

(1885) 02 AHC CK 0009

Allahabad High Court

Case No: None

Amir Muhammad Khan

APPELLANT

Vs

Jafri Begam

RESPONDENT

Date of Decision: Feb. 10, 1885

Citation: (1885) ILR (All) 822

Hon'ble Judges: W. Comer Petheram, C.J; Straight, J; Oldfield, J; Mahmood, J; Brodhurst, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

W. Comer Petheram, C.J., Straight, Oldfield and Brodhurst, JJ.

Our answer to the first question referred to us in this case is in the affirmative, to the second question in the negative, and to the third question (as amended) also in the negative.

Mahmood, J.

2. In this case I agree generally in the answers given by the learned Chief Justice and my learned brethren to the three questions referred to the Full Bench; but I do not intend on this occasion to state the grounds upon which my conclusions are based. One reason why I refrain from doing so is, that one of the greatest difficulties in the way of the Courts established in British India, is the paucity of text-books upon Muhammadan Law written in English which are sufficiently accurate to be safe guides in the administration of those branches of that law which, by Section 24 of the Bengal Civil Courts Act (VI of 1871) we are bound to administer. The only means of information consists of books of reference which are either incomprehensive compilations or abbreviated translations, and, in some cases, translations of translations. Another difficulty is that the language of the highest Courts in India is not the language of the people, and consequently the vast majority of advocates who appear in those Courts are those who must speak English, and who, as a matter of fact, are not likely to refer to the original Arabic authorities. For these reasons, I

confess, I fully expected that the judgment of the Court would  have been reserved in such a case.

3. As the learned Chief Justice rightly observed during the argument, there is "no magic in Muhammadan Law." There is, of course, no magic in that system any more than in any other. The Muhammadan Law is only a part of the general system of jurisprudence, and whatever is true as a matter of general principle would be true of any particular legal system, worthy of the name, so long as its rules are accurately ascertained.

4. My difficulty in the present case does not arise from anything intrinsically abstruse in the three questions referred to the Full Bench, but from the fact that some of the highest tribunals in India have repeatedly expressed views upon the subject which, according to the conclusions arrived at by us to-day, directly contradict some of the principles of Muhammadan jurisprudence. I make this observation with due respect, and do so because it was for this reason only that my brother Straight and I made the reference. Speaking for myself, I should not otherwise have thought it necessary to refer the case to the Full Bench. And this being so, I should be sorry if anything said by me in this case merely added one more to the rulings to be found in the Reports; and I reserve the grounds of my conclusion, in the hope that I may, perhaps, be able to make my judgment of such a nature as might, in some measure, help to remove what I may respectfully call the existing cloud of judicial exposition upon these important questions. For this reason, I should have been glad to hear in the argument at the Bar some reference to the Arabic texts of the Muhammadan Law; but under the circumstances, and considering that the learned Chief Justice and my learned brethren have been anxious to deliver their judgments at once, the only course open to me is, that I must search out these texts for myself, and as that will require some time, I must, of necessity, reserve the reasons of my judgment till such time as the exigencies of the business of the Court allow.

Mahmood, J.

5. When this case was argued before the Full Bench, I mentioned the reasons why I did not on that occasion set forth the exact grounds upon which I concurred in the conclusion at which the learned Chief Justice and the rest of the Court had arrived. I was anxious, as I said then, to support my conclusions by citing original authorities of Muhammadan Law--a course which I considered especially necessary in view of the long conflict of decisions which exists in the Reports upon the subject to which this reference relates. The exigencies of the business of the Court have not allowed me, before now, to consult the original authorities of the Muhammadan Law to which I wished to refer, and it has therefore devolved upon me to deliver my judgment now, although the rest of the Bench have already delivered their judgments.

6. Before, however, citing the original authorities of the Muhammadan Law, I wish to consider briefly the various rulings to be found in the Reports, and which constitute the case-law upon the subject. I shall, in dealing with this part of the judgment, [828] refer only to the most important cases which have been cited, as in the order of reference I have already summarised nearly all the cases.

7. The first question referred to us does not appear to have arisen simply and directly in any case to be found in the Reports, though it formed a necessary step of the ratio decidendi of some of the rulings which have been cited, and in this sense it was discussed and decided. Under this class of cases, the first authorities to which I wish to refer are the case of *Wahidunnissa v. Shubrattun* 6 B.L.R. 54 and another case very similar in principle, namely, *Bazayet Hossein v. Dooli Chund* ILR Cal. 402. The first of these was decided by the Calcutta High Court, and the second by the Privy Council. The principle which they lay down is, that the creditors of a deceased Muhammadan cannot follow his estate into the hands of a bond fide transferee for valuable consideration. Their effect is best described in the words used by their Lordships of the Privy Council in the latter of the two cases to which I have referred. Their Lordships say: At that time, if Najmooddin were the legitimate son of the deceased--and it has now been decided that he was--he had the right to convey his own share of the inheritance, and was able to pass a good title to the alienee, notwithstanding any debts which might be due from his deceased father. For that position the case of *Wahidunnissa v. Shubrattun* 6 B.L.R. 54 was cited as an authority. In that case, the share of an heir was seized and sold in execution of a decree against the heir, in his individual, and not in his representative, capacity, and it was held that the purchaser had a right to hold the property against a creditor of the ancestor who had obtained a decree for the debt before the seizure in execution. In that case, the creditor was a widow of a deceased Muhammadan, and her claim was in respect of dower. The principle of that case is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personality."

8. Such being the effect of these cases, I am of opinion that the ruling of the Privy Council cannot be understood without holding that, upon the death of a Muhammadan owner, the inheritance vests immediately in his heirs, and is not suspended by reason of debts being due from the estate of the deceased. It is true that the present question was not then raised in an unmixed and direct form, for there were considerations as to third parties being bond fide transferees for value, which to some extent contributed to the decision, But no considerations arising from any doctrine of equity relating to "notice" and bond fide transferees for value, could render the title of a transferee from a Muhammadan heir valid, where such transfer was made before the liquidation of the ancestor's debts, and if such liquidation were the turning point of the devolution of the inheritance. The Privy Council ruling is therefore of a clear authority in support of my view, and indeed I may go the length of saying that no other view can reconcile the ruling with the

undoubted principles of law and equity in such cases. But a short time before the Privy Council delivered their judgment, the same question regarding the devolution of inheritance was raised, but again indirectly, in the Calcutta High Court in *Assamathem Nessa Bibi v. Roy Lutchmееput Sing* ILR Cal. 142. That was a Full Bench case in which two of the learned Judges dissented from the opinion of the majority. That opinion was stated by Garth, C.J., but it bears upon the second only of the points before us in the present case. The judgment of the minority was delivered by MABKBY, J., who considered the question of the devolution of Muhammadan inheritance as a necessary step to the conclusions at which he arrived. The learned Judge, relying upon certain passages in the Hedaya, held it to be clear that the estate of an intestate descends entire, together with all the debts due from and owing to the deceased; that it is therefore, to use a convenient expression adopted by lawyers, a "universal succession;" that "there ought, according to the Muhammadan Law, to be in every case of death something very similar to what we should call an administration of the estate by a Court of Justice;" that, under the strict Muhammadan Law, the personal liability of the individual heirs was "something quite distinct from the liability of the estate;" that it was unimportant to determine whether such personal liability was *proportione hereditaria* or *proportione emolument*; but that "the liability of the estate remained, if the creditors chose to resort to that remedy, until the debts had been completely liquidated." And pursuing this argument, the learned Judge went on to say: "If this be so, it follows, I think, that on the decease of a Muhammadan, neither his estate vested immediately in his heirs, nor did his heirs become immediately liable for his debts. Until the heirs came forward to take possession, the succession was vacant (*hereditas jacens*). But by a fiction the deceased owner was supposed during this interval to be represented by the estate itself (*quia creditum est hereditatem dominam esse et defuncti locum obtinere*). It is particularly to be observed, however, that it was the deceased owner, and not the heirs, who were thus represented *personae vicem sustinet non heredis futuri sed defuncti*)." This view was not adopted by the majority of the Court, though their judgment mainly proceeds upon another ground, to which I shall refer in dealing with the second point before us.

9. I now pass to the passages of the Hedaya upon which Markby, J., based this opinion. I have carefully considered them, and I have come to the conclusion that they do not substantiate the conclusions at which that learned Judge arrived. In the first place, it must be remembered that the work to which he was referring is merely a translation of a translation, leaving room for the remark of Mr. Almaric Rumsey, that it is "much to be desired that a new translation should be made of the Hedaya, this time from the original Arabic, and not from the intermediate Persian." I agree in the observation, especially as the English terms employed in Mr. Hamilton's translation are frequently not the equivalents of the original Arabic terms, and are not used with the degree of definiteness essential for a book on law. In the second

place, to use the words of Mr. Rumsey again, the law of inheritance is "a branch of jurisprudence which the Hedaya does not formally discuss, but only mentions incidentally here and there." Moreover--and this is the most important point--most of the passages relied upon by Markby, J., relate, not to substantive law, but to procedure, and in particular to the duties of the Kazi in matters connected with partition, compromise, composition, and other similar subjects; whilst some of the passages do not appear to me to apply to the question--I mean the passage in Vol. II of Mr. Hamilton's Hedaya, to be found at p. 599, which belongs to the chapter "Of bail in which two are concerned", and at pp. 530 and 539 of Vol. IV. The other passages in the Hedaya relied upon by Markby, J., I shall presently consider in discussing the second question referred to us.

10. I now proceed to cite the original authorities of Muhammadan law in support of my view. It is well known that the Muhammadan law of inheritance is based upon a passage in the fourth chapter of the Koran, which in Sale's translation is thus rendered: "God hath thus commanded you concerning your children: A male shall have as much as the share of two females, but if they be females only, and above two in number they shall have two-thirds part of what the deceased shall leave; and if there be but one, she shall have the half. And the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part. And if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath, and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath, and the debts be paid. They also shall have the fourth part of what ye shall leave, in case ye have no issue; but if he have issue, then they shall have one eighth part of what ye shall leave, after the legacies which ye shall bequeath, and your debts be paid. And if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate, But if there be more than this number, they shall be equal sharers in a third part, after payment of the legacies which shall be bequeathed and the debts, without prejudice to the heirs."

11. In reading this passage, I have emphasized the words "after the legacies which he shall bequeath and his debts be paid," and also other phrases to the same effect, which have been repeated after each part of the passage describing the shares to be allotted to the heirs. These phrases gave rise to two difficulties in the minds of the Muhammadan jurists. The first was, whether the circumstance that legacies were mentioned before debts gave the former precedence over the latter in the administration of the estate of deceased persons; and the second was, whether the word "after" related to the devolution of inheritance, or to the ascertainment of the extent of the shares to be allotted to the various heirs. There is much learned

discussion upon both these points in the Arabic works; but with the former of these points we are not concerned in this case; and in regard to the latter, I will content myself with the explanation of Bai awi, one of the greatest commentators on the Koran, whose views have been universally adopted by Muhammadan jurists. He says: "The words after the legacies which he shall bequeath or debts relate to that which precedes relating to the distribution of all the inheritance; that is, these are to be the shares of the heirs out of that which remains from legacies or debts (1)." The meaning of the explanation is, that the word "after," as used in the Koran, simply refers to the balance of the estate after the payment of debts and legacies, but does not affect the question of devolution. That this is the interpretation accepted by the Muhammadan jurists in general is best shown by a passage in *Al Sirajiyah*, a treatise of the highest authority on the Muhammadan Law of inheritance, which Sir William Jones translated about a century ago; and in citing the passage I cannot do better than adopt his words: "Our learned in the law (to whom God be merciful) say: There belong to the property of a person deceased four successive duties to be performed by the Magistrate--first, his funeral ceremony and burial without superfluity of expense, yet without deficiency; next, the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors, according to the Divine Book, to the Traditions, and to the Assent of the Learned"--(Jones's Works, Vol. III, p. 517). I have quoted this passage to show the priority possessed by the three charges to which the estate is subject when inherited by heirs. This order of priority is, as is obvious from the passage, merely a direction as to the administration of the estate, and has no bearing upon the question of the exact point of time when inheritance devolves upon the heirs. When they inherit the property, they take it, of course, subject to these three prior charges, as they would subject to mortgages the difference being (as pointed out by the Privy Council in the case which I have already cited) that an incumbrance by way of mortgage follows the property even in the hands of bond fide purchasers for value, with or without notice of the prior incumbrance; whilst the three charges on the estate of a deceased Muhammadan as described in *Al Sirajiyah* cannot do so. It is one thing to say that these three charges take precedence of the inheritance, in the administration of the estate and its distribution among heirs, and it is another thing to say that the inheritance itself does not open up until those charges are satisfied. And it is obvious that all the arguments adopted by Maekby, J., as to debts, would, according to his hypothesis, necessarily apply also to funeral expenses and legacies, which, like debts of the deceased, are charges upon his estate. But I am unaware of any rule of Muhammadan Law which would render such charges, or even mortgages, an impediment to the devolution of property on the heirs by inheritance. Funeral expenses, debts, and legacies, or any one or more of them, may indeed absorb the estate of the deceased; defeating every Succeeding charge; and it is obvious that if nothing is left for the heirs they can take nothing. But this is a proposition widely different from saying that the

devolution of inheritance is suspended till the various charges are satisfied. Indeed, upon this point, the books of Muhammadan jurisprudence leave no doubt. The author of the *Ashbah*, a most celebrated book on maxims, lays down the following maxim: "Nothing enters the proprietorship of man without his option (consent), except inherited property;" (1) and the following explanation follows as a commentary: "They (the Doctors of Law) have differed as to the time of the devolution of inheritance. The learned men of Irak maintain the last part of the ancestor's life, and the learned men of Balakh (maintain that it is) the moment of death.(2)

12. These authorities leave no doubt in my mind that the devolution of inheritance takes place immediately upon the death of the ancestor from whom the property is inherited. But I wish further to adopt certain tests to confirm my view. The first of them is an absolutely universal rule of the law of Muhammadan inheritance itself. The *jus representations* being absolutely foreign to the Muhammadan law of inheritance, the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims, died--the order of deaths being the sole guide in such questions.

13. The rule of "perfect" exclusion from inheritance - to use the language of *Al Sirajiyah*--"is grounded on two principles; one of which is, that whoever is related to the deceased through any person, shall not inherit while that person is living; as a son's son with the son; except the mother's children, for they inherit with her, since she has no title to the whole inheritance; the second principle is, that the nearest of blood must take. To illustrate the principles, I adopt the language of Sir William Macnaghten: "The son of a person deceased shall not represent such person, if he died before his father, for he shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance if he have a paternal uncle. For instance, A, B, and C, are grandfather, father, and son. The father B dies in the life-time of the grandfather A. In this case, the son C shall not take *jure representations*, but the estate will go to the other sons of A. Now, in the above illustration, if we suppose that A died leaving both B and C, but B died before the debts and legacies were satisfied, the question would arise whether C would take a share along with his uncles, the other sons of A. The answer to the question depends absolutely upon the answer to the question whether immediately upon the death of A any share in the inheritance devolved upon B, for, if it did not, then C can have no vested interest in the inheritance. According to the views of Markby, J., upon the death of A "neither his estate vested immediately in his heirs, nor did his heirs become immediately liable to his debts;" for "until the heirs came forward to take possession, the succession was vacant." And, according to this hypothesis, C could take no share, because the debts and legacies of A not having been paid before the death of B, no share of the inheritance vested in him, and his son C could take no share along with his paternal uncles. That this would be the necessary result of the reasoning of Markby, J., seems to me to be obvious; but it is equally obvious

that the Muhammadan rules of inheritance furnish quite the opposite answer. The law upon the subject has been well summarised by Sir William Macnaghten, and I adopt his words because they are in perfect accord with the rules contained in *Al Sirajiyah*, *Sharifiyyah*, and other authoritative Arabic treatises on the Muhammadan law of inheritance. "Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death; and it must be supposed that they received their respective shares accordingly. Mr. Baillie, proceeding even more closely upon the Arabic texts, has enunciated the same rule in his work on Muhammadan inheritance: "When some, of the portions have become inheritances by the death of the parties entitled to them, before the estate has been actually divided among them...the rule is to arrange the original estate on the principles already explained, and to assign to each original heir his or her share, and then to arrange his or her estate, that is, his or her share of the original estate, on the same principles." It is dear from these passages that in the case supposed by me, C would take the share in the estate of A--a proposition which directly contradicts the conclusion at which Mabkby, J., arrived. Indeed, I may go the length of saying that some of the most important and undoubted rules of Muhammadan inheritance would become meaningless if any event other than the ancestor's death were to be considered as the point of the devolution of inheritance upon heirs.

14. It is scarcely necessary for me to pursue the argument much further, but I will, however, take a few illustrations to justify the proposition which I have just laid down. Take the case of missing persons under the Muhammadan Law of inheritance. Not long ago, in the case of *Mazhar Ali v. Budh Singh Ante*, p. 297 I had occasion to discuss the matter at full length, and here I will only say that the inheritance to his estate opens up at the moment when, by a legal presumption, he is taken to be dead, and all the arguments of the Muhammadan jurists make the presumption of the death of the missing person as the turning point of the devolution of inheritance on, his heirs. To use the "words" of Mr. Almaric Rumsey in his work on Muhammadan inheritance, it must be remembered that "the lost or missing person is deemed to die, not at the date at which he has become such, but at the precise time at which the declaration of his death is made; consequently his relations dying before that time cannot inherit from him." Now, taking the case of persons dying by a common calamity, it will be found that the rules of Muhammadan inheritance again treat death as the turning point of the devolution. I will show this by citing a passage from Baillie's *Digest*, as it is taken from the text of the *Fataw-i-Alamgiri*: "Where several persons have been drowned or burnt together, and it is not known which of them died first, we treat them all as having died together. The property of each will accordingly go to his own heirs, and none of them can be heirs to another, unless it is known in what order they died, when those who died last will inherit to those who died before them. And the rule is the same

when several are killed together by the falling of a wall, or in the field of battle, and it is not known which of them died first." I might go further, and show that all the rules relating to the inheritance by or from posthumous children, proceeding upon the analogy of the rules relating to missing persons, render death as the only turning point of the devolution of inheritance. But I will take a case having even a more directly analogical bearing upon the point now under consideration. It needs no citation of authorities to say that, under the Muhammadan Law, no property or right can be transferred or relinquished by the person entitled thereto, unless it is vested in him; that no valid will can be made in favour of an heir; that, even in favour of a stranger, a bequest can hold good only to the extent of a third of the property of the testator remaining after payment of his funeral expenses and debts; and that a bequest, notwithstanding these limitations, may be validated, and take effect with the consent of the testator's heirs. I have mentioned these rules as a statement of the premises from which I shall draw my conclusion. The question then arises, when should the consent of the heirs be given in order to render effective a will which exceeds the limitations imposed upon the testamentary power by the Muhammadan Law? The answer is furnished by a passage of the Hedaya, which I will translate here from the original Arabic, although a paraphrase of the passage, exists in Mr. Hamilton's translations (Vol. IV, p. 470): "Their (the heirs) consent during his (the testator's) life-time is not acceptable, for the reason that it would be previous to the establishment of their right. As their right is established upon the death (of the testator), therefore it is for them (i.e., they are at liberty to reject it after his death, because it would then be after the establishment of their right, and therefore it is not for them to recede from it (1))." This is the prevalent doctrine of the school of Iman Abu Hanifa which governs this case. But some of the jurists of the same school, whilst doubting the reasoning, have adopted the same doctrine, on the ground that, although a testamentary disposition in contravention of the limitations of law would, in itself, be illegal, yet effect would be given to it, because the consent of the heirs given after the death of the testator amounts to dealing, with, their own property, so that not the testamentary disposition, but the consent of the heirs, takes legal effect. This is shown by a passage in the Fatawa Kazi Khan: "As Sheikh-ul-Imam Al-Ali-us-Safdi has said that the answer of Abu Hanifa is difficult. He has allowed composition (regarding legacies) on the ground that the property in reality belongs to the heir on account [838] of the extinction of the ownership of the deceased, and on account of its transfer to the heir, and it remains as if it was the property of the deceased for the needs of the deceased. Therefore before it was so employed for the needs of the deceased, it becomes the property of the heir, and when the purposes of the deceased are not attained, the property remains in the ownership of the heir." In these passages there is not the slightest indication that the payment of funeral expenses, debts, or legacies, is a condition precedent to the vesting of the inheritance. These, of course, are charges upon the estate of the deceased in the sense in which I have already explained them; and I may concede that no distribution of the assets of a deceased Muhammadan's estate among his

heirs can be made irrespective of those charges. But this has no bearing upon the question of the devolution of inheritance a question which rests upon a reasoning analogical in principle" to that which relates to the vesting of legacies considered by me not long ago in *Bachman v. Bachman* ILR All. 583. The inheritance of an heir, like a legacy may be absolutely defeated if the debts of the deceased at the time of the administration of his estate are found to absorb the whole of his property. But this has no more bearing upon the question of the devolution of inheritance than upon the vesting of legacies, and I may say that in-neither case is distribution or division of the estate a condition precedent to the vesting of the right. In the case of legacies, the terms of a will might, of course, affect the ordinary rule, and division may possibly be made a condition precedent to the vesting of the legacy. But I need not resort to analogies, for the texts of the Muhammadan Law leave no doubt that distribution of the estate, or the payment of debts of the deceased, is not a condition precedent to the devolution of inheritance. Here is a passage from *Fatawa Kazi Khan*: "A man died, and his heirs, by mutual consent, divided the inheritance among themselves, and then one of them, on his own behalf, brought a claim for debt due" by the deceased. His claim will be entertained because debt neither prevents the establishment of the heir's proprietorship nor division (of the inheritance). If it were necessary to carry the argument further, I might cite many passages even from the Muhammadan law of slavery (which, happily for mankind, is no longer the law of British India), which would support my view. It is, however, sufficient to say here that "Itak" or manumission of slaves is a power which" can be exercised only by the full owner of the slave, and if the slave forms part of the inheritance, the heir can emancipate him, and the emancipation will take effect even though such manumission took place before payment of the" debts of the deceased from whom the slave was inherited, the reason of the rule being, as stated by Kazi Khan, that the ownership of the heir was complete at the time of the manumission.

15. There is one more point to be considered in connection with the first question referred to us in this case. I hope I have said enough to show that the existence of debts due by the deceased does not affect the period of devolution of inheritance; but the point remains whether the extent or amount of the debts affects the question. Some of the passages quoted from Mr. Hamilton's *Hedaya* in the Full Bench case of *Hamir Singh v. Musammat Zakia* ILR All. 57 would go to indicate an affirmative answer. But the translation is only a loose paraphrase of the original Arabic, and is liable to convey a wrong meaning. What is meant by the heirs to an insolvent estate being prevented from inheriting, simply refers to the rule that nothing will be left for them to inherit if the liabilities of the deceased swallow up the whole estate. It is only in this sense that Mr. Hamilton's translation can be understood, when it says that "the circumstance of a small debt attaching to the estate of a deceased person does not prevent the heirs from inheriting, whereas if the estate were completely involved in debt they would be prevented."--(*Hedaya*, Bk. XXVI.) I do not think it necessary to translate these passages in the *Hedaya* because,

after what I have already said, it seems enough to add that the existence of debts, whether large or small, is quite immaterial. Whatever their extent, nature or amount may be, the property of the deceased is liable to their payment, and their extent regulates the balance of the estate only, but does not affect its devolution.

16. The second point in F.A. No. 70 is similar to that raised in F.A. No. 50, and I have dwelt upon the first question at such length because it seems to me that the answer to the second question may be regarded as a corollary to the answer to the first. I have considered the passages of the Hedaya referred to in the Full Bench case of Hamir Singh v. Musammat Zakia ILR All. 57 and those cited by Garth, C.J., and Maekby, J., in Assamathem Nessa Bibi v. Roy Lutchmeeput Singh ILR Cal. 142. These passages have been understood by those learned Judges as governing the decision of cases like the present. I have also consulted other original authorities, such as Fatawa Kazi Kahan, Durrul Mukhtar, Shami, and Fathul Kadir, All these books possess high authority, and no doubt there are passages to be found in them, as in the Hedaya, which attach significance to such questions as the following: whether the heir is in possession, whether he is in possession of the whole or only a part or the estate, the amount of the assets in his hands, whether the suit was contentious or non-contentious, whether the decree was passed ex-parte or in the presence of the defendant, and these points the authorities treat as regulating or at least affecting the binding effect of the decree upon those heirs who, being either out of possession or absent, are no parties to the litigation. On the other hand, there, are passages to show that the decree will bind only the share of the defendant heir, or only so much of the property of the deceased as is in the hands of such defendant; whilst other passages lay down the rule that, even where no property belonging to the deceased has come to the hands of the heirs, the creditor of the deceased must sue them in order to obtain a decree, which might be executed against any such property of the deceased as may be subsequently discovered.

17. The rule is thus laid down in Fatawa Kazi Khan: "If the debtor has died without leaving any property in the hands of the heir, even then the heir will be (impleaded as) defendant for the claimant of the debt (that is, the creditor), and evidence will be taken and decree will be passed as to the debt, in order that the creditor may take any assets of the deceased which may be discovered. This rule is the same as that laid down by Morgan, C.J., and Ross, J., in Madho Ram v. Dilbur Mahul N.W.P.H.C. Rep. 1870 p. 449 and, although the case related to, the estate of a deceased Muhammadan, those learned Judges decided it without any reference to the Muhammadan Law, and treated the question as simply a matter of procedure. Again, according to the authorities of the Muhammadan Law, to which I have referred, the power of one or more heirs to represent absent heirs in a litigation is regulated by the consideration whether the litigant-heir appears in the suit as plaintiff or as defendant; and the power of representation is materially affected by the position of the litigant-heir as party to the suit. Further, there is authority for the proposition that a decree passed against the heir in possession as representing the

whole estate of the deceased in the litigation may, under certain circumstances, be set aside at the instance of the absent heir to the extent of his share, and that, when this is done, the matter should be adjudicated upon de novo, involving the production of evidence by the plaintiff again, in order to justify the correctness of the former decision. I do not consider it necessary to cite the original texts which go to maintain these propositions, because I am satisfied that these rules of law are provisions which go only to the remedy, *ad litem* ordinationem, being matters purely of procedure as to array of parties, production of evidence, *res judicata*, and review of judgment, etc. Indeed, they are treated as such in the text-books of the Muhammadan Law itself, and are in *pari materia* with some of the most important provisions of our Civil Procedure Code. They are not matters of substantive law; they do not constitute rules of inheritance; and the Courts in British India are no more bound by them than by any such rules of evidence or limitation as the Muhammadan Law may provide, for the simple reason that they fall outside the purview of Section 24 of the Bengal Civil Courts Act, which enumerates the matters in which we are bound to administer the Muhammadan Law. Under the opposite view, these rules would be in the anomalous position of conflicting with the provisions of the CPC upon the same subjects, and at the same time be equally binding upon the Courts. But for the reasons which I have already stated, I do not think any such conflict arises out of the present state of the law in British India. Upon the death of a Muhammadan owner, his property, as I have already shown, immediately devolves upon his heirs, in specific shares; and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure, and must be regulated according to the law which governs the action of the Court. The plaintiff must go to the Court having jurisdiction, and institute his suit within limitation, impleading all the heirs against whose shares he seeks to enforce his claim; and if he omits to implead any of the heirs, the decree would be ineffective as regards the share of those who were no parties to the litigation. The maxim of law, that a matter adjudicated upon between one set of parties in no wise prejudices another set of parties, is, of course, the foundation of one of the rules of *res judicata*, which itself is subject to strict limitation, as shown by Section 13 of the Civil Procedure Code; whilst even Explanation V of that section cannot be applied, unless the especial provisions of Section 30 of the Code are applicable, and have been duly applied by the Court in allowing one party to sue or defend on behalf of all in the same interest. There is, however, no such question in these cases, and to hold that a decree obtained by a creditor of the deceased against some of his heirs, will bind also those heirs who were no parties to the suit, amounts to giving a judgment *inter partes*, or rather a judgment *in personam*, the binding effect of a judgment *in rem*, which the law limits to the cases provided for by Section 41 of the Evidence Act.

18. But our law warrants no such course, and the reason seems to me to be obvious. Muhammadan heirs are independent owners of their specific shares, and if they take their shares subject to the charge of the debts of the deceased, their liability is

in proportion to the extent of their shares. And once this is conceded, the maxim *res inter alios acta alteri nocere non debet* would apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family. Now, putting aside questions of fraud or collusion between the creditors of the deceased and the heir in possession, it may well be that such heir, though defending the suit, is incompetent to contest the claim, or, by reason of not being acquainted with the facts of the case, or not possessing evidence, cannot properly resist the claim. There seems no reason why, in such a case, those should be bound by the decree who were no parties to the litigation, and had no opportunity of defending themselves against the creditor's claim by putting forward their own case.

19. This leads me to the considerations of the various rulings having a bearing upon the question now under consideration. In the case of *Assamathem Nessa Bibi v. Roy Lutchmeput Singh* ILR Cal. 142 the judgment of Markby, J., proceeds considerably upon the inferences which he drew from cases relating to the joint Hindu family, and the power of one member to represent the whole of the joint estate in litigation. I have already suggested that there are such essential distinctions between the Hindu Law relating to a joint family and the Muhammadan Law of inheritance that it would be unsafe to draw any conclusion by analogical reasoning. On the other hand, it is obvious that the conclusion at which that learned Judge arrived as to the power of the heir in possession to represent the estate in litigation, was materially induced by the opinion which he formed regarding the devolution of Muhammadan inheritance, which he discussed as the first point in the case. Now, I am unable to agree fully in the judgment of Garth, C.J., in which Kemp and Jackson, JJ., concurred. There is much in the *ratio decidendi* with which I entirely agree" and there is no doubt that the distinction which the judgment draws between a decree passed by consent and a decree passed in a contested suit is borne out by certain passages of the *Hedaya*, to which the learned Chief Justice referred. But, with due deference, I am unable to adopt the distinction because, as I have already pointed out, those passages lay down rules of procedure which are not binding upon us, which are in many important respects inconsistent with the rules of the Civil Procedure Code, and, at all events we can scarcely adopt some of them with consistency, unless we are prepared to adopt also other rules of the Muhammadan Law of Procedure which are complements of the rules so adopted. According to our own rules of procedure, there is no distinction between the binding effect of a decree passed by consent, and a decree passed in a contested suit. Both render the matter *res judicata*, and neither can bind those persons who were no parties to the litigation. There were, of course, reasons arising from the exigencies of life (such as the difficulty of communication and travelling) which induced Muhammadan jurists in the middle ages to frame rules of procedure in many essentials different from those which regulate the procedure of our Courts. But those conditions of life no longer exist: the law of British India has framed its own rules of procedure; and bearing in mind the analogy of the principle by which, not the *lex loci contractus*, but the *lex fori*,

regulates all matters going to the remedy, *ad litem* ordinationem, I would reject the rules of the Muhammadan Law of Procedure in connection with the binding effect of decrees upon absent heirs. And it follows that a decree obtained in a litigation to which the absent heirs or those who were out of possession were no parties, cannot be executed against them or against their shares in the inherited property. Indeed, such was the view adopted by Garth, C.J., himself in an earlier case--*Hendry v. Mutty Lall Dhur* ILR Cal. 395 with which I entirely concur, and which is in accord with the Full Bench ruling of this Court in *Hamir Singh v. Musammat Zakia* ILR All. 57.

20. There is, however, one more important case, and the latest ruling upon the subject, which I must consider. This is the case of *Muttyjan v. Ahmed Ally* ILR Cal. 370 in which Morris, J., with the concurrence of O'Kinealy, J., went the length of laying down the broad rule that when the creditor of a deceased Muhammadan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.

21. For this view of the law the learned Judges relied upon certain rulings, two of them being decisions of the Privy Council. I have consulted these cases, but I confess, with due respect, that I am unable to see how they support the broad rule of law laid down in that case. It seems to me that the nature of an administration-suit is essentially different from an ordinary suit for money brought by a creditor of a deceased person against his heir. I need only refer to Section 213 and to Nos. 105, 130, and 131 of the fourth schedule, read with Section 644 of the Civil Procedure Code, to explain my conception of the nature of an administration-suit. It appears to me that if every suit to recover a debt from the heir of a deceased debtor, irrespective of the form in which it has been instituted, is to be regarded as an administration-suit, any suit for money or any claim, however small, by tradesmen, may be so considered, creating anomalies and difficulties upon which I need not, however, dwell. The rest of the rule laid down by Morris, J., is met by what I have already said, and seems to me to be contradicted by the rulings of Garth, C.J., in the two cases to which I have already referred. My answer to the second question referred to us is, therefore, entirely in the negative, and I give the answer, holding that it is unaffected by the question whether the decree is passed by consent or in a contentious suit, whether the heir is in possession of the whole or only a part of the estate of the deceased, or whether he is present or absent, in possession or out of possession. The same answer applies to the point referred in the connected case F. A. No. 50 of 1883.

22. The third question referred to us in this case does not depend upon any rule peculiar to the Muhammadan Law; but upon the general principles of equity. The first point involved in the question is, whether in a case such as that contemplated, any equity exists in favour of the auction-purchaser, entitling him to retain the

property till the plaintiff recoups him to the extent [846] of his share of the ancestor's debts liquidated by the proceeds of the auction-sale. If so, then the second point is, whether effect can be given to that equity by a decree in this case.

23. In my opinion both points must be answered in the affirmative.

24. The general principles of equity in such case are to be found in Sections 696, 707, and 238 a of Story's celebrated work on Equity Jurisprudence, where illustrations are given of the general maxim, that he who seeks the aid of equity must do equity. For instance, as the learned author puts it, "in many cases where the instrument is declared void by positive law, and also where it is held void or voidable upon other principles, Courts of equity will impose terms upon the party, if the circumstances of the case require it." Such seems to be the principle which underlies the judgment of a Division Bench of this Court in *Mirza Pana Ali v. Saiad Sadik Hossein* N.W.P.H.C. Rep. 1875 p. 201 in which, although the learned Judges held a deed of sale, whereby the mother of a Muhammadan minor had sold his share in the estate of his deceased father, to be invalid, they dismissed his claim to recover possession of the share from the purchasers, who had redeemed a mortgage existing on the estate created by his father, because the plaintiff did not tender payment of his share of the mortgage debt. The learned Judges, however, do not appear, from the report of the case, to have considered the question whether in such a case a conditional decree could not be passed. The question, however, was decided by a Full Bench of this Court in *Hamir Singh v. Masammat Zakia* ILR All. 57 in which it was held that in such a case a decree might be passed for possession in favour of the plaintiff, "but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected. The same rule was adopted by a Division Bench of this Court in *Gulshere Khan v. Naubey Khan* Weekly Notes 1881 p. 20. In both these cases the sale was a private alienation, whilst in the present case the sale took place in execution of a decree to which the plaintiff was no party. But in my opinion this distinction does not alter the principle which enables Courts of equity to exercise a vast and flexible jurisdiction for adapting their decrees to the requirements of each case. "Some modifications of the rights of both parties may be required; some restraints on one side or on the other, or perhaps on both sides; same adjustments involving reciprocal obligations or duties; some compensatory or preliminary or concurrent proceedings to fix, contract, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries. In all these cases, Courts of common law cannot grant the desired relief... But Courts of equity are not so restrained. They may adjust their decrees so as to meet most, if not all, of these exigencies, and they may vary, qualify, restrain, and model the remedy so as to suit it in mutual and adverse claims, controlling equities, and the real, and substantial rights of all the parties"--Story's Equity Jurisprudence, Sections 27, 28. And, applying these principles to the present case, my answer to the third question is, that the

plaintiff cannot obtain a decree for possession of his share of the property in suit without such decree being rendered contingent upon payment by him of such proportion of the purchase-money as would represent his proportionate share of the liability to the ancestor's debts liquidated by the proceeds of the auction-sale.

25. I wish to add that I have considered it my duty to consider this case at such length because of the conflict of decision existing in the reports, which has thrown much doubt upon important rules of law governing the inheritance of a population nearly as large as the whole of the German-speaking population of Europe.