Chapter 3 of *Manu Smriti*. It is needless for me to dwell upon that chapter, but I have no doubt that there is nothing there either as to the meaning of the word *Nihang*, or as to the signification of the term *Grihasti*.

Holding these views then as I do, *viz.*, that the plaintiff has failed to prove that he is a *Nihang*, but that he is a *Grihast*, I have nothing more to say than that I entirely agree in all that the learned Chief Justice has said upon the evidence, and the decree which his Lordship has made in the case.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MURTAZAI BIBI AND ANOTHER (DEFENDANTS) *v.* JUMNA BIBI AND OTHERS (PLAINTIFFS.) *

1890. [*December* 8.

Muhammadan law—Wakf—Construction of document.

Where a Muhammadan of the Shia sect executed a document purporting to come into operation after his death, which document provided in a most complete manner of the devolution of his property, with the intention apparently of preserving the estate in perpetuity intact under the headship of some male member of the family, with provision by way of allowances for the other members, and of maintaining the dignity of the *riasat*, and in which no express mention of any sort of dedication of the property to charitable purposes was made, though there was some incidental reference to certain religious duties.

Held that such a document could not be construed as creating a *wakf*. Though it was not impossible that a document creating a *wakf* might contain provision also for the family of the settlor, the dedication to charitable uses being postponed, yet here there was not even an ultimate dedication of the property to charitable uses, but the object of the executant was evidently merely the maintenance of the family estates and of the dignity of the *riasat*.

Sheik Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu* (1) followed. *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan* (2) *and Nizamuddin Gulam* v. *Abdul Gafur* (3) referred to.

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* First appeal No. 143 of 1888 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Gorakhpur, dated the 29th June 1888.

(1) L. R., 17 I A., 28. (2) L. R., 3 I A., 291.
(3) I. L R., 13 Bom., 264.

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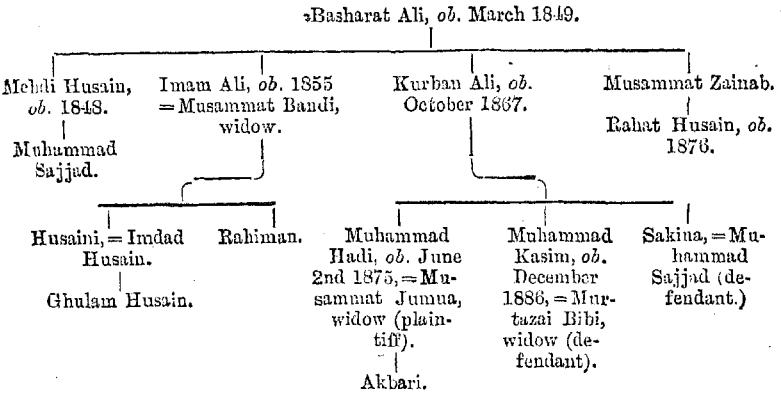
The parties to this appeal were Muhammadans of the Shia sect whose relationship to one another will be apparent from the accompanying genealogical tree :—



The plaintiff, Musammat Jumna, brought her suit in the Court of the Subordinate Judge of Gorakhpur for her share by inheritance of the property of her deceased husband, Muhammad Hadi, who died in 1875, alleging that she had on various pretexts been put off and kept out of her rights by her brother-in-law, Muhammad Kasim. The other two plaintiffs were pleaders to whom the principal plaintiff had sold a portion of her share of the property in suit to provide herself with funds for carrying on the litigation. The suit was resisted by the defendants, the widow and sister of Muhammad Kasim, mainly on the following grounds, *viz.*, that Musammat Jumna, the plaintiff, was not the widow of Muhammad Hadi, and that by reason of a deed executed by one Basharat Ali, the common ancestor of both the parties, in 1848, the plaintiff could have no claim to the inheritance so long as there were male descendantst of Basharat Ali living. The defendants also alleged that the plaintiff, Musammat Jumna, had acquiesced in the transfer of the property in suit to Muhammad Kasim on the death of Muhammad Hadi, that both Muhammad Hadi and Muhammad Kasim had dealt with the property as their own, and that Musammat Jumna had never lived in the house of Muhammad Hadi. The Subordinate Judge found on these pleadings that the plaintiff, Musammat Jumna, was

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lawfully married to Muhammad Hadi, and that the document relied upon by the defendants was a will, under which, as the conditions of it had come to an end, nobody could take anything, and that therefore the position of Muhammad Hadi's heirs was exactly what it would have been according to Muhammadan law at the date of his decease in June 1875. The Subordinate Judge accordingly passed a decision in favour of the plaintiffs. The defendants then appealed to the High Court.

Mr. *D. Banerji*, Mr. *Abdul Majid* and Maulvi *Mehdi Hasan*, for the appellants.

Mr. *W. M. Colvin* and Mr. *C. H. Hill*, for the respondents.

STRAIGHT, J.—Then comes the third question, which is a question of law, and this entirely turns upon the construction to be given to the document of the 16th March 1848. As to the genuineness of this document no controversy is raised, and we must take it that it was executed by Basharat Ali, the ancestor of the parties. At the outset of this judgment I took occasion to advert to the statement of defence, and the case therein set up, and it is to be remarked in this connection that in that written statement this instrument of the 16th March 1848 is spoken of as a deed of settlement, and as such it was put forward and relied upon before the learned Subordinate Judge. In the 7th plea in both the memoranda of appeal it is said :—" Because the document of 16th March 1848, executed by Mr. Basharat Ali, is in the nature of a settlement, and *not a will*, and binding upon the parties. Moreover it had been carried out." Despite this having been the position taken up in the Court below, and in the plea in appeal, an entirely new ground was adopted before us, the contention being that this instrument constituted a *wakf* created by bequest. Mr. *Hill*, when this point was raised by Mr. *Banerji* for the appellants, not unnaturally urged that the whole position for the appellants had been changed and that the contention now put forward on their behalf was inconsistent and at variance with the position they had asserted below and in their memorandum of appeal. I am not at

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all sure that I should not be more strictly performing my duty if I were to limit the appellants to the contention upon which the trial before the First Court proceeded; but as I think under all the circumstances it might be inconvenient to adopt that course, I am prepared to decide the questions of law in the case not upon that narrow view, but in its broader aspect. Now what then is this instrument, of the 16th March 1848? By paragraph I, the party executing it recites that, being "in the last stage of his life, and in old age, he executes this deed as a valid document as regards *heir and inheritance.*" And he then goes on to set out his various properties, which he states to be of "his own obtaining or creation, and that he has the full power over them by way of gift or transfer either to his kindred or to a stranger." In paragraph II, he recites that his son, Mehdi Hasan, who was at that time alive, had acted in a way that he did not approve, and that he therefore, excludes him from inheritance. As regards his two remaining sons, Imam Ali and Kurban Ali, he goes on to say that Kurban Ali has made himself extremely useful in the management of his property, in looking after his affairs, and in protecting it from attacks and litigation; and he uses the following expression:—"There is no one among my heirs, excepting Kurban Ali, who has ability to protect the livelihood. All these rights, personal earnings, and the whole income, after deduction of expenses relating to door (*darwaza*), Court occasions, of ceremonies and *taziadari* in Muharram, &c., appertaining to me will also be in the power of Kurban Ali in a proper manner." Then, in the next paragraph, he proceeds to make division, and he says:—"Supposing that the whole of my *madsh* (livelihood) is Re. 1, out of it 4 annas for Kurban Ali as remuneration for the labour, management of the livelihood, and opposition of claimants and adversaries which appertain to him. The remainder is 12 annas, which has been equally allotted to Kurban Ali and Imam Ali, *i.e.*, in equal shares of 6 annas each. But as regards *patta*, and *kabuliat* of tenants and lessees, purchase, sale, gift and *tamlik*, &c., *i.e.*, in the matters relating to the management and transfer, Imam Ali, illiterate, neither has, nor shall have, any power without the consent and advice of Kurban Ali. But sometimes, in

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case of Kurban Ali being engaged in other work, Imam Ali also, with the consent and advice of Kurban Ali, shall have power in matters of demand, settlement on account, receipt and acquittance in respect of the revenue fixed." Then further a provision is made for Zainab Bibi; and then comes the concluding paragraph, which, it seems to me, it is necessary should be read at length:—

"Let it be known that this property, together with its income, has been assigned to my heirs, *for maintenance and for protection and perpetuation of riasat and not for any sort of transfer*; but the way for the management is that one person be the owner and manager of the whole and the rest be his dependents and sharers in the profits in cash to the extent of their fixed shares without division of any land, for by division *power will be diminished and the riasat will be reduced to small parts. Then there will be neither the perpetuation of riasat nor the perpetuation of honour, and then the distinction of my family will be lost.* Therefore the powers of management of villages and domestic affairs, payment of revenue, and defending the claim of adversaries to the *riasat*, &c., *i.e.*, of all matters in connection with the protection, authority, and proprietorship, have been conferred upon Kurban Ali just as I have. He shall not be interfered with therein by any one else. It is incumbent on him also that by honestly acknowledging and giving effect to this deed he should assign this *riasat* to one of his legitimate and rightful issue after his death, and he, the latter, should also do the same after his death, *i.e.*, should assign this *riasat* in regular succession, subject to these customs, so that, God willing, *this riasat may be preserved in my family generation after generation.* It should also be binding that so long as there may be any male issue of any sharer this right should never be conferred upon any daughter or the issue of a daughter. But it is allowed to fix something in cash for maintenance for life as I have done, in case of insufficient livelihood. The document, with all its conditions, should be in force after my death, both against my heirs and the property left by me, and everyone should consider it binding on him to carry it into effect. Until my death my power will remain as it is."

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Now it seems to me that no rational person reading that document through can come to any other conclusion than that the only object that the maker of it had in view, to use his own words, was "the perpetuation of the *riasat*, the perpetuation of honour and the distinction of his family, and that the *riasat* might be preserved generation after generation." The mere casual mention in the middle of the document of "expenses relating to door (*darwaza*) and of ceremonies and *taziadari* in Muharram," does not appear to me to alter the real, main and direct scope and object of the instrument, about the meaning and intent of which there seems to me no room for two opinions.

Such being the nature of the deed, Mr. *Banerji*, upon the strength of a passage appearing at page 203 of Mr. Amir Ali's Tagore Law Lectures, contended that it constituted a good *wakf* of the whole of the properties. I confess that I was a little startled at this argument, and the more I have thought of it since, the more difficult have I found it to see any force in it. In the case of *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan*, (1) (a case which, by the way, may be looked at for other purposes, in connection with this appeal than those for which I am about to use it), there is the following passage in the judgment of their Lordships of the Privy Council:—"The policy of the Muhammadan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Muhammadan law, whereby its policy is defeated, have been complied with." This lays down a golden rule, which has ever since been followed in dealing with such documents in cases among Muhammadans.

(1) L. R., 3 I. A., 291.

The passage in Mr. Amir Ali's book that was the foundation of Mr. *Banerji's* argument is this:—"Kazi Khan, following Imam Ibn-ul Fazl, states that *wakf* is of three kinds in relation to the state in which it is made—

(1) When it is made in health;

(2) When it is made in illness;

(3) When its operation is made dependent upon death.

"Change of possession and appropriation is necessary in the first, but *not* in the third, for that is testamentary in its nature; but the second is like the first, though it takes effect with reference to the third of the estate of the *wakif* like a gift made in death illness.

"It has been already stated that a *wakf* is irrevocable, but a *wakf* made by a person to take effect after his death, or what is called a *wakf* by way of *wasiat* (*wakf-bil-wasiat*) is revocable at any time before his death."

If this case involved the bare question as to whether a *wakf* could be constituted by bequest, and if I were unable to dispose of this appeal without determining that point, I should have thought it right to obtain the assent of my brother Tyrrell to the disposal of this appeal standing over till the decision of the Full Bench in a case which has been referred by my brothers Mahmood and Young had been given; but it seems to me that Mr. *Banerji's* concession in answer to a question I put to him, has relieved me of any difficulty, and that we may dispose of this appeal upon the assumption that a "*wakf*" by bequest may be created. While Mr. *Banerji's* contention upon the passage is that a *wakf* may be constituted by bequest, he was constrained to admit, that, even if so made, it must be accompanied by all the incidents of *wakf*; and that, except in so far as immediate change of possession is concerned, a *wakf* created by bequest, and a *wakf* created by a deed to take immediate effect in the lifetime of the *wakif*, stand upon the same footing. If this were not so, it is easy to see that any Muhammadan might defeat the ordinary rules of his law of inheritance and his heirs by disposing of his property by a *wakf*. No question arises here as to this

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document having been executed by Basharat Ali in death sickness, or that it was to have effect at once; indeed, it is perfectly plain he contemplated that things should continue unchanged in his lifetime. In my opinion, the Muhammadan law, whether it be Shia or Sunni law, and I have had no authority shown me to the contrary, requires that to constitute a valid *wakf* it must be for purposes that cannot fail, and it must have some pious and charitable object. If no such incident as the latter were required, then every Muhammadan intending to make a will as to his whole property would do so by constituting a *wakf* by bequest. In passing I may remark that in former litigation in regard to this very document, it was treated as a will, by the representative of Kurban Ali, and it was upon that contention that they succeeded in those proceedings.

Now it is not denied, as I have before remarked, that for the purpose of constituting a *wakf* there must be certain specific conditions. I am willing to concede also that an endowment in the nature of a *wakf* would not be bad, because out of the property endowed, provision was made for the settlor's family. But, even if it be conceded that, whilst *inter vivos*, change of the character of his possession is necessary where the settlor creates himself the *mutwalli*, or where he creates somebody else the *mutwalli* by direct *seisin* of possession, no change of possession is necessary where the endowment is created by bequest; yet there must be the other essential incident of *wakf*, *i.e.*, a substantial dedication of property to charitable uses, to come into effect some time or another. I am not prepared to hold, as at present advised, that a man's gift to his male heirs in succession by ownership is a charitable gift in any such sense, and, until I am corrected by higher authority, I must decline to do so. What by this document of the 16th March 1848, Basharat Ali did was that for the maintenance of the integrity of his *riasat* and the glorification of his family he tied up his property, directed and limited its devolution, and prohibited all transfers of it. It seems to me that I have direct countenance for the view I have expressed in the judgment of their Lordships of the Privy Council

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in the case of *Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1), where the whole question was very fully discussed. At page 36, appear the following passages, which I think may be conveniently referred to by me :—

"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

"On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court, stated by Mr. Justice Kemp in one of the cited cases. After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says :—'We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan law.'

"On the other hand, they have not been referred to, nor can they find, any authority shewing that, according to Muhammadan law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. Arathoon indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the

(1) L. R., 17 I. A., 28.

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Tagore Lectures delivered in 1885, by a learned Muhammadan lawyer. But no authority has been adduced for that proposition. The observations of Mr. Justice West, which are relied on by the learned lecturer, do not go that length, and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses."

In the concluding part of the judgment their Lordships point out that the document in question appeared in the main to contemplate aggrandisement of the family, and not charity, and they say, "the gift in question is not a *bonâ fide* dedication of the property, and the use of the expressions, "*fisabilillah wakf*" and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable."

It seems to me that that case is directly in harmony with the present, the only distinction being that that was an endowment *inter vivos*, while this purports to be a "*wakf*" under a document to come into effect after death. I therefore hold that no *wakf* was legally constituted, and in further support of this view I may refer to a judgment of the Bombay High Court which is to be found in the case of *Nizamuddin Gulam* v. *Abdul Gafur*, (1) which goes fully into the question as to whether a *wakf* can be created without some express provision being made for the ultimate devolution of the property in respect of which *wakf* is made, for some charitable and religious object. It has been asserted that because Imam Ali did not in his lifetime assail the document of the 16th March 1848, he must be taken to have accepted and acquiesced in it. This contention was not raised in the Court below, nor am I prepared to accept it; indeed the evidence on the contrary shows that, so far as his widow and heirs were concerned, they, immediately after his death, came into Court with a suit against Kurban Ali asserting their

(1) I. L. R., 13 Bom., 264.

rights by inheritance under the Muhammadan law, and disputing the proposition that they were bound by the terms of the document of 1848.

I am therefore of opinion that this document of the 16th March 1848 was not a *wakf* by bequest, and that the plaintiffs are entitled to take their shares as if it never existed as the widow and daughter of Muhammad Hadi.

There only remains the question raised by the cross-objections filed on behalf of the respondents, as regards the learned Subordinate Judge's order as to costs. He says in his judgment :—"In determining the costs of this case, I cannot help remarking that the present suit savours of champerty. In this case two Mukhtars, who, as legal practitioners, ought to have known better, are co-plaintiffs with Jumna. The greater portion of the property goes to them. Perhaps the suit would have been amicably settled had these men kept aloof from the family dispute. Although the law of champerty does not apply in the mufassil, yet a Court of equity ought to look with great disfavour upon contracts of this nature. Pleaders and Mukhtars specially ought not to take up civil cases as a matter of commercial speculation, and thereby promote unnecessary and vexatious litigation. Having regard to these facts, and taking into consideration all the circumstances of the case, I think it is fair and equitable that parties should pay their own costs."

I really fail to understand why the learned Subordinate Judge uses the expression 'promoting unnecessary and vexatious litigation.' Muhammad Hadi died on the 2nd June 1875; this suit would have been barred by limitation upon the 2nd June 1887; and the plaintiffs were only placed in a position to institute it by their co-plaintiffs, upon the 14th May 1887. The Subordinate Judge's own findings satisfactorily established that the suit was not unnecessary and that the litigation was not vexatious. On the contrary the female plaintiffs are fully entitled to the shares by inheritance which they claim; and I do not see why they and those who have assisted them should not have their costs. I dismiss the appeals in both cases, with costs, and allow the objections of the plaintiffs with costs.

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TYRRELL, J.—I agree with all that has fallen from my brother Straight, and with the decree passed by him.

Appeals dismissed.

[NOTE.—This case is connected with F. A. No. 142 of 1888 in which also similar questions were in issue and the same judgment was delivered in both cases. Of this judgment only so much had been reported as relates to the point of law decided thereby, the former portion of the judgment dealing exclusively with the facts of the case.—W.K.P.]

FULL BENCH.

1890
December 20.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

JANG BAHADUR SINGH AND ANOTHER (PETITIONERS) *v.* SHANKAR RAI AND ANOTHER (OBJECTORS.)

Counsel and client—Authority of counsel to compromise a case on behalf of his client—Nature of power conferred by counsel's retainer.

A counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client; and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client. *Strauss* v. *Francis* (1), *Matthews* v. *Munster* (2) and *In re West Devon Great Consols Mine* (3) referred to.

THIS was a reference to the Full Bench by Mahmood, J. The circumstances under which the reference was made, as also the facts of the case, are sufficiently stated in the judgment of Edge, C. J.

EDGE, C. J.—This was a reference by my brother Mahmood to the Full Bench for expression of its opinion on a question raised as to the authority of advocates by an application for review of a decree passed by my brother Mahmood. The applicant on the hearing of the appeal in this Court was represented by Mr. *Spankie*, one of the advocates of this Court. His opponents were repre-

(1) L. R., 1 Q. B., 379. (2) L. R. 20 Q. B. D., 141.
(3) L. R., 38 Ch. D., 51.