. He basis this argument upon the words of the Regulation, which are as follows :
    a. *The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone.*

4. The Lordships cannot accept this view relying on Daya Ram v. Sohel Singh (1908) P.R, No. 110 where it was held that there is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply.

5. It is therefore incumbent upon the plaintiff to allege and prove the custom on which he relies, and it becomes important to consider the nature and extent of the proof required. Also pointed out **in Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar (1872) 14 M. I.A. 570, 585** that it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. It is therefore necessary to define what is the custom, and then examine the evidence to see if it satisfies the conditions so laid down.

6. Regarding the second issue, the Lordships think that this evidence fails to satisfy the necessary standard of proof and that upon this point the judgment of the High Court must be accepted. *In every case of this kind the burden of proof lies heavily upon the plaintiff, and though his evidence may consist of a number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists.*

- **Decision Held:**

The ground upon which their Lordships base their judgment does not include any such considerations; it is their opinion that, although there is much reason in history for the custom alleged, and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mahomedan law to a devolution determined by a family custom, and they will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.