

(1888) 04 AHC CK 0004
In the Allahabad High Court

Muhammad Allahdad Khan and Another	APPELLANT
Vs	
Muhammad Ismail Khan and Others	RESPONDENT

Date of Decision : 07-04-1888

Acts Referred:

Citation : (1888) ILR (All) 289

Hon'ble Judges : Straight, J; Mahmood, J; John Edge, J

Bench : Full Bench

Final Decision : Disposed Of

Judgement

John Edge, Kt., C.J.—I have had an opportunity of reading and considering and in fact discussing with my brother Straight and my brother Mahmood my brother Straight's judgment, on the status of the plaintiff Allahdad Khan. With that judgment, so far as it deals with the status and rights of inheritance of Allahdad Khan, I concur for the reasons stated by my brother Straight. But I do not agree with him as to the course we should take under the circumstances.

2. First of all we must consider Section 562 of the Civil Procedure Code. It appears to me that Section 562 applies not only to a case in which the Judge of the Court of First Instance has expressly excluded evidence, but that also it applies to a case in which the parties may have been or were by the act of the Judge misled as to the issues or the evidence necessary in the case. I think it would apply to a case in which it was apparent that a Judge intended only to consider one issue, such as the status of the plaintiff as an heir as in this case; or an issue of limitation; and where the parties owing to the view of the Judge on that point did not tender or bring forward their evidence. It appears to me here in this case that the main contention in the Court below as in fact here in appeal was as to the status of the plaintiff Allahdad Khan. In fact, during the whole of the argument of this case there was no word addressed to us by either side, so far as I remember, in regard to any of the issues, except as to the legitimacy to be inferred from the acknowledgment of Ghulam Ghaus Khan. I do believe that the probability is that in the Court below the same course was followed, and that

the attention of the Judge and the parties was almost exclusively directed to the exceedingly interesting point of law as to the effect of the acknowledgment made by Ghulam Ghaus Khan. It is quite true that we are told that in this case there is nothing on the record to show that any evidence was in fact excluded, not in the broad sense in which I use the word excluded, but in the contracted sense of exclusion by a rule or order of the Judge. That proposition put so broadly, I am bound to say, I do not concur in. Because with regard to the issues raised by the defendants Nos. 5, 6, 7, the so-called lessees, I think it can hardly be said that their evidence was not excluded within any reading of Section 562, because the Judge for some reason omitted to frame any issue on their written statement. In their case they raised certain questions which would have to be tried. I do not express at present any view as to whether, if that written statement were proved, the allegations contained in it would amount to a defence in law, but it was the duty of the Court to inquire whether those allegations were true or not.

3. This also true in this case that no affidavit is produced to show that the parties were misled, or that any evidence was excluded by the order of direction of the Judge. But we have to remember this, that Ismail Khan, one of the defendants in the suit, was, we are informed, practically a pauper, and these issues, which may not have been tried, may have been very immaterial to him. I think that in this case, if we proceed to finally dispose it on the evidence on the record, it is possible that we may do very material injustice to the parties interested in this litigation. I think, unless we are satisfied that no injustice will be done by proceeding on the evidence on the record as it at present stands, we ought to satisfy our own minds by directing a remand u/s 562. The issues, except those numbered 1, 2, 3, and 4, framed by the Judge have admittedly not been tried. There were other issues arising in the case which were not even framed by the Judge; and I do think in a complicated case of this kind it is better that we should extend the operation of Section 562 rather than limit the operation of that section. We have remanded cases u/s 562 where all the evidence was on the record, but where we came to the conclusion from the nature of the judgment that the Judge had misunderstood the case. If Section 562 be taken in its literal sense, it is obvious to me that it was our duty in these cases to have tried the real issues raised ourselves and not to have remanded them. I have never had any doubt that Section 562 would be applicable to a case in which the Judge has misunderstood the questions raised by the parties and has in consequence mistried the case. Such a trial could not be said to be a trial at all. I quite agree with what has fallen from my brother Straight that, in remanding cases u/s 562, we should take care that the parties should not have the opportunity of starting an absolutely new case; and I do not propose suggesting to the Judge to whom this case will go that he will give the parties an opportunity of starting a new case. The Judge must take the pleadings of the parties and their admissions and frame issues to dispose of all the material questions and proceed to try those issues on the merits.

4. For the reasons which I have given I am of opinion that this is a case to which

Section 562 applies, and that we ought to remand it under that section. I have to make one observation with regard to Section 563. It appears to me to be a section which had been drafted upon an assumption that there was something in the previous section to which it would apply and which gave authority to the Court to say what evidence should be taken on the remand u/s 562. We order the Court to try the case on its merits. Concurring with my brother STRAIGHT on the finding as to the status of the plaintiff, I am of opinion that this case should be remanded for the disposal of the rest of the issues u/s 562 of the Civil Procedure Code, and that the costs should abide the result.

Mahmood, J.

5. I concur in what has fallen from my brother Straight as to the facts of the case, and also as to the rules of law applicable to those facts. But because, in the course of the elaborate argument which was addressed to us at the Bar, many suggestions were made as to the exact scope of the rule of Muhammadan law relating to the acknowledgment of parentage, and much was argued as to such acknowledgment being a substitute for adoption as recognised in other systems, such as the Roman or the Hindu law, I am anxious to specify my own views.

6. First, then, as to the facts of the case, for the reasons so exhaustively stated by my brother Straight, I have no doubt that the following conclusions are justified by the evidence:

- (1) That Moti Begam did not stand in any such position of relationship with Ghulam Ghaus as would render her marriage with him unlawful;
- (2) that she is not proved to have been ever married to any person other than Ghulam Ghaus;
- (3) that she was married to Ghulam Ghaus;
- (4) that the exact date of her marriage with reference to the birth of the plaintiff Allahdad is unascertainable for want of trustworthy evidence;
- (5) that she cohabited with Ghulam Ghaus for a considerable number of years and was treated by him as his lawful wife;
- (6) that the plaintiff Allahdad was acknowledged and treated by Ghulam Ghaus as his son;
- (7) that in such acknowledgment or treatment there was no express specification as to whether Allahdad was a step-son, a legitimate son, or an illegitimate son of Ghulam Ghaus;
- (8) that similar acknowledgment or treatment was accorded to him by the defendant Ismail and the other children of Ghulam Ghaus by Moti Begam, and indeed by the rest of the family.

7. Such being the main conclusions as to the facts of the case, I am desirous of stating the propositions of the Muhammadan law applicable to these facts. My

brother has so fully quoted the authorities of the Muhammadan law that I am relieved of the necessity of repeating them, and need only refer to them for formulating my propositions.

8. The first and perhaps the most important question in the case is whether the rule as to the acknowledgment of parentage is a rule of the Muhammadan substantive law of inheritance or merely a rule of evidence. The question is important, because unless it is a " question regarding succession, inheritance, marriage or caste, or any religious usage or institution," within the meaning of Section 24 of the Bengal Civil Courts Act (VI of 1871) which governs this case, we are scarcely at liberty to apply the Muhammadan law in its integrity to this case, and the alternative would be almost unavoidable to apply to the question the rules of evidence, as to the admissions and presumption of legitimacy, contained in the Indian Evidence Act (I of 1872), by Section 2 of which enactment all other rules of evidence have been abolished.

9. Now, it cannot be denied that in all mediaeval systems of jurisprudence much confusion exists between rules of substantive law and rules of adjective law, that is, between rules which affect the merits and go ad litis decisionem and rules which regulate the remedy and, as rules of procedure, only go ad litis ordinationem. The Muhammadan system of jurisprudence is no exception to the general rule, and I have before now felt considerable difficulty in distinguishing the rules of the substantive law of Muhammadan inheritance from the rules of evidence. I allude in particular to the case of Mazhar Ali v. Budh Singh ILR All 297 which related to the inheritance of a missing person, and in which, after much consideration, a Full Bench of this Court agreed in holding that the question there raised was a question of evidence and as such governed by Sections 107 and 108 of the Evidence Act.

10. Is the question now before us one of a similar character? In order to decide this question I have been at some pains to consult the original authorities of the Muhammadan law which my brother has already quoted, and I am responsible for the English translation of the original Arabic of those texts. The first of them is a passage from Birjandi which describes the exact place which ikrar or acknowledgment in general occupies in Muhammadan jurisprudence, and the passage leaves no doubt that the Muhammadan juris consults themselves do not treat the subject of acknowledgments as forming part of the rules of evidence, though they recognise the fact that acknowledgments resemble admissions. To us the language of Birjandi, " an acknowledgment is giving information as to the right of a person enforceable against the acknowledger, that is, the person who gives such information," and "it is indispensable that the acknowledgment should expressly state the subject of the acknowledgment as if it already exists, and that by the acknowledgment the proof thereof is expressed." The author then goes on to explain that "it is not an effect of an acknowledgment that anything is for the first time founded or established."

11. So far, it would seem at first sight that an ikrar or acknowledgment stands in

the Muhammadan law much on the same footing as an ordinary admission as defined in Section 17 of the Evidence Act; and if the matter rested here, I confess I should have been inclined to regard the question as one appertaining to the province of the law of evidence. But acknowledgments of parentage under the Muhammadan law rest upon a footing higher than that of ordinary admissions as pure matters of evidence. The rules of the Muhammadan law applicable to such acknowledgments and the conditions under which such acknowledgments can be validly made are stated in the authoritative texts which my brother Straight has already quoted, and to those texts I wish to add a passage from the Hedaya which sums up the law upon the subject:

If a person acknowledge the parentage of a child who is able to give an account of himself, saying "This is my son," and the ages of the parties be such as to admit of the one being the child of the other, and the parentage of the child be not well known to any person, and the child himself verify the acknowledgment, his parentage is established in the acknowledger, although he (the acknowledger) be sick; because the parentage in question is one of those things which affect the acknowledger himself only and no other person. It is made a condition, in this case, that the ages of the parties be such as to admit of the relation of parentage; for if it were otherwise, it is evident that the acknowledger has spoken falsely. It is also made a condition that the parentage of the boy be unknown; for if he be known to be the issue of some other than the acknowledger, it necessarily follows that the acknowledgment is null. It is also made a condition that the boy verify the acknowledgment; because he is considered as his own master, as he is supposed able to give an account of himself. It were otherwise if the boy could not explain his condition; for then the acknowledgment would have operated without his verification. It is to be observed that the acknowledgment, in this instance, is not rendered null by sickness, because parentage is an original and not a supervenient want. By the establishment of the parentage, therefore, the boy becomes one of the acknowledger's heirs in the same manner as any of his other heirs " (Hamilton's Hedaya by Grady, p. 439).

12. In commenting upon this passage of the Hedaya, the author of the Kifaya points out that the rule as to acknowledgment of parentage is based upon the words of the Koran, "call them after their fathers;" and the author explains that such acknowledgment is sufficient, "because the burden of the obligation in respect of the child rests especially on the father, and the latter's acknowledgment affects himself personally and is thus accepted without any verification by the mother." Another celebrated commentary on the Hedaya, the Fathul Qadir, in explaining the rule contained in the above passage as to the condition that the acknowledged child should be of unknown parentage, goes on to say that the condition has been imposed, because otherwise the descent of the acknowledged child could not be established from the acknowledger since "descent after it is established is not susceptible of the annulment."

13. The last point is important, and is to the same effect as the text from the Ashbah and the first text from Vol. I of the Fatawa-i-Alamgiri both of which are quoted in my brother Straight's judgments. The same rule is stated in another portion of the Fatawa-i-Alamgiri; and to use the words of Mr. Baillie's translation, "descent, when once established, cannot be dissolved or cancelled, neither can it be transferred from one person to another" (Baillie's Dig., p. 408).

14. The passage from the Ashbah, however, throws the greatest light upon the nature of such acknowledgments and their effect under the Muhammadan law. That passage shows that whilst ordinary acknowledgments stand upon one footing an exception is made in favour of such acknowledgments as relate to matters of personal status, and that in such cases the law does not allow cancellation or annulment of the acknowledgment. This peculiarity of such acknowledgments, that is, the permanency of their effect when duly made, upon the personal status of the persons in respect of whom such acknowledgments are made, is in itself sufficient to justify the conclusion that the acknowledgment of parentage, though it has reference to evidential presumptions and other considerations, is in effect a rule of personal status in the eye of Muhammadan law; and I am fortified in this conclusion by the uniform practice of the Courts in India and of the Privy Council in dealing with such questions as falling within the province of the Muhammadan law of inheritance and marriage.

15. The various propositions of the Muhammadan law as they apply to the fact of this case and the steps of legal reasoning upon which those propositions proceed may now be stated.

16. The right of inheritance under the Muhammadan law is based upon three grounds described by Mr. Baillie to be, "nasub, which is kurabat, or kindred; special cause, which is marriage, that is, a valid marriage, for there are no mutual rights of inheritance by a marriage that is invalid or void, according to all, and wula, which is of two kinds, wula of emancipation and wula of moowalat, or mutual friendship." In this case we are concerned only with nasub, that is, relationship by consanguinity of descent, which in Muhammadan law means legitimate descent only, so far as inheritance from or through males is concerned, and marriage between the parents of the inheritor is a condition precedent to his legitimacy. "The intercourse of a man with a woman who is neither his wife nor his slave is unlawful and prohibited absolutely. When there is neither the validity nor the semblance of either of these relations between the parties, their intercourse is termed zina and subjects them both to hudud or specific punishment, for vindicating the rights of Almighty God." (Baillie's Dig., p. 1). "The offspring of a connection where the man has no right nor semblance of right in the woman, by marriage or slavery, is termed wulud-ooz-zina, or child of zina, and is necessarily illegitimate." (26, p. 3). The Durrul Mukhtar states the acknowledged general rule that "an illegitimate child as well as a child of curse or imprecation inherits only from the relations on the mother's side by reason of its being no residuary and having no father." (Tagore Law Lectures, 1873, p.

123). The same is the effect of the rule as stated in Rumsey's Chart of Muhammadan Inheritance (p. 342, 3rd ed.); and it is more fully expressed in Aini, where it is laid down that "illegitimate children and children of curse do not inherit, except from the mother's side, because their parentage on the father's side is wanting; so they do not inherit from their putative fathers, but as their parentage on the mother's side is established, they, on account of such parentage, inherit only from their mothers and half brothers by the mother's side the legal shares and no more." (Tagore Law Lectures, 1873, p. 123). "When a man has committed zina with a woman, and she is delivered of a son whom he claims, the descent of the son from the man is not established, but it is established from the woman by the birth." (Baillie's Dig., p. 411).

17. From these passages two points are perfectly clear, viz., first, that, so far as inheritance from males or through males is concerned, the existence of legitimacy of descent or consanguinity is a condition precedent to the right of inheritance; and secondly, that such legitimacy depends upon a valid marriage or connection between the parents of the inheritor. Now, the Muhammadan jurists themselves in dealing with the question of parentage, nusub, or relationship by consanguinity, recognise a distinction between cases in which inheritance is claimed from or through the father and inheritance claimed from or through the mother. "Maternity admits of positive proof, because the separation of a child from its mother can be seen. Paternity does not admit of positive proof, because the connection of a child with its father is secret; but it may be established by the word of the father himself or by a subsisting firash (bed), that is, a legally constituted relation between him and the mother of the child." (Baillie's Dig., p. 389). And it may be taken as an undoubted proposition of the Muhammadan law of inheritance that in no case can an illegitimate child, that is, the offspring of zina or illicit intercourse, be entitled to inheritance from his father or through him, because he is regarded as nullius filius, that is, a person whose nusub or descent from the father is wanting.

18. I have already said that in the case of establishing descent from a mother and claiming inheritance from her, legitimacy is not a condition precedent to such right of inheritance; but in the case of inheritance from the father legitimacy is absolutely necessary before any such right can be claimed. The question then is, whether in cases like the present, where the paternity of JS child, that is, his legitimate descent from his father, cannot be proved by establishing a marriage between his parents at the time of his conception birth, the Muhammadan law recognises any other method whereby such marriage and legitimate descent can be presumed, inferred, or held to be established as a matter of substantive law for purposes of inheritance.

19. In dealing with this part of the case much help is rendered by the case-law upon the subject. In *Khajah Hidayat Oolah v. Rai Jan Khartum* LR 3 IA 295 the principle was laid down by the Lords of the Privy Council "that, under the Muhammadan law, where a child has been born to a father of a mother where

there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan law, the presumption is in favour of such marriage having taken place;" and their Lordships go on to add, "that in considering this question of Muhammadan law we must, at least to a certain extent, be governed by the same principles of evidence which the Musalman lawyers themselves would apply to the consideration of such a question " (p. 318). The general effect of the ruling in that case is that continual cohabitation of the parents and acknowledgment of the child by the father is presumptive evidence of marriage between the parents and of the legitimacy of the offspring. Their Lordships had to deal with a similar question in *Mahomed Banker Hoossain Khan v. Shurf-oon-nissa Begam* 8 Moo I. A. 136 in which their Lordships held, that although by the Muhammadan law the legitimacy of a child of Muhammadan parents may be presumed or inferred from- circumstances, without any direct proof either of a marriage between the parents or of any formal act of legitimation, in the absence of evidence or circumstances sufficient to found such a presumption or inference, a claim by a party as a legitimate son to share in an intestate's estate should be dismissed. But whilst laying down this rule their Lordships went on to say: "But in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Muhammadan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation " (p. 159).

20. The exact effect of these rulings was again considered by their Lordships in the important case of *A shruf-ood-Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* 11 Moo I.A. 94 where their Lordships observed:

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An ante nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of facts. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override over-balancing proofs, whether

direct or presumptive" (pp. 113-14).

21. This passage, if taken as an abstract enunciation of the law, might lend colour to the contention that even a child whose illegitimacy is proved may be legitimated by an acknowledgment, and indeed it was upon this interpretation of that passage that a considerable portion of the argument on behalf of the plaintiffs-appellants proceeded. But the Lords of the Privy Council themselves in *Muhammad Azmat Ali Khan v. Musammatt Lalli Begam* LR 9 IA 8 :ILR Cal 422 took occasion to explain the exact effect of that passage and went on to say:

These observations must be taken with a reference to the facts of that case, and in that case it appeared that there was a Moottah marriage after the birth of the child. There was no acknowledgment, and the treatment of the child was equivocal. Sometimes he was treated as son and at others not; and in(sic)deed by a deed executed by the father for that purpose he was distinctly repudiated by him as his son. In that case it was decided that in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in point of time would cover the birth of the child or of an acknowledgment. The facts and questions in that case were very complicated, and some of the passages in the judgment referred to by the Judge below can only be understood by referring to the question to which they were addressed" (p. 19).

22. These observations are, in my opinion, an important limitation upon the interpretation of the passage on which so much reliance was placed at the Bar in the argument for the appellants. The general effect of the ruling in the case last cited is that, according to Muhammadan law, the acknowledgment and recognition of children by a father as his sons gives them the status of sons capable of inheriting as legitimate sons, and this rule was affirmed again by the Privy Council in *Sadakat Hossein v. Syed Mahomed Yusuf* LR 11 IA 31 : ILR Cal 663 where their Lordships expressly refrained "from offering any opinion upon the very important question of law" whether "the offspring of an adulterous intercourse could be legitimated by any acknowledgment" (p. 36). This last reservation is to my mind a most significant one, as showing that the passage which I have quoted from their Lordship's judgment in *Ashruf-ood-Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* 11 Moo. I.A. 113 must not be understood loosely in the sense of being an abstract enunciation of the law applicable to all cases; for I cannot help feeling that if that passage were to be interpreted loosely and regardless of the facts of the case in which those observations were made, there would have been no necessity for reservation of opinion by their Lordships in the case of the acknowledgment of an offspring of an adulterous or even of an incestuous intercourse. Illegitimacy under the Muhammadan law, as indeed under other systems, arises from the absence of a lawful matrimonial relation between the parents of the child; and if illegitimacy which is proved and placed beyond doubt were no impediment to an acknowledgment, there would be no logical reason why the offspring of an

adulterous or incestuous intercourse should not acquire the status of legitimate children when acknowledged by the father.

23. After having carefully considered the various rulings of the Lords of the Privy Council in the cases to which I have referred, I am of opinion that their Lordships never intended to go the length of laying down the rule that a child who is proved to be illegitimate, either in consequence of marriage between his parents being disproved, or being unlawful, could be legitimated by an acknowledgment. All the cases which their Lordships had before them were cases in which the question of marriage itself was a matter in dispute and involved in obscurity with reference to the legitimacy of the child. In other words, those cases were such as left either the fact or the exact time of the alleged marriage a matter of uncertainty, that is, neither proved nor disproved; and their Lordships in dealing with those cases applied the principles of the Muhammadan law of acknowledgment of parentage with reference to legitimacy for purposes of inheritance. Any other view of those cases would involve the proposition that their Lordships intended to go far beyond the authority of the Muhammadan law itself as to acknowledgments of parentage and legitimacy for purposes of inheritance.

24. Yet such was the effect of the argument addressed to us in support of the appeal, and indeed that argument went the length of contending that the Muhammadan law as to acknowledgment of parentage was nothing more or less than a substitute for affiliation by adoption as recognised by the Roman or the Hindu law, that is, an affiliation which has no reference either to the consanguinity of descent of the acknowledged child from the acknowledger or to the legitimacy of such descent. I have already said that this contention is not warranted by any of the rulings of the Lords of the Privy Council, and I now proceed to show that it is positively opposed to the rules of the Muhammadan law itself.

25. Not a single authority of that law has been quoted, and I am not aware of any, which would justify the conclusion that legitimacy of descent from a father is not an absolutely indispensable condition precedent to the very existence of the right of inheritance from the father, and I have already shown that children born of zina (which means fornication, adultery, or incest) can never be legitimated or entitled to inherit from their father. Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a proved and established fact. The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being disproved. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as

distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child. This is abundantly clear from the authorities from which my brother Straight has already quoted. Among those authorities the passages from the first volume of the Fatawa Alamgiri may at first sight contradict the view to which I have given expression, and I am therefore anxious to explain that those passages have no such effect. The first of those texts only shows that an acknowledgment of parentage when duly made cannot be negatived. The second text, which relates to the case of a majbub From which means the removal of the penis only. (Durr-ul-Mukhtar, p. 267). See footnote at p. 27, Baillie's Dig, acknowledging a child and such acknowledgment taking effect, notwithstanding the acknowledger's mutilated condition, proceeds upon the general principle of Muhammadan law against bastardizing children, and the words "the child necessarily becomes his even without proof of sexual intercourse" which occur in the text must not be understood to mean anything beyond the rule that even in such a case acknowledgment of parentage obviates the necessity of ascertaining either the time or the extent of the mutilation of the acknowledger's person. The text assumes the existence of a valid marriage and the possibility of the acknowledged child's legitimate descent from the acknowledger, and I have no doubt that it would be misunderstanding the text if it were held to mean that even where there is a physical impossibility of the child's descent from the acknowledger, the child becomes of one who could not be his father. The reason of the rule relates not to any theory of adoption, but to the theory that an acknowledgment of parentage obviates any investigation as to the physical condition of the acknowledger's potency or impotency for procreating the offspring of a valid marriage. The same is the explanation of the latter part of the second text which my brother STRAIGHT has quoted from the Fatawa Kazi Khan.

26. The third text from the Fatawa Alamgiri requires no explanation, but the fourth text does require reference to show that it does not contradict the view which I have taken as to the assumption of legitimacy being a condition precedent to the validity of an acknowledgment of parentage. Now that text begins by assuming that the offspring was the result of an illicit intercourse, but the birth of the child took place during lawful wedlock, and it was acknowledged by the father. Now, so far as my view that the assumption of a legitimate descent is a condition precedent to the validity of the acknowledgment of parentage is concerned, it is enough to point out that in the text itself the condition is imposed that the birth of the child should take place after the expiration of six months (the shortest period of gestation under the Muhammadan law) from the date of the marriage--a condition which proceeds upon the theory of the possibility of a legitimate birth. The same is the theory upon which the latter part of the text proceeds, although it relates to birth within six months of the marriage, because the implication there is that the acknowledgment of the father

must be taken to involve the possibility of a legitimate intercourse between the parents of the acknowledged child at the time of his being begotten. The text would be misunderstood if not considered in the light of the circumstance that divorce under the Muhammadan law rests entirely with the husband, that it may under certain limitations be retracted by him, and that there may be a remarriage between the parties. It is no doubt in view of this circumstance that the Muhammadan jurists have placed acknowledgment of the parentage of a child by a man upon an exceptionally strong footing, as obviating the necessity of an investigation into facts which would otherwise be necessary to establish the legitimacy of the child, with reference to the marriage of his parents, the period of his conception, and the date of his birth. The principle of the Muhammadan law on this head is much the same as that adopted by the Courts of justice in England, where the rule is represented by the maxim *semper praesumitur pro legitimatione puerorum*, or by a cognate rule *semper praesumitur pro matrimonio*, the authority of which was recognised in *Piers v. Piers* 2 HLC 331. And it is important to observe that in the very text with which I am now dealing it is expressly indicated that an acknowledgment of parentage is ineffective if accompanied by an intimation that the acknowledged offspring was the result of an illicit intercourse. The words of the text are: "if he says that the child is born of me by illicit intercourse, the descent is not established and he will not inherit from him," and they leave no doubt in my mind that it is only by misapprehension of the principles of Muhammadan law that it can be held that a person proved to be a *walad-ooz-zina*, that is, the offspring of a fornication, adultery, or incest, can ever be legitimated by any kind of acknowledgment by the father. It is upon the same principles that the first and third texts from the *Fatawa Kazi Khan* quoted by my brother Straight must be explained, and the latter part of the first text, as also the third text, show that the matter as to the effect of acknowledgment of parentage, though a rule of substantive law, proceeds entirely upon an assumption of the possibility of legitimate descent of an acknowledged child from the acknowledger, and that the rule as to the effect of such acknowledgment does not extend to cases where such legitimate descent was impossible owing either to the impossibility of a valid marriage between the parents of the child, or owing to the existence of such a marriage being disproved by trustworthy evidence. And I have no doubt that I am representing the views of the Muhammadan jurists rightly when I say that there is no warrant in the principles of the Muhammadan law to justify the view that a child proved to be the offspring of fornication, adultery, or incest could be made legitimate by any act of acknowledgment by the father. I repeat that the rule is limited to cases of uncertainty of legitimate descent and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment.

27. I have dwelt upon this point at such length because the judgment of Petheram, C.J., now under appeal begins by saying:

The evidence in this case proves, in my opinion, that the plaintiff-appellant

Allahdad was the illegitimate son of Ghulam Ghaus Khan. I also think upon the evidence that he was born before the marriage of Ghulam Ghaus Khan with Moti Begam, and therefore it has been established that he was, in the inception at all events, an illegitimate son of his father.

28. Similarly, my brother Brodhurst, in summing up the effect of the evidence in this case, went even further than Petheram, C.J., in saying:

The following appears to, be the established facts: that Allahdad was not born in wedlock; that he was the son of Moti by an unknown father; that his mother was at the time of his birth and up to the time that she married Ghulam Ghaus a prostitute.

29. If I had taken the same view of the evidence as Petheram, C.J., or my brother Brodhurst, as to the parentage or birth of Allahdad, I should have found it impossible to have favoured his claim; but according to the view of the facts which my brother Straight has taken, and in which I concur, the date of the marriage of Ghulam Ghaus with Moti Begam with reference to the birth of Allahdad is wholly uncertain owing to want of trustworthy evidence, and, indeed, it is not even established that he was the natural son of Ghulam Ghaus. But direct evidence of paternity is not to be expected in such a case any more than in a case where the question of alleged illegitimacy does not complicate the facts. Indeed, in the Muhammadan law, as in other systems of jurisprudence, direct proof of paternity is not required, and rules of presumption more or less stringent are adopted by various systems as furnishing the place of absolute proof of paternity which, *ex necessitate rei*, cannot be proved by positive and direct evidence, because, as the *Fatawa Alamgiri* puts it, "the connection of a child with his father is secret," as distinguished from "maternity, which admits of positive proof, because the separation of a child from its mother can be seen." To sum up the matter, I agree in the views of my brother Straight in holding that the entire question of the descent, birth, and legitimacy of Allahdad is involved in obscurity owing to the exact date of his mother's marriage with Ghulam Ghaus being unascertainable, and that, therefore, this case presents all those conditions to which the Muhammadan law as to the acknowledgment of parentage is most appropriately applicable; and further, as my learned brother has shown here, the requisite acknowledgment in words and by treatment was made by Ghulam Ghaus without any such intimation of Allahdad being the offspring of illicit intercourse as would vitiate the effect of the acknowledgment according to the texts which my learned brother has quoted.

30. Such being my view of the facts of the case, it is not necessary to enter into any elaborate discussion as to how far the provisions of Section 112 of the Indian Evidence Act (I of 1872), as to birth during wedlock being conclusive proof of legitimacy, would affect a case such as this. That section of course proceeds upon adopting the period of birth, as distinguished from conception, as the turning point of legitimacy. "It is a peculiarity of the English law that it does not concern itself with the conception, but considers a child legitimate who is born of

parents married before the time of his birth, though they were unmarried when he was begotten" (Lord Mackenzie's Roman Law, p. 130, 4th ed).

31. That peculiarity of the English law has no doubt been imported into India by Section 112 of the Indian Evidence Act, and it may some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Muhammadan law of marriage, parentage, legitimacy, and Inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the Courts in British India. Fortunately the difficulty does not arise in this case owing to the date of the marriage of Ghulam Ghaus with Moti Begam with reference to the birth of Allahdad being uncertain, and I need not therefore refer to the difficulty any further than by saying that there is enough authority in the texts of the Muhammadan law to show that, under that system of jurisprudence, questions of legitimacy are referred to the date of the conception of the child and not to the period of his birth.

32. Nor need I dwell much upon that part of the argument of the learned Pandit for the appellant which aimed at showing that the Muhammadan rule as to the acknowledgment of parentage is only a substitute for adoption as understood in the Hindu and the Roman system of jurisprudence, or that the rule of the Muhammadan law is the same as the Roman or the Scotch rule relating to the legitimation of children per subsequens matrimonium, that is, legitimation of ante-nuptial children whose illegitimacy is proved and admitted by subsequent marriage between the parents. So far as the argument refers to the Hindu law of adoption, I need only say, with reference to the numerous authorities which were considered by me in *Ganga Sahai v. Lekhraj Singh* ILR All 253 that adoption under that system has no reference to the natural descent of the adopted child from the adoptive father; that adoption, at least in its principal form, is established by a gift from the parents of the child to the adoptive parents; that the power of adoption itself is based upon religious considerations relating to the spiritual welfare of the adoptive father in the life to come after death; that the effect of such adoption takes away the adopted child from the family of his natural parents and affiliates him to the family of the adoptive father. Further, under that law only male children can be adopted for religious reasons, although no doubt secular considerations, such as the continuity of a family and devolution of inheritance, may form motives of adoption. None of these main elements of the theories upon which the Hindu law of adoption proceeds is common to the Muhammadan law, for there, as I have shown, acknowledgment of parentage proceeds upon the theory of actual descent of the acknowledged child (whether male or female) from the father who acknowledges it, and such descent being the result of a legitimate intercourse between the parents, and when either of these two, essentials is disproved, the one by proving that the acknowledged child is the offspring of another man, the other by proving either that marriage between the acknowledger and the mother of the child was impossible or did not exist at the time which would make the child legitimate, the acknowledgment

itself would be effective.

33. For similar reasons there is absolutely no analogy between the Roman law of adoption and the Muhammadan law of the acknowledgment of parentage. Under the Roman system adoption, whether in the form of *arrogatio* or in the later form of *adoptio proper*, was simply one of the methods of acquiring *patria potestas*, that is, the rights of control enjoyed by the head of a Roman family over his children, and it went through various stages of modification both as to the method by which it was acquired and as to its conditions and effects upon the adopted children. The history of the law and its rules have been well summarized by Mr. Hunter in his work on Roman Law (pp. 58-66), and by Colquhoun in his work on Roman Civil Law (Vol. I, Sections 683-705, pp. 545-558). It is not necessary to enter into any detail of the reasons and rules which distinguish the Roman adoption from the Muhammadan law as to the acknowledgment of parentage, and it is enough to say that before the age of Islam adoption by a feigned parturition was common and well recognised among the ancient Arabs, that the cognate as well as the agnate rights were attributed to children so adopted, and that such adoption and its legal effects were abrogated, by the express words of the Koran and have never since found a place in Muhammadan jurisprudence in connection with marriage, inheritance, or for any other legal purpose (see Colquhoun's Roman Civil Law, Section 707, Vol. I, p. 559).

33. Then, so far as legitimation is concerned as a rule of the Roman Law and of the Scotch Law, I need only refer- again to Colquhoun's Roman Civil Law (Sections 660, 666, 667, and 683) and to Lord Mackenzie's Roman Law (pp. 130-34), which describe the rules, conditions, and effect of legitimation under both those systems, and it only requires a comparison between those rules and the rules of the Muhammadan law as to acknowledgment of parentage to show that no analogy exists between the principles upon which those rules proceed and those upon which the Muhammadan rule of the acknowledgment of parentage is founded. Putting the matter shortly, the former two systems proceed upon the principle of legitimating children whose illegitimacy is proved and admitted, whilst the Muhammadan law relates only to cases of uncertainty and proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child. To illustrate this distinction I may refer to the rule adopted in Scotland, and I may also say in France (Lord Mackenzie's Roman Law, pp. 132-33), as to the legitimation of ante-nuptial children by reason of a subsequent marriage between their parents-- *per subsequens matrimonium*. In both those countries the marriage itself, subject to certain restrictions, has the legitimating effect. No such rule is known to the Muhammadan law, and we should really be introducing doctrines foreign to that system if, influenced by the analogies furnished by the Roman, the French, or the Scotch law of legitimation, we were to place acknowledgment of parentage under the Muhammadan law on the same footing as the rule of legitimation *per subsequens matrimonium* rests on in the foreign systems of law

to which I have referred.

34. It is apparent from what I have said that I fully concur with my brother Straight as to the weight of evidence and the facts of this case, and that I have as a matter of law arrived at the same conclusion as he has arrived at with reference to the status of the plaintiff Allahdad to be that of a legitimate child of Ghulam Ghaus, and as such entitled to inherit from the latter and entitled to maintain the suit. But then comes a question upon which, unfortunately, I am unable to agree with my learned brother, namely, the question as to what order we should pass upon this appeal. The facts of the case and the pleadings of the parties show that this is one of those cases which fall within the purview of the Full Bench ruling of this Court in Jafri Begam v. Amir Muhammad Khan ILR All 822 and of a Division Bench ruling in Muhammad Awais v. Har Sahai ILR All 719. These rulings show that no absolute and unconditional decree should be passed for possession in favour of the plaintiff, if it is true that during his remaining out of possession debts due by the deceased Ghulam Ghaus Khan were lawfully paid by the heirs in possession. If such payment of debts be proved, the effect would be that the payment of a proportionate share of such debts would be a condition to which the decree in favour of the plaintiffs would be rendered subject with reference to the various equities that may arise in the case.

35. Have we, then, upon the record any material for framing such a decree? The learned Counsel for the parties are agreed that there is no sufficient material upon the record to enable us to frame such a decree. All that is contended by the learned Pandit for the appellants is that, in the absence of such materials, it is the duty of this Court as the Court of appeal to decree the suit absolutely without any further remand for a proper trial of the points upon which the equities aforesaid would proceed. It is important to observe that not only the heirs of the deceased Ghulam Ghaus Khan, but also three lessees, were parties defendants to the suit, and it is clear that in a suit of this character, if the Court below had framed adequate issues arising out of the proceedings of the parties and after taking evidence thereon had adjudicated upon those issues, we should have been bound by Section 564 of the CPC to go ourselves into the merits of the evidence and to refrain from a remand such as Section 562 of the Code contemplates. But for the reasons stated by the learned Chief Justice such is not the case here; and agreeing with him in the interpretation of the law upon the subject of remand for new trials u/s 562 of the Code of Civil Procedure, I hold that all that the learned Judge of the lower Court tried and decided in this case was the preliminary question of the plaintiff Allahdad's status to sue as the heir of the deceased Ghulam Ghaus, and that, by reason of the view taken by that Judge upon this point of status, the rest of the case was not tried upon the merits, and that, therefore, the case is a fit one for remand u/s 562 of the Code of Civil Procedure.

36. I agree with the learned Chief Justice in the order which he has made.