

(1917) 02 BOM CK 0008
In the Bombay High Court

Tajbi Abalal Desai

APPELLANT

Vs

Mowlakhan Alikhan Desai

RESPONDENT

Date of Decision : 06-02-1917

Acts Referred:

Citation : 39 Ind. Cas. 603

Hon'ble Judges : Basil Scott, C.J;Beaman, J

Bench : Division Bench

Judgement

1. The only question we have to answer is whether Tajbi is, under the Muhammadan Law, the legitimate daughter of Hussankhan.

2. The admitted facts are that he first married Amabi. and subsequently her sister Sadabi, who is the mother of Tajbi. The later marriage took place during the subsistence of the marriage with Amabi, and both sisters appear to have survived him.

3. The same question arose in the case of Aizunnissa Khatoon v. Karimunnissa Khatoon 23 C. 130 ; 12 Tnd. Dec. 87. The Calcutta High Court held that the issue of a sister of the husband's first wife, if the second marriage was contracted or consummated during the continuance of the first, that is, before the sister first married had died or been divorced, was illegitimate.

4. We are unable to agree with that view of the Muhammadan Law. There is nothing in the reasons to be found in the judgment, there is nothing in the mass of material upon which the judgment is based, which, in our opinion, would warrant a Court in overriding so high and so clear an authority as the Fatawa-i-Alamgiri.

5. Briefly the reasoning of the learned Judges in the case of Aizunnissa Khatoon v. Karimunnissa Khatoon 23 C. 130 ; 12 Ind. Dec. 87 may be thus summarized.

1. No distinction can be drawn from the language of the original text in the Kuran between the prohibited women mentioned in it.

6. The words used suggest no such distinction or any intention to make it.
7. It cannot be maintained on grounds of law or reason or even when looked at in the light of common sense.
2. The weight of authority (contained in the writings of accredited authorities on the tradition and the law) is against the law laid down in the Fatawa-i-Alamgiri.
3. The reasoned conclusions of Baillie upon the point set forth in the Chapter VIII, Bk, I, are his own, and are not drawn direct from his chief authority, the Fatawa-i-Alamgiri. They are, therefore, entitled to no more weight than the opinions of any other modern writer on the Muhammadan Law. Similarly, Ameer Ali, in summing up this topic, is not clear, and even if his considered opinion is the same as Baillie's it is certainly of no higher authority.
4. Doubt has been thrown upon the authority of the Fatawa-i-Alamgiri by later Muhammadan lawyers such as the author of the Rudd-ul-Muhtar. And
5. The text directly in point professes to be based upon the authority of the Muhit of Sarakhshi (1096), the original of which was not before the Court.
8. The learned Judges of the Calcutta Court recognized and accepted the classification of marriages with prohibited women in two categories: (1) Those which were "batil" or absolutely void, and (2) those which were "fasid" or only invalid (or irregular). Also they recognized and accepted the general rule regulating the resultant legal consequences of marriages falling within the one or the other category. Void marriages could have no legal effects, invalid marriages, if consummated, could. Last, they also appear to have accepted the criterion in general use for determining whether a marriage with a prohibited woman should be classed in the category of void or of invalid marriages. This criterion is to be sought in the nature of the prohibition; if that be permanent, then the marriage is void, if temporary, then the marriage is invalid. Adopting the classification, its legal consequences and the test, the Judges held that a marriage with a sister during the subsistence of a prior marriage with her sister was void, and, whether consummated or not, had no legal consequences, and that this was so because the prohibition against marrying two sisters together was a permanent prohibition, and brought a wife's sister within the moharram or (in effect) the pale of incestuous adultery. It will thus be seen that the true foundation of the judgment was the very strong opinion the learned Judges held upon the true and intended meaning of the passage in the Kuran. There is now a general consensus among the best modern text-book writers on Muhammadan Law, the case of Aizunnissa Khatoon v. Karimunnissa Khatoon 23 C. 130 ; 12 Ind. Dec. 87 was wrongly decided. Whether Ameer Ali was clear upon the point in his book then before the Court or not, he has made his own view, unmistakeably clear in later editions.
9. In dealing with a point of this kind it is well to remember that where the origin of law lies in revelation, divine or semi-divine communication, or inspiration, the

form of expression is almost certain to be extremely compendious. For all purposes of modern jurisprudence and applied law derived from such sources, Courts have almost invariably to draw upon the amplification of the first revelation, taking the form of treatises, themselves sometimes sacrosanct, and later of mere commentaries of admittedly human origin. In administering the Hindu Law, English Courts rarely, if ever, have recourse to the Shrutis. The Smritis of Manu and Yajnyavalkya, eg., being, if not actually divine, sacrosanct, are, wherever expressly applicable, of paramount authority. But in practice the Courts of India rely far more upon the critical commentaries such as the Mitakshara, the Mayukha, and in Bengal, the Dayabhaga.

10. In interpreting a highly condensed text such as that in the Kuran, prohibiting certain women, supposing the actual words to leave any material point ambiguous, the Courts must look to the way in which the most authoritative exponents of the law thus enjoined have understood it, and to what extent traditions thus legitimately moulded have gradually come to be established and accepted as integral parts of the Muhammadan Law, as long as that law was administered by Muhammadan lawyers in Muhammadan Courts. The Fatawa-i-Alamgiri stands in much the same relation to the Muhammadan Law, first revealed, it is true, but later going through a long process of traditional interpretation and resultant moulding in the hands of sages and learned lawyers, as the Institutes of Justinian stood to the Roman Law which had preceded them. The Fatawa-i-Alamgiri was an authoritative exposition of what the Muhammadan Law was, at a time when Muhammadanism was at the height of its power in this country.

11. By the time of Aurungzeb, Muhammadanism, as a temporal power, had perhaps passed its zenith, but through the centuries which separated Muhammad from the leading lawyers of Aurungzeb's Empire, Muhammadanism had absorbed and represented in more than one important sphere, the highest mental culture. The codification of the Muhammadan Law, as it had, in the meanwhile, been shaped by its leading exponents, was the work of men, whose minds may be allowed to have been strictly trained to systematise, and reduce to coherent and practically applicable principles, much that had been matter of dispute, uncertainty and controversy. And where the authors of the Fatawa-i-Alamgiri announce without doubt or qualification the legal limits and proper mode of administering the law the Prophet had in mind, in such a connexion as this, we do not see where Courts can look for better authority, or why they should set themselves to interpret over again what was thus declared in the plainest and simplest language. In this connection reference may be made to the observations of the Privy Council in *Aga Mahomed Jaffer Bindanim v. Koolsom Beebee* 25 C. 9 ; 24 I.A. 196 ; 1 C.W.N. 449 ; 7 M.L.J. 115 ; 7 Sar. P.C.J. 199 ; 13 Ind. Dec. 7. Their Lordships say that "They do not care to speculate on the mode in which the text quoted from the Kuran, which is to be found Sura II, verses 241-2, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a

point of this kind to attempt to put their own construction on the Kuran in opposition to the express ruling of commentators of such great antiquity and high authority."

12. Abating the authority of such a passage as that upon which we are commenting from the Fatawa-i-Alamgiri by pointing out that it is expressly based upon an earlier work, the Muhit of Sarakhshi, which the learned Judges would have wished to see for themselves, appears to us to miss the point. In the first place it is, to say the least of it, unlikely, that any two English Judges would have been more competent to give a text from the Muhit its real meaning than the compilers of the Fatawa-i-Alamgiri. In the second place, the citation of authority in such a book as the Fatawa-i-Alamgiri, whether or not its meaning may be capable of other interpretations, need be taken no further than this, that what is expressed upon it is what, in the considered opinion of the authors of the Fatawa-i-Alamgiri, is the right law. That, and that alone, appears to us to be what Courts are first to consider in valuing the authority of the Fatawa-i-Alamgiri. Thirdly, whatever may now seem to be the literal face meaning of a passage in the Kuran, Courts cannot forget that the law flowing from that revelation had, by the time the Fatawa-i-Alamgiri was published, been administered in Muhammadan Courts under the rule of Muhammadan Sultans and Emperors for ten centuries, and, therefore, that the exposition of it at that time by the highest available legal talent, by all the best jurists in the service of Aurungzeb, ought to be highly respected. Last, we cannot admit that such a work as the Rudd-ul-Muhtar, written as late as 1817 A.D., can be or ought to be weighed, as authority, against the Fatawa-i-Alamgiri. The Muhammadan empire of India had long been extinct. The author (from whom immensely long and often highly confused and sometimes altogether irrelevant excerpts have been made in the appendix to the judgment of the Calcutta High Court) is extremely dogmatic, and gives many indications of the high opinion he entertains of himself. But it is safe to say that no Muhammadan would pat him upon the same level, or anywhere near the same level, as the compilers of the Fatawa-i-Alamgiri. We have no right to discredit the latter because the Rudd-ul-Muhtar throws doubt upon its authority.

13. Before considering the text in the Kuran, these propositions may be stated. We do not think any one of them will be seriously disputed:

(1) The prohibited women fall into three Classes: (a) those who are prohibited for consanguinity; (b) for affinity; (c) for unlawful conjunction.

(2) The ground of permanent prohibition is that marriage with a woman so permanently prohibited would be incestuous at any time by reason of consanguinity, or at any time after the bar had been established by affinity.

(3) The grounds of temporary prohibitions are various. But the notion of incest certainly underlies the particular prohibition now under discussion. But the ground of the prohibition, confined to that notion, is clearly not permanent. It is incestuous to have two sisters in marriage together, but it is not incestuous to

marry a wife's sister after the wife has been divorced or died. It at once becomes clear that, unlike the cases of permanent prohibition for affinity (although this too is referable to affinity for its substantial reason), the prohibition will not survive the removal of the person by death or divorce, marriage with whom has first set up the bar of affinity. No one has yet contended that a Muhammadan may not marry his wife's sister, merely because she was his wife's sister. Here then is a case of continuing condition, or obstacle, which ceasing to exist, the disability disappears. It is otherwise in all cases of permanent prohibitions for consanguinity or affinity. The distinction is quite simple and plain. On the ground of affinity a man is permanently prohibited from marrying his mother-in-law or his step-daughter. He could not marry them after the death of his wife, But a man is not permanently prohibited, on the ground of affinity or any other ground, from marrying his wife's sister. After his wife's death, he may of course marry her sister. It seemed to the learned Judges of the Calcutta High Court that no reason could be given for such a distinction, and when they looked at the matter in the light of common sense, they were equally at a loss. Even were that so, Courts must not be too exacting in getting at sound reasons for all the rules laid down in oriental, archaic, often very arbitrary, systems of law.

(4) Marriage with a permanently prohibited woman is void, and has no legal consequences. Marriage with a temporarily prohibited woman, if consummated, may have legal consequences.

(5) Three principal consequences are: Right to dower, Obligation to perform iddat, Legitimacy of issue, "the establishment of nasab, or paternity,"

14. To be clear whether a marriage is absolutely void, or only invalid, or irregular, or illegal (the latter word appears to be used loosely, and applied to both classes of marriage), it is necessary to enquire whether one or more of these legal consequences flow from the marriage, under any conditions. If they do, then the marriage cannot have been void.

15. Next we will state what we think to be the only principle upon which our Courts can hope to regularize the administration of the Muhammadan Law upon the point. It needs to be systematized, and placed upon a solid ground of intelligible and virtually universal principle, if we are ever to be freed from the chaos of texts, glosses, definitions, illustrations, distinctions and exceptions with which most of the Doctors of the Muhammadan Law abound.

16. Confined to the question we have to answer, and leaving aside for the moment express authority where the legitimacy of the issue of a marriage is disputed, it must be first found, whether the marriage was absolutely void, or only invalid. The test is whether the woman married was permanently, or only temporarily, prohibited. If it be found that she was only temporarily prohibited, although the contract made while that prohibition persisted was a void contract, if followed by sexual intercourse, the woman will be entitled to dower, will be

under obligation to perform iddat and the issue if born after six months will be legitimate.

17. We will now deal with the text in the Kuran. It runs as follows in Sale's translation: "Ye are forbidden to marry your mothers, and your daughters, and your sisters, and your aunts, both on father's and mother's sides, and your brothers' daughters, and your sisters' daughters, and your mothers who have given you suck, and your foster sisters, and your wives' mothers, and your daughters-in-law (step-daughters ?) which are under your tuition, born of your wives, unto whom ye have gone in (but if ye have not gone in unto them it shall be no sin in you to marry them), and the wives of your sons who proceed out of your loins; and you are also forbidden to take to wife, sisters, except what is already passed, for God is gracious and merciful."

18. The literal translation is: "made unlawful upon you, your mothers and your daughters and your sisters, etc., etc., and to join together two sisters, etc."

19. This makes it clear beyond doubt that what was forbidden was not marriage with a wife's sister, but "joining together two sisters," in other words, this prohibition is against unlawful conjunction, and from its very nature temporary. Had the text borne the meaning put upon it by the Calcutta High Court, the wife's sister would have been expressly prohibited, as all the other women are. This strikes at the root of most of the reasoning in the judgment of the Calcutta High Court, and deprives it of much of its force. It might be argued that although a marriage is temporarily and not permanently prohibited, yet, if it takes place in fact while the temporary prohibition is in force, it is as void as though it had been permanently forbidden. If that were really so, it would destroy one of the principles upon which the sound and systematic administration of this part of the Muhammadan Law in our Courts must rest.

20. But we doubt whether it is. Rigorously analyzed the ground of the doctrine, that a marriage with a woman permanently prohibited is absolutely void, is simply that from the moment that prohibition takes effect, any sexual connexion with her must always be incestuous. And no issue of necessarily incestuous intercourse can ever be legitimate. But even on the confused dicta of the Muhammadan lawyers, it would not be contended that where a man simultaneously married two sisters, and had intercourse with them both, but could not remember with which first, and both had issue, such issue would be illegitimate. In such circumstances it seems to be agreed that both sisters would be entitled to dower, would both be obliged to perform iddat, and presumably, therefore, the children of both would be legitimate. Nasab would be established. Yet it is equally clear and certain that having regard to the prohibition against marrying two sisters at once, if that rests upon a basis of such marriages being incestuous, in the case supposed the children would be the children of incest, or at any rate one of them would, though it might be difficult to say which. Again if a man married first A and then while A was still alive, her sister B, and had intercourse with B and begot a child upon her, and the very same night A died, it

may be doubted much whether any one would contend that the child so begotten must be illegitimate. Such an example introduces the always illusive and difficult time element. If it really would have the play above attributed to it, then it is clear that the incestuousness of the act which brought the child into being would not be the true determinant. In every case of permanently prohibited women it would. No matter when the act of procreation took place, if by reason of consanguinity or affinity the woman was permanently haram to the man, the child born of their union would be illegitimate. An examination of text-book writers, old and relatively modern, puts it beyond all doubt that in numerous instances of temporary prohibition, all the legal consequences of marriage may follow, if in fact there has been consummation. In all these cases, there is no incest, and time is always the determinant factor. In dealing critically with a topic which has been subjected to such interminable examination, and finedrawn distinction, the difference between incest and adultery must never be lost sight of. Fornication or adultery was severely punished under the Muhammadan Law, and a great part of the extracts appended to the judgment in Aizunnissa's case (1) is devoted to this question of punishment. It has little, if any, relevance to the question we have to answer. It has now been shown, we hope conclusively, that the Kuran was incorrectly interpreted by the learned Judges of the Calcutta High Court and that rightly read, it allows full play to the principles upon which we would decide this case.

21. We propose now as briefly as possible to summarise the collection of texts appended to that judgment, omitting all that is not relevant to the matter in hand. It is a great pity that this was not done before the ill-digested mass was printed in the appendix. We venture to say, after having gone through it all, that it ought to have been carefully sifted; that a great deal of it is quite irrelevant, and much also is utterly unintelligible, even, supposing if any sense could be extracted from it, that would be relevant. The plain truth is that many of these early writers in their desire to define and distinguish, and systematize, went far beyond their powers, with the inevitable result, that instead of clearing the points they were discussing they have rendered them hopelessly obscure. We need only refer to the treatment of errors in act and errors in subject. That dissertation, which is meant to be extremely subtle, profound and semi-metaphysical, is in fact only unintelligible verbiage.

22. A careful analysis of the materials available will show that there is nothing in them prior to the promulgation of the Fatwa-i-Alamgiri, which necessarily impairs the soundness of the doctrine therein enunciated upon this point.

23 In the Fatwa-i-Kazi Khan (A.D. 1190) it is written: "Another of those classes is the joining of two sisters in marriage, whether they be free women or female slaves; then if the husband has married them together (that is by one contract), the marriage with both of them is void (batil); but if he has married them consecutively, (that is one after the other), the marriage with the first is valid, and the marriage with the second is void (batil)...And if a man marries a woman

and he afterwards marries her sister, the marriage of the first is valid, and that of the second is void (batil). "...if a man marries a woman by an invalid marriage and cohabits with her and gets a child by her after six months, the nasab will be established from him."

24. Here certainly the writer describes without qualification the marriage with the second sister as "void" (batil). But it may be doubted whether he was laying down more than a general proposition, without particular regard to the nice distinctions afterwards drawn so profusely between the legal consequences of a void and an invalid marriage.

25. Hamilton's Hedaya (A.D. 1190): "it is unlawful to marry two sisters.--It is not lawful to marry and cohabit with two women being sisters, neither is it lawful for a man to cohabit with two sisters...because the Almighty has declared that such cohabitation with two sisters is unlawful." This carries the matter no further, and what follows about the case of a man marrying two sisters at the same time without being able to say which was first married has but an indirect bearing upon the question. Like all other passages on that topic, however, the principle is that where no priority can be established the marriage of both must be dissolved, and each must have half the dower. To that extent it is clear that such a marriage is not void. Then follows a passage which lays down that a woman is not entitled to any dower for an invalid marriage which has not been consummated. But in case of consummation she is entitled to her proper dower.

26. The next passage is from the Hedaya, Book II, Chapter 3; "The descent of a child born of a woman enjoyed in an illegal marriage is established (in the reputed father), because in this, regard is had to the child's preservation," etc.

27. Under the extract from the Hedaya, Book VII, Chapter 5, dealing with slander, the following passage occurs: "It is to be observed, as a rule, that punishment for slander is not incurred by the accusation of any person guilty of such a carnal conjunction as is in its own nature unlawful, because the term whoredom (zina) signifies a carnal conjunction of this description: but where a person forms such a carnal connexion as is unlawful on some other account, punishment for slander is incurred by the accusation of him, as a carnal conjunction of this description is not whoredom. The connexion of a man with a woman who is not his property in any shape whatever (such as a strange woman), or with one in whom he has no property in some one shape (as in a partnership slave, for instance), is unlawful in its own nature; so also is his connexion with a woman who is his slave, but who is one with whom cohabitation is unlawful to him by a perpetual illegality (such as his foster sister); hut his connexion with a slave with whom cohabitation is unlawful to him by such an illegality as is not of a perpetual nature (as in the case of one with whose sister he cohabits, either as his wife, or as his slave) is unlawful on another account." "That is to say," says the marginal note, "although it be not unlawful in its own nature, yet it is made so by circumstances; but this is not a perpetual illegality, as the prohibition (in the instance here cited) would be

removed by the death or other means of removal of the sister, contrary to perpetual illegality, which, existing in the subject herself, can by no means be removed." This passage and the commentary thereon in the Inaya subsequently noticed support the view advanced in this judgment.

28. Kanz-ud-Uaqaiq (A.D. 1300): "in a case of invalid marriage the customary dower becomes obligatory where there has been cohabitation...and the paternity will be established, and the iddat will be obligatory."

29. Sharhi Viqaya (A.D. 1349): "in the case of an invalid marriage nothing will be obligatory unless there be cohabitation, even if there be valid retirement. But if he were to cohabit he will have to pay the customary dower...and the parentage will be established from the time of cohabitation."

30. All these citations show that in invalid marriages cohabitation validates them for all practical purposes. But they do not touch the main question, viz., whether the marriage of a sister while the marriage with her sister subsists is merely invalid, or wholly void.

31. A passage from the Inaya (A.D. 1384) merely goes to show that marriage establishes inter alia, the bar of affinity, and instances the case of sisters. The meaning simply is that when a man has married one sister, the other sister becomes (haram) unlawful to him.

32. The Inaya has this passage, Volume 2, page 10? "The Hedaya has confined the case to two contracts, because if he marries them (sisters) by one contract, the nikah is batil on account of juma (or joining) between two sisters, and, therefore, they will not be entitled to any dower; and he has confined the case to one where the husband does not know which marriage is first, because if he knows this the nikah of the second is batil...The Kazi will separate the wife and husband in the case of a fasid (invalid) marriage. Fasid marriages are, for example, a marriage without witnesses, the marriage of a sister during the iddat of another sister, of a fifth wife during the iddat of the fourth wife, etc., and the nasab of the son of her (that is the wife in a fasid or invalid marriage) will be established..."

33. The conjunction of these passages is intended to show that the writer treats the marriage with a sister during the subsistence of a marriage with her sister as absolutely void, and not within the group of "invalid" marriages of which examples are given. That is a fair construction no doubt. But the authority is neither pointed nor conclusive.

34. Again we have another passage from the Inaya, which deals with haram or unlawful intercourse. This is said to be of two kinds, that which is unlawful in itself and that which is unlawful for some other reason. Under the second class we find an instance of intercourse with two slaves who are sisters, and it appears that this is more or less condonable. But the writer was evidently not thinking of marriage. The Inaya also, Volume II, page 496, commenting upon the passage

with reference to slander in the Hedaya observes: -"The accuser in the second class shall be subjected to punishment, because the illegality in this class is on account of a temporary cause which is susceptible of being removed. Dost thou not see that when a majusi (or fire-worshipper) woman accepts Islam, or when one of the sisters goes out of the ownership of the man, then it shall be competent to the man to have intercourse, therefore, the intercourse is not zina, and the accuser of the man shall be subjected to punishment. And the remaining portion (of the Hedaya) is clear (not requiring commentary)."

35. The Aynee (A.D. 1445), a commentary on the Hedaya, contains this passage, dealing with the marriage of two sisters: "because if the man marries them by one contract the marriage is batil on account of juma (or joining) between two sisters, and, therefore, they will not be entitled to any dower, and the Hedaya has confined the case to one where the man does not know which is first; because if he knows this, the marriage of the second is batil." All this appears to be written with special reference to the right of dower.

36. In the Fath-ul-Qadir (A.D. 1456) there is an interesting little passage to this effect: "if a man were to marry his slave girl to another man, while she is pregnant by the (former) man, the marriage is batil (Hedaya)." "The expression the marriage is batil" is said by some (to mean) fasid, as mentioned above, and there is no difference in marriage between them (batil and fasid) contrary to (the case of) sale." This shows that at that time the distinction between void and invalid as applied to marriage, which has come to be so much insisted upon, was not valued very highly. The same author states that the Hedaya in dealing with the question of the marriage of two sisters has confined the case to one where the man does not know which was first married, because if he does the prior marriage is sahih or valid, while the second is batil or void. But in view of what he had already said about there being no real distinction in marriage between batil and fasid, not much importance need be attached to this.

37. Zakhairat-ul-Uqbar (A.D. 1496) enumerates instances of "fasid" marriages which would appear to be incompatible with the inclusion in this class of such a marriage as we are here dealing with.

38. Jami-ur-Rumuz or Kohistani (A.D. 1534): "To a man is unlawful his near root, which is his mother, etc., and it is permissible that unlawfulness be explained by fasid and batil, because there is no difference between batil and fasid in the matter of marriage." Such views may explain practically everything we find in texts and commentaries so far which may appear to conflict with the more liberal, and we think, more sensible, view taken of this question in the Fatawa-i-Alamgiri.

39. The same author goes on to say: "And in nikah which is fasid, that is batil, as, for instance, a marriage with a woman prohibited perpetually or temporarily, with a woman on whose behalf there has been compulsion, etc...if the man has had no intercourse then nothing shall be obligatory on account of the dower

fixed...or iddat, or maintenance, although he might have validly retired with her. And if he has had intercourse with her and admits the fact, then the nasab shall be established from him if she gives birth to the child at six months from the intercourse according to Muhammad."

40. In the section on punishment in the same treatise we find this passage: "and it drops: (punishment ceases) in respect of the man who has intercourse from doubt...as if a man marries with a woman without witnesses, or a slave girl without the permission of her master, or a slave girl upon a free woman, or a majusi woman, or five women in one contract, or joins two sisters or marries his maharram." Here we have a glaring example of the laxity of grouping or classification characteristic of so much in the Muhammadan Law books.

41. Next in order comes the passage from the Fatawa-i-Alamgiri, which is in our opinion decisive. It runs as follows: "If two sisters are married in one and the same marriage, the Kazi will effect separation between them and him (the husband). If the separation takes place before cohabitation nothing will be payable to them (the sisters), but if the separation takes place after cohabitation each of them will be entitled to the smaller amount of the two, namely, customary and fixed dower. This is the muzmirat. But if the two sisters are married by two marriages, the second marriage is fasid (invalid) and it will be obligatory on him to put her away. And if the Kazi comes to know about the existence of such a marriage he will separate them. If she (the second sister) is separated before consummation nothing will be established amongst the ahkam (legal effects of marriage). But if she is separated after cohabitation she will have the customary dower, and the lower of the two amounts of the customary and fixed dowers will be obligatory, and it will be obligatory on her to observe iddat, and the nasab will be established. This is in the Muhit of Sarakhshi."

42. Then follow liberal extracts from the Rudd-ul-Muhtar, and one quotation from a commentary on the Dur-ul-Mukhtar of the year 1839. We do not propose to criticize these, because we do not consider that either is comparable with the Fatawa-i-Alamgiri.

43. It may be noted, however, that in the Muhammadan Jurisprudence of Mr. Justice Abdur Rahim, page 330, it is stated that in the Egyptian edition of the Rudd-ul-Muhtar, Vol. I, page 380, the marriage of two sisters is said to be fasid.

44. The above brief critical notice supports what we have said, that there is no sufficient ground for holding that the clear and explicit doctrine of the Fatawa-i-Alamgiri really conflicts with sound tradition or makes any innovation upon the Muhammadan Law as it had been gradually evolved up to 1660 A.D. Broadly speaking, no doubt such a marriage as that of Saidabi in this case is prohibited and would be described as void. Per se, it certainly is void, in the sense that it is expressly forbidden. But since the reason for the prohibition is to be sought in the subsistence of a relation with another, and not in the blood of the woman married, it should not, in any classification which aims at logical exactitude, be

placed in the same category as those which are founded on incest. By 1660 A.D. the best Muhammadan legal opinion had expressed itself very definitely in favour of regarding such marriages, as the one we are dealing with, to be fasid only. This opinion seems to us to be founded upon the only intelligible, universal principle, upon which the Courts could deal with marriages some of which must be absolutely void, while others would only be relatively void, or invalid. That principle, as we have stated, is that the test and the only test to be applied is whether the woman in question is permanently or only temporarily haram. In every case of the kind the woman in question must be haram, and the difficulty is to decide when, although haram, she has in fact married a man and the marriage has been consummated, it is to be treated as absolutely void without any legal consequences at all, and when it is to be treated as bad indeed in inception, yet capable of having legal consequences. We see no other ground upon which such a decision can be based with the certainty that it will be uniform and consistent and applicable in every case of doubt than the permanence or otherwise of the prohibition.

45. It is true that in the case before us, considerations in favour of placing the marriage in one or the other category may so overlap each other as to make it hard to feel that the entire position is logically unassailable. But as contrasted cases diverge further from the point at which, in the present instance, they meet and seem to interpenetrate, the applicability of the test becomes more and more apparent and its use more efficacious.

46. Taking the whole current of authority and the general trend of informed thought on this subject, it points clearly to some such distinctions having always been recognized by the Muhammadan Law. Where that is so and a particular case on the borderland of such distinctions, to which it may be doubtful whether they can be applied in the ordinary way, arises, surely the Courts would be well advised to accept the authoritative statement of the law as it was then understood by the authors of the Fatawa-i-Alamgiri. It is impossible to say that that statement conflicts with the textual authority of the Kuran. Speaking generally, it appears to us to harmonize with the course the law took during the intervening period, and to be in consonance with the soundest practical principles. It has the support of such a great modern text-book writer as Baillie. The eighth chapter of his first book appears to us to reach conclusions by unanswerable reasoning, and while those conclusions may be his own, they are the conclusions of a writer of profound knowledge intimately versed at first hand with all the best writings of Muhammadan lawyers. The modern Muhammadan text-book writers, Ameer Ali, Tyabji and Abdur Rahim, are in substantial agreement. All authority appears to us to point one way. Against this is nothing but the judgment of the Calcutta High Court in Aizunnissa's case (1) and after having given it and the materials upon which it avowedly rests our most careful and respectful attention, we find ourselves wholly unconvinced by its reasoning and unable to agree with the law it lays down.

47. The result is that the decree of the lower Court must be varied by declaring that the plaintiffs are together entitled to a five-eighth share in the estate of Hassamkhan and they do obtain that share by partition of the plaint land. The mesne profits awarded must be increased proportionately to Rs. 375 and Rs. 125 a year until possession for future mesne profits from the defendant No. 1. The plaintiffs are entitled to three-fourths of the costs throughout.