Before Mr. Justice Ashworth and Mr. Justice Muhammad Raza.

MUSAMMAT KANIZA AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* HASAN AHMAD KHAN AND OTHERS (DEFENDANTS-RESPONDENTS).* 1925 November, 24.

Muhammadan law—Marriages under Muhammadan law, kinds of—Marriage to a sister of an existing wife, validity of—Issues born within six months of marriage, legitimation of—Evidence Act, section 112, *applicability of, to Muhammadan marriages—Evidence—Appellate court, opinion of, as to evidence—Legitimation of issues.*

Held, that section 112 of the Evidence Act cannot be applicable in any way to a marriage which is neither *void ab initio* (*batil*), nor absolutely void, but is *fasid*, i.e. irregular inasmuch as section 112 is based on a division of marriage into two categories (valid and invalid), and cannot be applicable to Muhammadan law which divides marriages into three categories, viz void *ab initio* (*batil*), *fasid* and valid. In any case if section 112 can be held applicable, then the word " valid " in that section should be construed as " flawless " so that the presumption would not apply to *fasid* marriages.

Held further, that under the Muhammadan law the marriage of a man to a sister of his existing wife, though invalid for certain purposes, is valid for the purpose of legitimizing the issue. [I.L.R., 41 Bom., 485, followed, and I.L.R., 23 Calc., 130, dissented from.]

Held also, that under the Muhammadan law there is a presumption that in the case of a false marriage a child born on the expiry of six months of copula is to be regarded as legitimate.

Held also, that where the Judge who wrote the judgement appealed against was not the Judge who wrote the evidence, then the appellate court is in as good a position as the Judge whose judgement is appealed against to express an opinion on the veracity of the witnesses.

* First Civil Appeal No. 17 of 1924, against the decree of Shiam Manohar Nath Shargha, Subordinate Judge of Gonda, dated the 24th of November, 1923.

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Messrs. *M. Wasim* and *Muhammad Ayub*, for the appellant.

Mr. *Naimullah* and Mr. *Niamatullah*, for the respondents.

ASHWORTH and RAZA, JJ.:—This first appeal is a plaintiff's appeal. It arises out of a suit brought by Musammat Kaniza alleged daughter and Musammat Chinka alleged widow of one Abdul Sattar Khan against Abdul Razzak Khan, nephew of the deceased. The parties are Sunnis (Hanafis). The plaint only set up any title on behalf of plaintiff No. 2 in default of the claim of plaintiff No. 1 succeeding in part or in whole. We shall decree the claim of the plaintiff No. 1 in part. So far, therefore, as the lower court has dismissed the claim of plaintiff No. 2 that decision must be upheld and her appeal dismissed. The case set up for plaintiff No. 1 that is the daughter, is that by a custom in the family of the deceased the daughter succeeds to her father's estate to the exclusion of any collateral, and alternatively that, in the absence of any such custom, under ordinary Muhammadan law the daughter is entitled to succeed to a moiety as against the nephew. The lower court dismissed the plaintiff's suit on the ground that her mother was not the legally wedded wife of the deceased, and that the plaintiff although a daughter of the deceased, was illegitimate. It also held that there was no evidence to support the allegation of the custom set up.

It is common ground that the deceased was married to Musammat Mehrbibi the sister of Musammat Chinka, the mother of the plaintiff No. 1, and that he contracted a second marriage with Musammat Chinka. In the lower court it was maintained that the deceased had divorced Musammat Mehrbibi before he married Musammat Chinka, but this plea was

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rejected by the lower court and the finding to this effect is not impugned in this appeal. It was, urged, however, and is urged in this appeal, that notwithstanding that the deceased married Musammat Chinka without first divorcing her sister, the plaintiff, under section 112 of the Evidence Act and under Muhammadan law, is to be regarded as a legitimate daughter. Section 112 of the Evidence Act provides that—

> "Any person born during the continuance of a valid marriage between his (or her) mother and any man . . . shall be conclusive proof that he or she is the legitimate son or daughter of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he or she could have been begotten."

For the respondent it is urged that under Muhammadan law the marriage of a man to a sister of his existing wife is invalid. For the appellants it is urged that such a marriage, though invalid for certain purposes, is valid under Muhammadan law for the purposes of legitimizing the issue. In the case of *Aizun-nisa Khatoon* v. *Karimunissa Khatoon* (1), it was held by a Bench of the Calcutta High Court that under the Muhammadan law marriage with the sister of a wife who is legally married is void, and that the children of such marriage are illegitimate and cannot inherit. The decision was considered and dissented from by a Bench of the Bombay High Court *Tajbi* v. *Mawla Khan* (2). It was there held that Muhammadan law does not place unions, as English law does in two categories, valid and invalid, but in three categories of void *ab initio*

(1) I.L.R., 28 Calc., 130. (2) I.L.R., 41 Bom., 485.

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(*batil*) forbidden but not entirely void if consummated (*fasid*), and lastly valid. The Calcutta ruling was considered in chapter VII of volume II of Amir Ali's Muhammadan Law, fourth edition, and reasons were set forth at length for holding that the decision of the Calcutta High Court was wrong. The Bombay ruling agrees with Mr. Amir Ali. The Calcutta ruling is also held to be incorrect by Mr. Tyabji on page 162 of the second edition of his "Principles of Muhammadan Law" where assent is expressed to the Bombay ruling. This effect of the Bombay ruling is succinctly expressed by Mr. Amir Ali in the following words:—

> "There is a great difference between a marriage which is void *ab initio* (*batil*) and one which is invalid (*fasid*). If a man were to contract a marriage with a woman related to him within the prohibited degrees, the marriage would be void *ab initio*. Under the Hanafi law, the children of such an union would not have the status of legitimacy, unless the man was wholly unaware of the relationship or he was the subject of *ghurur* or deception. For example, if a man were to marry a woman related to him within the prohibited degrees, on the representation that she was not so related, and the marriage was consummated the issue of such an union would be legitimate.
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> But it is different in the case of an invalid marriage. An invalid marriage is one where the parties do not labour under an inherent incapacity or absolute bar,

> or where the disability is such as can be removed at any time. The issue of such unions are legitimate.
>
> An invalid marriage', says the Fatawai Alamgiri, 'is like a valid marriage in some of its effects, one of which is the establishment of parentage'.
>
> In these cases the six months will run from copula and not from marriage."

The last line of this passage refers to the rule of Muhammadan law that a child born after the lapse of six months from marriage, or in the case of a *fasid* marriage, from copula, will be deemed legitimate even though conception may have taken place before marriage. We are not disposed to rehearse again the arguments respectively in favour of the divergent views of the Calcutta and Bombay High Courts. We consider that the argument set up by the Bombay High Court and by the authorities quoted against the Calcutta view, hold the field, and that the Bombay ruling should be followed supported as it is by the views of the eminent authorities mentioned.

We may now consider the application of section 112 of the Evidence Act. In the case of *Hajira Khatun* v. *Amina Khatun* (1), Mr. Justice DANIELS expressed the opinion that section 112 was applicable to Muhammadans. The contrary view was taken by Mr. STANYON in a case of the Nagpur Judicial Commissioner's Court, *Zakir Ali* v. *Sograbi* (2). Here it is contended that section 112 is applicable, and that "valid" in that case means any marriage which is not *batil* or void *ab initio*. We are of opinion that section 112 of the Evidence Act cannot be applicable in any way to a marriage which according to the

(1) 73 I.C., 982. (2) 43 I.C., 883.

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Bombay ruling mentioned above is neither void *ab initio* (*batil*), nor absolutely void, but is *fasid*, i.e., irregular inasmuch as section 112 is based on a division of marriages merely into two categories, and cannot be applicable to Muhammadan law which accordingly to the Bombay ruling divides marriages into three categories. In any case we hold that if section 112 can be held applicable, then we should have to construe the word " valid " in the section as " flawless ", so that the presumption would not apply to *fasid* marriages.

The lower court followed the Bombay ruling as we propose to do and not the Calcutta ruling, but it held that the plaintiff No. 1 was born before the expiration of six months from the marriage of the deceased to her mother, and that, therefore, she could not be held to be the daughter of Musammat Chinka. Neither in that court nor in this Court does it appear to have been urged that even if she could be held to be the daughter of Musammat Mehrbibi it would be sufficient for her claim to the property, and so it is unnecessary for us to consider this point of view. Five witnesses for the plaintiff deposed that the plaintiff No. 1 was born in *baisakh*, that is April-May of the year 1908.

This evidence was not impugned by cross-examination, but the lower court disbelieved it in the face of an admission by Musammat Chinka made in former criminal proceedings. These proceedings were brought by Abdul Sattar against his nephew under section 198 of the Indian Penal Code by way of prosecution of that nephew for his having eloped

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with Musammat Mehrbibi. Musammat Chinka was examined in that case and deposed as follows :—

> "I cannot count. Four months ago I gave birth to a daughter. Ten months ago I was married to Abdul Sattar. I do not know the month that the daughter was born."

Now this evidence would make the plaintiff No. 1's birth to have occurred in September or October, that is to say within six months of Abdul Sattar's marriage with her mother. An additional reason for the Subordinate Judge rejecting the evidence of the five witnesses for the plaintiff was that their evidence was clearly false evidence so far as they asserted the fact of a divorce between Abdul Sattar Khan and Musammat Mehrbibi. We are not disposed to agree with the lower court on this finding. It may be mentioned that the Subordinate Judge who wrote the judgement appealed against was not the Judge who heard the evidence. We are, therefore, in as good a position as he was to express an opinion on the veracity of the witnesses. The statement of Musammat Chinka in the criminal proceedings cannot be regarded as an admission. She has not the status of a plaintiff in the case, and her statement cannot bind her daughter as an admission. The only way in which that statement was admissible in evidence was as rebutting Musammat Chinka's evidence in this case. We are prepared to exclude her evidence, but there still remains the evidence of the five witnesses for the plaintiff. No attempt was made, as already remarked, to impugn this evidence by cross-examination. It may be that these witnesses gave false evidence in support of the divorce of Musammat Mehrbibi, but as the case stands we think that their evid-

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ence must be accepted as to the month of birth of the plaintiff No. 1. Accordingly our finding is that the plaintiff No. 1's legitimacy must be held to be proved under the presumption of Muhammadan law that in the case of a *fasid* marriage a child born on the expiry of six months of copula is to be regarded as legitimate.

We now come to the question of the custom. The wajib-ul-arz provides that a son and daughter will share equally. There is no specific provision that a daughter, in the absence of a son, will exclude a collateral, but it is urged that this must be inferred from the fact that a daughter shares with a son to the exclusion of collaterals. We agree with the lower court that the inference would be a dangerous one. It may well be that there is a custom to give a daughter a half share with her brother, but it does not follow that the daughter should have the whole inheritance in the absence of a brother. Under ordinary Muhammadan law she will be entitled to one half as against a collateral. She will not, therefore, be in a worse position than that if she had a brother. We do not think it safe to infer that she should be in a better position.

We agree with the lower court that the plaintiff No. 1 has failed to prove the custom set up by her We also find nothing in the wajib-ul-arz that would support the plea of plaintiff No. 2 that a widow without children, i.e. legitimate children will have preference to a collateral, a point, which as remarked above, would only arise if the plaintiff No. 1's claim were to be rejected *in toto*. In consequence of the above findings we dismiss the appeal of plaintiff No. 2 with costs. We allow the appeal of plaintiff No. 1 in part and direct a decree to be drawn up securing the plaintiff No. 1 a half share in the property in

suit. The plaintiff No. 1 is awarded half costs in both courts, inasmuch as her claim has been allowed for half the property.

It may be remarked that before argument in this appeal the plaintiffs Nos. 1 and 2 had arrived at a compromise with defendant No. 1, one of the nine persons substituted for the original defendant Abdul Razzak, who died before the hearing of the appeal, whereby the defendant No. 1 agreed that the plaintiffs Nos. 1 and 2 should get a decree for one-third of the 8 annas share of Abdul Razzak. On our finding the plaintiff No. 2 is entitled to nothing, and the plaintiff No. 1 is entitled to one half of the 8 annas share as against all the defendants. We are unable in our decree to give an effect to this compromise. The compromise states that the defendant No. 1 was entitled under a deed of gift to one-third for the property of Abdul Razzak, but we do not know whether the other defendants would admit this. In any case under our finding the plaintiff No. 1 gets one-half of the property of Abdul Razzak which is more than one-third. She cannot, therefore, suffer, from our disregarding the compromise. On the other hand, the defendant No. 1 has given up all that he says that he is entitled to. He, therefore, cannot complain of the decree.

Appeal allowed.