Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Fuzul Karim and another v. *Haji Mowla Buksh and others, from the High Court of Judicature at Fort William in Bengal; delivered 21st February* 1891.

Present:

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

[*Delivered by Lord Hobhouse.*]

When the plaint in this suit was filed the Plaintiffs were the two present Appellants and one Hafiz Mowla Buksh. The last-named Plaintiff was the Imam and Moazzin of a mosque in Tajpore, and the two others were Mutwalis of the same mosque. The Defendants were 12 persons who worshipped at the mosque. The plaint alleged that the Defendants, being dissatisfied with certain variations in the ceremonial which the Imam had introduced, interfered with his performance of the service, and claimed to conduct the service in their own way, and otherwise misbehaved themselves.

The relief prayed was as follows:—

"(*a*) That it be declared by the Court that the Plaintiff No. 1 is Imam and Moazzin of the musjid at Tajpore, pergunnah Saresa, and that Plaintiffs Nos. 2 and 3 are Matwalis thereof; and that as Imam and Matwalis the Plaintiffs have a right, as they have all along hitherto had, to deliver the Friday oration and perform the daily prayers before the congregation from the pulpit and mosulla.

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"(*b*) That the Defendants have no right to interfere therewith, nor any to do the acts referred to in paragraph 5 of the plaint.

"(*c*) That it be declared that the Defendants, as a sect of Mussulmans, have simply the right to visit the musjid at the time of prayer only, and to say prayers, led by Plaintiff No. 1; otherwise they have no right to visit the musjid with any other intention.

"(*d*) That it be declared by the Court that in case the Defendants interfere with the rights of the Plaintiffs as Imam and Matwalis, and do the acts referred to in paragraph 5 of the plaint, the Plaintiffs have the authority to turn out all the Defendants, or any one who may do such acts, from the musjid."

The suit was therefore in the first instance a declaratory suit, but the plaint was amended by adding a prayer for substantive relief as follows:—

"That the Defendants may be prevented from interfering in any way in the Moazzin's right and the Imam's right enjoyed by the Plaintiff No. 1, and in the towliat right of the Plaintiffs Nos. 2 and 3, and that a prohibitory order may be issued to the Defendants, to the effect that the Defendants must not do any acts mentioned in paragraphs 4 and 5 of the plaint, within the mosque of the Plaintiff, nor should the Defendants enter the mosque of the Plaintiffs with that object."

In their written statement the Defendants did not deny that Hafiz Mowla Buksh had been Imam and Moazzin for 25 years, nor that the other Plaintiffs acted as Mutwalis, but they defended themselves by alleging in effect that the Plaintiffs had forfeited their offices by reason of heresy. The two material pleas are as follows:—

"Prior to this, the Plaintiff No. 1 was Moazzin and led people to prayer. But he has renounced his Hanifi religion and embraced the Wahabi religion. That being so, the Plaintiff No. 1 can by no means now, according to Mahomedan law and rule, claim to be Imam and Moazzin, and therefore he has no right to bring the suit.

"The Plaintiffs Nos. 2 and 3 are, on their own showing, not Matwalis. They are certainly sons of the deceased Matwali Kazi Ramizuddin. But they can have, in Mahomedan law, no right to the matwaliship simply because they are sons (of the deceased Matwali). Besides this, the Plaintiffs Nos. 2

and 3 have renounced their previous and paternal religion and joined the Wahabi sect. That being so, they have no right whatever to the management of the disputed musjid."

The Plaintiffs filed what is called "a refutation" of the Defendants' statements. It is not in the Record, and is probably immaterial except as a general denial of the matter urged in defence.

In the months of August, September, and November 1884, three petitions were presented by eight of the Defendants, stating their regret at having been persuaded to take part against the Plaintiffs, and their wish that the Plaintiffs might obtain the decree they prayed for. It does not appear that any order was made for stay of proceedings against these converted Defendants, but by the time the suit reached the High Court the eight names had disappeared from the proceedings.

In the course of taking the evidence it became clear what was the real quarrel between the parties. The general charge against the Plaintiffs of having become Wahabis (whatever the Defendants may have meant by it) resolved itself into this, that they had adopted two observances which the Defendants think to be wrong; one being the pronunciation of the word Amen in a loud instead of a low voice, and the other the performance of Rafadain, which is a ceremonial gesture of raising the hands to the ears at a particular point of the service.

All the parties are, or claim to be, Sunni Mahomedans. Hafiz Mowla Buksh says, "I obey equally all the four Imams," which is the mark of the Sunni school. Omed Ali, the first Defendant, says, "Even now I would say prayers "under the leadership of Mowla Buksh if he "only gave up uttering 'Amen' loudly and "raising his hands to his ears. . . . I call

" him a Wahabi because he utters ' Amen ' and " raises his hands, and says prayers standing " with the two legs apart, and he crosses the " hands on the breast." It is clear that the Defendants make no charge of false or heretical doctrine, except so far as it is to be inferred from the offending ceremonial; and it is the two first acts of worship mentioned by Omed Ali to which the whole evidence and argument has been addressed. The two last are not mentioned again. The question is whether the use of the loud Amen and of Rafadain is inconsistent with Hafiz Mowla Buksh's retention of the office of Imam and Moazzin.

That it is consistent with his being a sound Sunni is clear, for both practices are prescribed by one or more of the four Imams whom the Sunnis follow. But the Defendants allege that the mosque was built by Sunnis of the school of Abu Hanifa, who, they say, prescribes the low-toned Amen and the omission of Rafadain. Thence they infer, first, that no person who is not an Hanifi can properly be Imam, Moazzin, or Mutwali of the mosque; and, secondly, that to use the loud Amen and Rafadain is inconsistent with being an Hanifi. The Plaintiffs deny both these inferences.

Their Lordships have been careful to state the precise constitution and nature of the suit, because it appears to them that it has not always been sufficiently borne in mind. The next step is to see how it has been judicially dealt with.

After a decision by the Moonsiff that he had no jurisdiction to deal with the matter, which was reversed on appeal, the case was heard by the then Moonsiff in December 1884. He took the views of the Defendants as regards the office of Imam and Moazzin, but he did not think that the Mutwalis were disqualified. The decree passed by him is as follows :—

"That the Plaintiffs Nos. 2 and 3 do continue to remain Matwalis of the musjid; that the Plaintiff No. 1 cannot be considered as Imam and Moazzin as against the contending Defendants, nor are the Defendants bound to follow his leadership in prayer; that the Defendants have every right to say prayers in the musjid in their own way behind their own Imam."

On appeal by the Plaintiffs the case was heard by the Additional Subordinate Judge in March 1886. It is important to see precisely what his findings are, because, so far as they relate to matters of fact, no appeal from them lay to the High Court. The material findings appear to their Lordships to be in substance as follows:—

(*a*) The Plaintiffs belong to a school known as Amil-bil-Hadis or Ahil-Hadis.

(*b*) The Amil-bil-Hadis are Mahomedans, Sunnis, and members of the Sunnat Jamait.

(*c*) There is no authority to say that an Amil-bil-Hadis cannot lead the prayer of an Hanifi.

(*d*) The only difference is that the Amil-bil-Hadis perform Rafadain and say Amen in a loud tone.

(*e*) That difference is no ground for a religious objection on the part of an Hanifi to pray behind an Amil-bil-Hadis.

(*f*) The Amil-bil-Hadis follow the authority of the kias and the ijma, if not inconsistent with the Koran and Hadis, in which they do what every Mahomedan should do.

(*g*) It is doubtful whether the mosque is an Hanifi mosque.

(*h*) Granting that the founder was an Hanifi, still there is nothing to show that he prohibited an Amil-bil-Hadis from praying in the mosque or acting as Imam therein.

(*i*) The Defendants are not entitled to pray behind an Imam of their own selection.

From these findings the necessary conclusions were that Hafiz Mowla Buksh was not disqualified to be Imam; that he was entitled to protection against the Defendants, and that the Moonsiff's decree must be reversed. This was done, and a decree made for the Plaintiffs according to the prayer of the plaint, with costs of suit.

The Defendants then appealed to the High Court, and the case was heard before a Division Bench in December 1887. The Court discharged the decree of the Subordinate Judge and restored that of the Moonsiff. They considered that the Subordinate Judge had addressed himself to matters which were altogether irrelevant, and had nothing to do with the suit, viz., whether it was lawful for Hanifis to pray behind Amil-bil-Hadis, whether Amil-bil-Hadis are respectable members of society, and whether it is lawful for them to perform the duties of an Imam. Their ground of decision is thus stated :—

"The only questions we have to decide are, whether these Plaintiffs, who were appointed by members of the Hanifi sect, and who performed the duties of the mosque in accordance with the observances and ceremonies of that sect for twenty years, can now turn round and claim to have the right to discharge their duties in a different manner. No authority for any such proposition has been brought to our knowledge. The learned Counsel who argued the case on behalf of the Plaintiffs declined to enter into the matter, being one of great difficulty. *Primâ facie*, it appears to us that the Imam or Matwali should have performed his duties in the customary manner. It is for them to justify the change, and they have been unable to do so."

From that decree the present appeal is brought. Hafiz Mowla Buksh died before the decision by the High Court, but leave was given to his two co-Plaintiffs to prosecute the appeal, though their own title as Mutwalis was affirmed by all the Courts. They have however a sufficient interest in maintaining the views of their school or party in the mosque, especially as it is stated in evidence that they appoint the

Imam. Their Lordships must decide the points raised in the suit just as if Hafiz Mowla Buksh were the Appellant. The Defendants, now three in number, have not appeared. It is very unfortunate that such a case should be decided on an *ex-parte* argument.

It is not apparent from the judgment of the High Court on what ground they considered that a second appeal was sustainable, or, in other words, what was the law, or usage having the force of law, which the Subordinate Judge had decided erroneously, or had failed to decide. The most obvious meaning of their brief judgment is that their decision is rested entirely on the peculiar constitution or trusts of the Tajpore mosque. But that is a question of pure fact, at least in this case where no written evidence is forthcoming; and the findings of the Subordinate Judge are conclusive in the High Court, and also in this tribunal, seeing that the Defendants have not obtained any leave to appeal to Her Majesty in Council from his decree. His findings on this point, as stated above, (*g*) and (*h*), are fatal to the Defendants' case, but the High Court appear to have paid no attention to them.

Though it is not competent to their Lordships on this appeal to go behind the Subordinate Judge's findings of fact, they think it right to say that, for the purpose of examining the case from other points of view, it has been their duty to study the whole of the evidence, and that they entirely agree with the Subordinate Judge that there is no evidence whatever that the mosque was intended for Hanifis only, and not for all Sunnis or for all Mahomedans, or that an Amil-bil-Hadis is prohibited by its constitution from being its Imam.

The judgment however may mean that there is some rule of law to the effect that when public worship has been performed in a certain

way for 20 years, there cannot be any variance from that way, insomuch that the officiating minister who is guilty of a variance is *ipso facto* disqualified for his office. If that is the meaning of the judgment, their Lordships hold that it is not well founded in law. Indeed it is not well founded in fact, because general uniformity of practice in the worship at this mosque is neither proved nor alleged, though the particular practices now objected to are comparatively recent. But passing that by, it cannot be that an Imam should be so bound by his own or his predecessor's previous practice in worship that he cannot make the slightest variation from it in gesture, intonation, or otherwise, without committing an offence. Even a code of ritual can hardly be so minute as absolutely to exclude all individual peculiarity or discretion; and here there is no code of ritual at all. If the principle above stated were allowed, it would follow that the practice of a single Imam (for Hafiz Mowla Buksh had been in office for 20 years before the dispute began) might be so stereotyped as to become the constitution of the mosque, and that a single member of the congregation might, against the wishes of the rest, insist that no variation however innocent or however minute should be made. The question in each case of dispute must be as to the magnitude and importance of the alleged departure. To that question the Subordinate Judge has very properly addressed himself, but the High Court have set aside all his findings as irrelevant, and have declined to examine the points to which the pleadings, the evidence, and the judgments of the two first Courts are mainly addressed.

Their Lordships cannot follow this course, because the judgment in favour of the Defendants might be rested, as the Moonsiff did in fact rest it, on more general grounds than the private

constitution of this mosque, or the obligations resulting from the practice which has prevailed in it, and those grounds must be examined.

Before quitting this point mention should be made of a case cited from the Allahabad Reports, Vol. 12, p. 494, Ata-Ullah *v.* Azim-Ullah, in which the High Court of that province held that a mosque, being dedicated to God, is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. If that principle were accepted, it would be decisive of the present case, so far as it rests on the judgment of the High Court. But it has not been propounded by Mr. Doyne, nor do the facts of this case properly raise the question, because it does not appear that this mosque ever was intended to be appropriated to any particular sect. Their Lordships therefore express no opinion upon it.

Turning to the question most discussed in the two lower Courts, it appears to be this,—whether the introduction of the loud Amen and Rafadain (which is the offence charged against Hafiz Mowla Buksh, and which is the reason why he calls himself Amil-bil-Hadis and his opponents call him Wahabi) shows such a change of tenets, or is in itself such an important departure from custom, as to disqualify the Imam from acting in a mosque where those ceremonies had not previously been used. If this question is to be answered in the affirmative, it must be on the ground either of general express rule of Mahomedan law, or of the growth of customs separating different schools in so marked a way that the followers of one school cannot properly worship with those of another.

As regards general law their Lordships have not been referred to any authoritative code of ritual for Sunnis, such as is the statutory

rubric of the Church of England. In the Hedaya there appears to be a long chapter or book on Prayer, which would probably expound the views of Abu Hanifa, and those of his two principal disciples Abu Yusuf and Abdoolla Mohammed, as they were understood in the sixth century of the Hegira. But Mr. Hamilton, who was employed by Warren Hastings to translate the Hedaya, did not translate the book on Prayer, because it seemed to him that it could not afford any manner of assistance in decisions concerning matters of property. And so far as their Lordships have been informed there is no translation of it from the original Arabic ; certainly there is none into English. Nor has any text been produced from any source to show that one who follows Abu Hanifa does any wrong in performing ceremonies recommended by the other Sunni Imams, or thereby cuts himself off from communion with other followers of Hanifa. There have been two cases in the High Court of Allahabad in which disputes have arisen about the intonation of the word Amen. One has already been referred to on another point. The other, in Vol. 7 of Allahabad Reports, p. 461, was a criminal case, the Empress *v.* Ramzan, and the decision turned on the question whether those who said Amen aloud said it in an indecent way, and with intention to annoy the others. In both cases Mr. Justice Mahmood entered at length into the question how Amen should be pronounced. He states that though Hanifa recommends a low tone, the other three Imams recommend a loud tone, and gives it as his opinion that though it is imperative to say Amen, there is no authority to regulate the tone of voice. In the later of the two cases the First Court treated both the loud Amen and Rafadain as open to all Sunnis to practise. Their Lord-

ships cannot find that there is any general law on the point for Mahomedans, or for Sunnis, and must hold that there is none.

Their Lordships then come to inquire what is the usage among Sunni communities. That ground is completely covered by the findings of the Subordinate Judge, as above set forth, and if the questions are questions of fact his findings are conclusive. But their Lordships will not on an *ex parte* argument take it as concluded against the Defendants that this inquiry may not involve usage having the force of law. They have therefore thought it right to go into the evidence, with the result that they agree with the Subordinate Judge.

The Sunnis follow the four Imams, who appear to agree in placing the sources of their law in the following order:—1, *The Koran;* 2, *The Hadis*, or traditions handed down from the Prophet; 3, *Ijma*, or concordance among the followers; and 4, *Kias*, or private judgment. Beyond that the four differ in many details, including the loud Amen and Rafadain. No Imam can follow all four in everything. But the followers of any are equally orthodox Sunnis.

This statement, which is common in the text books, and is supported by the evidence of Nurul Hassan, is also illustrated strongly by the learned men of Delhi who have given evidence. A number of them, upwards of 30, framed a Fatwa in the year 1880, in which they appealed solemnly to their co-religionists not to quarrel about minor matters of difference, the tone of Amen and Rafadain being among them. Five of them were examined. One says he does not follow any one of the admitted Imams particularly, evidently meaning that he is at liberty to follow an eclectic process among them. Another says he follows all four, which must mean in essentials, for he cannot do so in many details, including those

now under consideration. A third says he follows all four, and the Hadis. A fourth says he follows Abu Hanifa; and yet he is a party to the Fatwa, which treats the tone of Amen and Rafadain as matters on which different courses may be followed with equal propriety.

Nurul Hassan is the Moonsiff before whom this case came in some of its earlier stages, and who would have tried it if the Plaintiffs had not prayed that it might be transferred to another Judge, because they wished to have his testimony. He is a learned man, who knows Arabic. He is of the Hanifi sect or school, uses the low Amen, and does not use Rafadain. He agrees with the Fatwa, and speaks highly of some of its signataries. He states that "those who do not "say the word Amen, and do not raise their "hands, can say their prayer behind those who "do the same." And he quotes a number of authorities to support his opinion.

Sheik Ahmedulla was one of the subscribers to the building of the mosque. He was the first witness called to support the Defendants. But he says that he himself prays behind an Amil-bil-Hadis and behind an Hanifi also. And having been to Mecca, he says that there "the followers of all four Imams say "prayers behind an Amil-bil-Hadis, and the "Amil-bil-Hadis say prayers behind the followers "of all four Imams." Also that "at Tajpore, "and in its neighbourhood, the Hanifis say "prayers behind an Amil-bil-Hadis."

What this witness says of Mecca accords with the statement of Mr. Justice Mahmood in The Empress *v.* Ramzan. He says that in the Kaaba all the four schools are at liberty to pray, from which he justly infers that the prayers of none are heterodox. And what the same witness says of Tajpore would seem to be confirmed by the observation that in this very mosque, where the congregation is said to be largely Hanifi,

it does not appear that a single one of the worshippers, except the Defendants who appealed to the High Court, objects to the way in which Hafiz Mowla Buksh conducted the service.

Against all this evidence of the opinions of learned and devout Mahomedans, and of the actual practice of Mahomedan worshippers, what is there on the other side? The evidence is an absolute blank. No book, no opinion, no practice of any community of worshippers is cited. There is no ground given to dissent from the findings of the Subordinate Judge, nor from his conclusion that the Plaintiffs were entitled to relief. In one point he has followed too closely the prayer of the plaint. Paragraph (*d*) asks for a declaration that the Plaintiffs have the authority to turn out the Defendants when they interfere. The Court ought not to make such a declaration. The Plaintiffs must rely on the prohibitory order or injunction for which they pray, and must enforce it, as they may be advised, in each case that arises. The High Court should have varied the Subordinate Judge's decree by refusing to grant the declaration asked by paragraph (*d*), and subject to that should have dismissed the Defendants' appeal, with costs. That is the decree which their Lordships will humbly advise Her Majesty to make now, in lieu of the decree of the High Court, which should be discharged. The Respondents must pay the costs of this appeal.