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ADMINISTRATION OF ESTATE UNDER MUSLIM LAW—A REVIEW

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Introduction

The existing law of administration of a dead man's estates as applied in this sub-continent is a total misrepresentation of the genuine principles of the Muslim law. It is quite unaware of the basic theory of the Muslim law of succession. So there is ao logical relation or coherence between the various rules applied by courts. Some of its rules are contrary to the genuine Muslim law, some rules are more in agreement with the English law of succession and some are arbitrary and peculiar to themselves. The fundamental Muslim principles to the effect that the payment of the deceased must precede the exercise of the rights of inheritance by the heirs is defeated completely. Before paying the debts of the deceased the heirs are allowed to pass an absolute title.

So, the law applied in this sub-continent is very unsatisfactory. It is neither conducive to substantial justice nor is it in accordance with the genuine principles of Muslim law. It is not even English law. For the ends of justice the payment of the deceased's debt should be made before the acquisition and disposal of the inheritance. This is expressly laid down in the Qur'an[1].

In this article attempts will be made as to how far the Muslim law i.e. *Sharia* law of administration of estate of a deceased person, devolution of inheritance and right of alienation is affected by legislations and judicial decisions.

A. Administration

An executor under the Muslim law is called *Wasi*, derived from the same root as *Wasiyyat* which means a will. But it did not recognise an administrator. The executor under the Muslim law was merely a manager of the estate and no part of the estate of the deceased vested in him as such. As a manager all that he was

1. The Qur'an, IV : 11-12

entitled to do was *to pay the debts* and distribute the estate as directed by the will. But he has no power to sell or mortgage the property of the deceased, not *even for the payment of the debts.* The first time this power was conferred upon him was by the Probate and Admistration Act, 1881. Under section 4 of that Act the whole of the property of a Muslim testator vested in his executor, and it does so now under section 211 of the Succession Act, 1925.[2] The property vests in the executor even if no probate has been obtained. But section 211 of that Act must be read along with the limitation which are imposed under the Muslim law on the rights of a testator to dispose of his property.

As a result of the vesting of the estate in the executor, he has the power to dispose of the property vested in him in the course of administration, a power which he did not possess before the probate and Administration Act, 1881. This power given by section 90 of the Probate and Administration Act, 1881 and by section 307 of the Succession Act, 1925. Section 307, however, is to be read subject to the provisions contained in the Muslim law limiting the powers of disposition of the Mulim testator; the powers of the executor cannot be extended over the entire estate without being limited by the provisions contatined in the Muslim law which restricts the power of testamentory dispostition by a Muslim. In the Hanafi system of of law it is not the duty of an executor to partition the property amongst the heirs.

So, we find that as regards the administration of the estate of a deceased person, the Muslim law has been superseded in Indo-Bangladesh sub-continet by the Succession Act 1925, and such administration is carried out by the executors or administrators under the provisions of the said Act. They are active trustees for the purpose of the will as to one-third of the estate, which remains after the payment of the funeral expenses and the debts and bare trustees for the heirs as to the remaining two third.[3] The powers and the duties of the executors and administrators are defined in the Succession Act, 1925 which applies to all persons in this sub-continent including Muslims.

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2. Act. No. XXXIX hereafter cited as the Succession Act.
3. *Mirza Kurrat-ul-ain Bahadur* V. *Nawab* Nuzhat-ul-dowla 33 Cal. p. 116.

Some of the rules of the pure Muslim law have been compared below with the provisions of the Succession Act, 1925, so that it may be clear how far the Muslim law has been superseded in this respect by the said Act.

Where there are several executors, there is a conflict amongst the Muslim jurists as to whether one of several executors can act by himself, without the concurrence of others, and the better opinion is that he cannot act alone, except for the preservation of the estate of the deceased, or for providing his funeral expenses, or for the immediate necessity of his family or property.[4] But under section 311 of the Succession Act, co-executors have been regarded as individual persons and consequently the acts of any one of them, in respect of the administration of the estates, are deemed to be the acts of all, for they have all a joint and several authority over the whole property.[5] Its application is confined in its operation to cases where the obtaining of probate is compulsory before dealing with property.[6]

Under section 226 of the Act, it is provided that on the death of one of several executors, the power goes to the survivor or survivors, so also in case of administrators. This is more in consonance with the Shia law[7] ; But there is some difference amongst the Hanafi authorities, and apparently the executor of a deceased executor is substituted in place of the latter.[8]

Under the Muslim law, the Court has been vested with power to appoint a joint administrator when the executor is weak or incompetent. There is no such power under the Act. [9]

Under the Muslim law, a minor may be an executor and may act as such, but on application being made, the Qazi may remove

4. Nail B.E. Baillie's *Digest of Moohummudan law* : Part I (Hanafi Law, Sunnite) 2nd edn., London, 1875, p. 670, part II, 1st edn., London, 1896; *Hyderman Kulti* V. *Syed Ali* 37 Mad. p. 514.
5. *Owen* V. *Owen* 1 Atk p. 494.
6. *Chidambara* V. *K.ishnasami* 39 Mad. 365.
7. Nail B.E. Baillie's *Digest of Moohummudan Law* : Part II (Ithna Ashari law, Shiite), 1st edn, London 1896. p. 250, 251, 240.
8. Nail B. E. Baillie's *Digest of Moohummudan Law* Part I (Hanafi law Sunnite) 2nd edn. London, 1875 p. 671, 572, 678.
9. Sections 222 and 229 of the *Succession* Act, 1925.

him.[10] Under section 223 of the Act, a minor cannot apply for probate but it is silent as to his capacity to act without obtaining probate. The Shia authorities, and the two disciples, Abu Yusuf and Imam Muhammad, have allowed the limited grant of administration where the executor is a minor, similar to the provisions of the Act.[11]

The Muslim law does not allow the appointment of a non-Muslim as an executor,[12] but under the act until his removal, his appointment remains valid and his administration is effectual. [13]

Under the Muslim Law, an executor nominated by the testator cannot be removed exeept for breach of trust, though an administratior may be appointed to act jointly with him. Under the Act refusal of the probate is not allowed on the ground that Court does not think that the duly appointed executor, not incapacitated by law, is a fit person to act as sush .[14]

In the Hanafi system of law, it is not the duty of an executor to partition the property amongst the heirs, but in a partition he represents the minors and the legatee of any fraction of the estate, and occupies the same position an heir.[15]

Except by operation of the succesion Act the estate of the deceased does not vest in an executor under the Muslim law.[16]

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10. Nail B. E. Baillie's *Digest of Moohummuhan law* : Part II (Ithna Ashari law, Shiite), 1st edn. London, 1896 p. 248, 249; sections 244, 245 of the Succession Act, 1925.

11. *Fatawa-i-Alamgiri* Vol. VI, p. 214; Nail B.E. Baillies' *Digest of Moohummudan law* : Part I p. 669; part II p. 249, 251.

12. Ibid.

13. *Moohummud Ameenoodee* V. *Mohd. Kuberoodeen* (1825) Sel; Rep. IV, p. 49, 55; *Henry* Imlach V. *Mt. Zuhurunnissa Khanum* (1828) Sel. Rep. IV, p. 301.

14. Sections 223, 298 of Succession Act, 1925.

15. Nail B.E. Baillie's *Digest of Moohummudan law* : Part I, (2nd end. London 1875) p. 67-74; section 211 of the Succession Act, 1925.

16. Sections 211, 307; *Joykali* V. *Sibnath Challinga* (1866) 2 Beng. L. R (O.C.J.) 1; *Kherodemoney Dassee* V. *Doorgamoney Dassee* 4 Cal. p. 455; (Mirza) *Kurrat-ul-ain* V. *Nawab Nushat-ud-dowla* 33 Cal. p. 116, 32 I.A. 244.

The Muslim Law does not make any distinction between the moral duty of accepting an executorship when asked to do so and the legal incapacity to renounce after acceptance.[17]

Whether an executor can purchase any property of the deceased or not is a conflicting question in the Muslim system, but it appears that he can do so so at a fair price;[18] while under section 310 of the Act such transfer is voidable at the instance of any interested person.

In the Muslim system, the law as to the liability of an executor or administrator is that "an executor is an ameen or trustee and, therefore, not responsible for any loss or destruction of the deceased's property unless occasioned by his departure from the conditions or rules of his office or by some personal neglect;[19]" while under sections 368 and 362 of the Act, the executor or administrator is liable to make good the loss or damage so occasioned if he misapplies the property of the deceased.

Under the Muslim law, "in the case of a bequest, the transfer is to be decreed from the date of death of the testator and not from the time of taking possession."[20] This rule has now been superseded by section 337 of the Act which lays down that the executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death,

The executor is allowed remuneration for his work as such under the Muslim Law;[21] while in this sub-continent a guardian or an executor is considered as a trustee, and as such, is not allowed to derive any sort of benefit from his office.[22]

B. Devolution

According to the Hanafi, Shafi'i and Maliki schools, the heirs become independent owners of the solvent estate at death in spite of the existence of debts owned by the deceased. Only the Shii (Ithna

17. Nail B. E. Baillie's *Digest of Moohummudan law* : Part II, p. 250, 665, 667; *Ayesha Bai* V. *Ebrahim Haji Jacob*, 32 Bom. 364.
18. *Ibid* p. 250; section 310.
19. Nail B.E. Baillie's *Digest of Moohummudan law* : Part II. p. 250 ; sections 368, 369.
20. *Ibid.* p. 207, section 337.
21. *Durr-ul-Muhtar*, Ch. on Nafaqa, fasi 1, Trusts Act, sections 50, 51.
22. F.B. Tyabji, *Muhammadan Law*, p. 736.

Ashari) School maintains that until the payment of debts the devolution of ownership to the heirs is postponed. But although according to the former schools the heirs become the owners of the solvent estate they cannot exercise their rights of ownership by transfering an absolute title to the transferee by sale, gift, division, composition or other means until they have paid the deceased's debts. Without exception all the schools admit the principle that there is no inheritance until after the payment of debts. We are not concerned with the insolvent estate where there is no inheritance at all.

Succession of the heir is postponed to the payment of debts.[23] The heir does not take any thing until after the payment of debts.[24] There is no inheritance until after payment of the debts.[25] It is consensus of opinion of the Muslims that there is no inheritance until after the debts ... are paid.[26]

But it is laid down by judicial decisions that the whole estate of a deceased Muslim devolves upon his heirs at death in specific share. This is so even where there is existence of debts owned by the deceased. It is immaterial whether the amounts of debts are smaller or larger than the value of the assets. The estate devolves upon the heirs whether the estate is solvent or insolvent or whether the debts are paid or not. The view that the insolvent estate devolves to the heirs is contrary to the genuine Hanafi law. It is also contrary to the Hanafi law that the heirs of an insolvent estate may even proceed to distribute it and pass an absolute title to a bonafide acquirer.

In 1883, a Full Bench of the Allahabad High Court decided the question of devolution in the case of *Jafri Begum* V. *Amir Mahammad Khan*.[27] His Lordship Mr. Justice Mahmood appears to have dealt with the question exhaustively. In this case[28] Mr. Justice Mahmood searched out the texts for himself. He tried to support his conclusions by citing original authoritities of Muhammadan law. Mahmood, J. said : "Upon the death of a Mahammadan owner, the inheritance vests immediately in his heirs and is not suspended by reason of

23. Akmaladdin Mohammad Ibn Mahmud al-Babart's *Inayah*, iii p. 374.
24. Shams al-A'immah Abu Bakr Muhammad ibn Ahmad, *al-Sarakhsi's* Mabsut, XV, p. 59
25. Sahnun ibn Said al-Tanukhi's *Mudawwanah*, xiii p. 86.
26. Imam Muhammad ibn Idris al-Shafi's *Kitab al-Umm*, iv. p. 29.
27. (1885) 7 All. 822
28. *Ibid* p. 827.

debts, being due from the estate of the deceased ... the existence of debts whether larger or smaller is quite immaterial.[29] Mahmood, J. uses the word 'inheritance' which apparently means the estate. Inheritance is not the asset.

Prior to 1885, in two earlier cases the court relying upon certain passages of Hedaya translated by Hamilton expressed the correct views, though as obiter.

In *Syeed Imad Hossein* V. *Musammat Hosseinee Buksh*[30] "decided in 1870 by Phearson and Turner" and it (the passage) seems also to demonstrate that where the owner had died free from debts his estate will pass to the heirs, when the owner has died involved in debt his estate does not pass to the heirs".[31] Without mentioning their earlier case the same judges in 1875 in the case of *Hamir Singh* V. *Musammat Zakia*[32] quoted with approval passages from the Hedaya to the same effect.

Mahmood, J. commenting upon the correct view in the latter of the above two cases opined : "... but the point remains whether the extent or amount of the debts, affects the question. Some of the passages quoted from Mr. Hamilton's Hedaya in the Full Bench case of *Harir Singh* V. *Musammat Zakia*[33] would go to indicate an affirmative answer. But the translation is only a loose paraphrase of the original Arabic and is liable to convey a wrong meaning. What is meant by the heirs to the insolvent estate being prevented from inheriting simply refers to the rule that nothing will be left to them to inherit if the liabilities of the deceased swallow up whole estate".[34]

Mahmood, J. in support of his own view of the Muslim law, relied upon the Privy Council case of *Bazayet Hossein* V. *Dooli Chand*[35] decided in 1878. He also relied upon certain citations of the original authorities on Muslim law. In *Bazayet Hossein's* case it was observed that an heir "had the right to convey his own share of the inheritance and was able to pass a good title to the alienee notwithstanding any

29. *Jafri Begum* V. *Amir Mohammad Khan* (1885) 7 All. 822, p. 828.
30. (1870) 2 North West Frontier Province High Court Report, p. 327.
31. *Ibid.* p. 333.
32. (1875) All 57 p. 58, 59.
33. *Ibid.*
34. *Jafri Begum* V. *Amir Muhammad Khan* (1885) 7 All. p. 839.
35. (1878) 51 A. 211.

debts which might be due from his deceased father."[36] Mahmood, J. goes on saying that the ruling of Privy Council "cannot be understood without holding that upon the death of a Mohammadan owner, the inheritance vests immediately in his heirs, and is not suspended by reason of debts being due from the estate of the deceased. The Privy Council ruling is, therefore, a clear authority in support of my view, and indeed I may go to the length of saying that no other view can reconcile the ruling with the undoubted principles of law and equity in such cases...."[37]

Now, at the first hand the case of *Bazayet Hossein* was decided upon the earlier case of *Wahidunnissa* V. *Shubrattun*[38] and on some authorities such as William on *'Eexecutors'* and Sugden on *'Vendors and purchasers'*. These two books are not authorities on Muslim Law. Reference to the original authorities was ever made in neither of these cases. On the contrary, the principle in *Wahidunnissa's case* is more in conformity with the English Law as applicable to to heirs and devisees as to real estate and executors as regard personality.[39] Secondly the original *authorities cited relate and are true of* the devolution of inheritance to the heirs but these do not relate to the devolution of estate in which the debts exceed or are equal to the assets. They all pre-suppose the existance of surplus of assets or of an inheritance. In other words, they relate to solvent estate. At page 832 Mahmood, J. quoted some passages from *Baidawi Sirajiyyah.*

These passages pre-suppose the existence of an inheritance which is to be distributed after the payment of debts. In the same way at page 833 and 834 Mahmood, J. quoted Passages from Ibn Najaim's Ashbah Wa'n–Noza'ir and these relate to inheritance "which enters the ownership of a man without his consent" and the moment of inheritance. At page 837 Mahmood, J. also quoted a passage from the *Hedaya* of Hamilton. This passage relates to the right of the heirs and this is a right which is established at the death of the testator. At page 839 he quoted a pertinent passage and this passage was from Qadi Khan. The passage runs thus : "Debt

36. *Bazayet Hossein* V. *Dooli Chand* (1878) 5 I.A. 211 p. 220.
37. *Jafri Begum* V. *Amir Muhammad Khan* (1885) 7 All. 822 p. 829 & 829.
38. Beng. L.R. 54.
39. *Ibid.*

neither prevents the establishment of the heir's proprietorship nor division."

By this passage Qadi Khan means that if the debts do not exhaust the assets, the ownership of the heirs is not prevented. This meaning of the above passage of Qadi Khan finds support from the passage of Qadi Khan quoted below—"The debts exhausting the asset prevent the ownership of the heirs." [40]

Mahmood, J. is silent about those passages of the Hadaya which support the view contrary to his own. Apparantly he was silent about those passages of the Hedaya on the basis of which one can arrive at a correct conclusion.

Some of these passages of Hedaya correctly translated by Hamilton are : ".....a debt.....equal to the whole (estate).....prevents the estate from being the property of the heirs."[41] "If the estate be completely overwhelmed with debt neither composition nor division of it amongst the heirs is lawful, because the heirs are not in this case, masters of the property."[42]

Even he does not controvert the passages from Mucnaghten.[43]

In fact, there is not even a single authority cited by him to substantiate his view that when the debts exhaust the estate it devolves to the heirs. On the contrary, there are numerous authorities which substantiate the opposite correct view that where the debts exhaust the assets the heirs do not acquire ownership of an estate (much less than they distribute it) and that in such a case it remains in the fictitious ownership of the dead man.

It is true that the contention of M. J. has been followed in the latter decisions. Moreover, it has been approved by the Privy Council.[44]

If the law enunciated by Mahmood, J. that the heirs become owners of the insolvent estate is accepted as correct it would lead

40. *Qadi Khan* iii p. 552.
41. *Hadayah*, translated by Charles Hamilton, 2nd edn. by S.G. Grady, London, 1870, p. 575.
42. *Ibid* p. 454.
43. Sir W. Macnaghten's *Principles and Precedents of Muhammadan law* (ed. by W. Sloan, 7th Reprint, Mad. 1890) p. 87, 88, 94.
44. *Kazim Ali* V. *Sadiq Ali* (1938) 65 I. A. 219 p. 232; F.B. Tyabji's Muhammadan Law (3rd ed. Bombay, 1940) p. 735.

to obvious inconsistences. In that case the heirs will proceed to disiribute the insolvent estates among themselves paying no attention to the debts of the deceased and the creditor will not be in a position to declare their distribution invalid. They are to be satisfied with the unsatisfactory remedy of suing each one of the heirs for a proportionate part of the deceased's debt and up to the vahie of the estate.

Of course a creditor being aware of the insolvency of the deceased can file a petition under the Insolvency Act for the administration of the estate. In a case where this is not done the correct law is that the heirs ought to be made personally liable for all the debts of the deceased as they have voluntarily merged the property of the deceased with their own peoperty.

This is so because the faults are the theirs. For they being aware of the extent of debts, have not taken the step of keeping the property of the deceased seperate from their own. Now they have taken the precaution of having the estate administered by the Court by drawing an inventory.

In support of this view we have an old case [45] decided in 1859. The judgement of this case speaks of the heirs as 'wrongdoers' because they have intermeddled illegally their own property with the deceased estate. [46] So far as Shia Law is concerned the estate does not devolve upon the heirs so long as the debts remain unpaid. In Iran the prevailing view is this.[47] It is, in principle, agreed that the law governing the administration and distribution of the estate of a deceased Shia, is the Shis law.[48] Very little is known of the Shi'i law of inheritence. Perhaps, no case has come up to the Courts for decision upon that subject. As has been the general practice prior to about 1841, the Court would be compelled to apply the Hanafi law to the deceased Shia's estate.[49]

45. Decision of *Sader Dewanny Adalat* (Bengal) 30th April, 1859, p. 540.
46. *Ibid.*
47. Iranian Civil Code, Art. 868.
48. "The Mohammadan Law of Succession applicable to each sect ought to prevail as to litigation of that sect". *Rajah Deeder Hossein* V. *Ranee Zuhoor-un-uissa* (1841) 2 M. I.A., p.'441, p. 447.
49. *Mussammat Hayatun-nissa* V. *Sayyid Muhammad Khan* (1890) 17 I.A. p. 73 p. 78; *Akbar Aly* V. *Mohammed Aly* (1931) 57 Bom. p. 551, 559; *Aghaali Khan* V. *Anjuman Ara Begum* (1903) I.A. 94. p. 110 ; *Aziz Banu* V. *Mohammad Ibrahim Hossein* (1925) 47 All. p. 823, 835.

C. Alienation

The Qur'anic principle, "There is no inheritance until after the payment of debt"[50] is undoubtedly the substantive law and so this should be regulated by the Muslim Persanal Law only. But it will be seen that the Court regulated this principle in name.

In *Syed Shah Enaet Hossein* V. *Syed Ramzan Ali*[51] the Court said, "It is the duty of the heir to pay all debts before appropriating any portion of assets to his own use." In *Bhola Nath* V. *Maqbul-un-nissa*[52] the Court said : "It cannot be disputed that the liquidation of the debts of a deceased Muhammadan should precede the distribution of the property among his heirs..... The heir, in fact, takes no beneficial interest excepect..... after payment of the debts of his ancestor."

In *Abdul Majceth* V. *Krishnamachariar*.[53] the Court held : "..... ..in the administration of the estate the funeral expenses, debts and legacies must be paid first and it is only the residue that is available for distribution among the heirs."[54] In *Kazim Ali Khan* V. *Sadiq Ali Khan*[55] the Court said : "That the right of the heir under the Mohammadan law is a share in the estate after debts and valid legacies have been provided for is undeniable. It is laid down no less than three times in the fourth sura of the Qurau. The principle is not disputed by any one..... In providing that the heir takes a share in the net estate after the deduction of the debts of the deceased, the Mohammadan law is in line with the other laws."[56] Though in the first three cases the correct view was given the Courts continued to go on wrong. As shown in the fourth case above, in 1938 Sir George Rankin made a vigorous statement of the correct view in the Privy Council. It was too late to correct mistakes which had been made by the Courts which said that the heirs can distribute

50. The Qur'an iv : 11.
51. (1868) 1 Beng. L.R. Appellate side p. 172 p. 173.
52. (1903) 26 All. 28 p. 33-34.
53. (1916) 40 Mad. 243
54. *Ibid* p. 253.
55. (1938) 65 I.A. 219.
56. *Ibid* p. 231.

and transfer the estate (even insolvent estate) and pass a good title to a modified transferee before the actual payment of the debts.[57].

So the Muslim law on the point is totally defeated and the creditors of the deceased are also seriously prejudiced. If the heirs transfer the property before the payment of the debts, the creditors cannot challenge it to be declared invalid and so they are deprived of this instrument to compel the heit to pay the debts. They are left somewhat at the mercy of the heirs. They are to be contended with the unsatisfactory remedy of having to sue the alienating heir and also every other heirs personally for a proportionate share of the debts. So after the death of the debtor their rights become weakened inttead of becoming stronger as in Muslim law. Their rights against the property of the deceased have been taken away. Their rights against the property have been replaced by their inferior rights against the person of the heirs for a fractional share of the debt.

If the heir becomes insolvent after having transerred his share in the property, the creditors have no other alternative but to compete in equality with the personal creditors of the heir. As revealed by the decisions of the Court in the history of this principle one can see two distinct phases. Upon questions of Muslim law the British Judges of the Sadder Court invariably consulted the Muslim law officers attached to their Courts prior to about 1864. Thus the principales ofMuslim law were, to a large extent, admitted and given practical effect. Eor example, in 1852 in the case of *Mohammad Noor Baksh* V. *Budun Chand Bebe*[58] the principle was positively recognised until the heir had first paid the debts of the deecased he had no right to alienate the property.

In the above stated case, as creditor of her dower, the widow was in possession. The fact of the case, in brief, was that the

57. *Compbell* V. *Delany* (1863) Marshall's Rep. p. 509; *Mt. Wahidun-nissa* V. *Mr. Shabrattun* (1870) 6 Eeng L.R. 54; *Bazzayet Hossein* V. *Dooli Cnand* (1878) 5 I.A. 211; *Land Mortgage Bank* V. *Bidyashari* (1879) 7 C.L.R. 460, 463; *Jafri Begum* V. *Amir Mohammad Khan* (1885) 7 All. 822; *Abdul Majeeth* V. *Krisnamachariar* (1917) 40 Mad. 243 244, 253-254; Sir D.F. Mollah's Principales of Mahameddan Law, 11th edn. by Sir G. C. Rankin Cal. 19; Ameer Ali's Mahomedan law 2 Vols. 4th edn. Cal. 1912, 1917.

58. Decisions of the Sadder Dewanny Adawlat, 2nd Sept. 1852, p, 885.

heir sold certain properries to party who in his turn sold it to the plaintiff who filed the suit for recovery of possession from the widow. The two judges named Sir R. Barlow and Mr. Jackson opined as follows : "the claim for the ground of dower takes precedence over all clains of inheritance; consequently, the heir Moheeooddeen had no power to transfer the property by sale till he had first paid the dower; and the claim by virtue of sale from him must be held contingent on the fact that the claim of the widow for dower has been satisfied".[59]

In the avove case it was held by the judges that until the plaintiff had paid the dower debt he could not recover possession and thus it is implied thereby that the transferee from the heir took the property subject to dower debt which was a kind (sort) of lien upon the deceased's estate. The above view is questionable but it is significant that the principle was admitted and that until the heir had paid the debt he had no power to dispose of the property.

According to Muslim law the correct view is that the alienation made by the heir is valid subject to the condition that the heir pays the debt. In default the widow i.e. the creditor has the right to annual the transfer.

In the case of *Khajah Abool Hossein* V. *Maharahiah Heetnarain*,[60] the heirs appropriated the inheritance and distributed the deceased's property before payment of the debts of him. In the above case the heirs wilfully fused the deceased's property with their own personal property and as a result the personal property of the heirs became undistinguishable from the former. In this circumstances, the Court allowed the creditor a decree to be executed from all the properties which were in possession of the heirs.

The burden of proof was upon the heirs that the attached property was not an asset of the deceased nor that it was acquired out of the funds derived from him. By the judgement of the above case, the Court clearly recognised the rule that until after the payment of debts the heirs have no inheritance.

59. *Ibid*, 885.
60. Decisions of the Saddar Dewaanny Adawlat (Bengal), 30th April, 1859 p. 539.

The Court said : "In appropriating the inheritance and distributing it without providing for the payment of their father's debts, there is no doubt, therefore, that the appellants have placed themselves in the position of the wrong-doers.

They have violated the rules of Mohammadan law, which seems to have been expressly intended for the protection of creditors against the risks to which they would otherwise have been exposed from the practice of confining the liability of heirs to the amount of assets they have received ...." They have intermeddled illegally with the assets which ought to have been devoted to the payment of their father's debts and must take the consequences. The heir of a Mohammadan owner has his duties as well as his privileges and cannot be allowed to claim the one without fulfilling the other."[61] It is to be noticed here that the right of the creditor to set aside the distribution of assets had not been mentioned. In 1870,, in the case of *Syed Imad Hossein* V. *Musammat Hoosseinee Buksh*,[62] this right of the creditors general were reviewed. Though this case was decided after the abolition of the institution of law officers it is more in spirit with the above mentioned cases decided in 1852 and 1859.

Before we proceed to see how after 1864 this principle is gradually lost sight of it is convenient to deal with it here. In this case the widow in possession resisted the claim of the heirs for distribution on the allegation that her dower was not paid. In the iadgement the Court is silent about the right of the widow to retain possession so long as her dower debt was not paid. Their lordships Phearson and Turner, JJ. said : "i) that the debts of the deceased must be paid before the estate is pivided but ii) if creditors are not present to assert their claims, the division of the estate need not be postponed, iii) creditors who later appear and assert their claims are entitled to set aside the partition of the estate so as to render it available for the satisfaction of their claims, or to hold the heirs personally liable to the extent and in proportion of shares taken in the estate".[63]

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61. Decisions of the Sadder Dewanny Adawlat (Bengal), 30th April, 1859 p. 539.
62. 1870 North West H.C.R . Vol. 2 p. 327.
63. *Ibid.*

Now we are proceeding to deal with the second and present phase of this principle. The system of attaching Muslim law officers to Court was abolished in 1864. The Judges were left alone and they themselves were to decide issues upon the Muslim law as they could. In the absence of Muslim law officers the available information upon Muslim law was not sufficient to enable them to come to a correct interpretation of the law.

As a result, their interpretation and consideration of this principle is totally contrary to the Muslim law. They were well-conversant with the English law of debt and of the bonafide acquirer from the heir and so they were wholly influenced by the above English laws. They often equalised or assimilated the position of a Muslim heir to that of an old English heir-at-law, "to devissees as to real estate and to executors as regards personality."[64] To well-understand the matter we propose to discuss it by illustration.

Let us discuss the case of *Campbell* V. *Delany* decided in 1863. The fact of this case was that the heirs had mortgaged the property to the dependent before paying the debts. A creditor of the deceased instituted a suit and obtained a decree and he executed the decree by selling the property. The plaintiff purchased the property. The plaintiff purchased the property in execution proceedins, So the plaintiff claimed possession of the property. The Court's decision, in this case, was that the heir was free to transfer the property like the old English heir-at-law of landed estate before payment of debts. The Court also decided that the bonafide acquirer who is a mortgagee took a better title than the execution purchaser.

Bayley, J. held : "Both the Ennglish law and our practice are opposed to this view (that the mortgage was not valid unless it was to pay debts). As to English law, the passage cited by Mr. Doyne from Williams on *'Executors'* page 838 clearly shows that executors acting for the benefit of the estate are entitled to sell and that the purchasers are not bound to follow the purchase money to its ultimate application".[65]

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64. *Bazzayet Hossein* V. *Dooli Chand* (1878) 5 I.A. 211 p. 221.
65. *Ibid* p. 512.

Cambell, J. observed : "There can be no doubt of the obligagation of heirs to apply the proceeds of the estate to discharge the debts; but I do not think that it necessarily follows that he is deprived of all power of alienating or dealing with the property. Under the strict construction of Mohammadan law regarding the obligations of heirs, I think that the heir must at best be considered to be in as good a position as an English executor. And an English executor has the fullest power to deal with the property for reasons of good equitable policy.....I conclude then that..... even under the Mohammadan law, the heir has full power to deal with the property".[66]

So it is apparent that Campbell, J. had a misapprenhension of the Muslim law of succession. His lordship erred in law when he remarked that he was unable to be convinced of the existence of a law in which the heir cannot alienate so long as the debts had not been paid.

In the similar case of *Syed Shah Enaet Hossein* V. *Syed Ramzan Ali* [67] decided in 1868 the Court recognised the principle by saying, "that it is the duty of the heir to pay all debts before appropriating any portion of the assets to his own use."[68]

But in the next breath they contradicted their above observation by saying that the heir could transfer a good title before paying the debts. The two judges, Macpherson and Bayley, further said : "but although that is unquestionably so, it does not follow that a third party who purchases from the heir bonafide and for full consideration, may not by his purchase acquire a good title as against a creditor."[69]

In the case of *Wahidunnisa* V. *Mussamat Uhufratun* [70] decided in 1870 the judges followed the same English principles of former cases. They carried the English principles of the former cases further by saying that upon the death of a Muslim owner the heirs themselves but not the estate, become answerable for the debts.

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66. (1863) Mashall's Rep. 509 p. 514, 515.
67. (1868) 1 Beng. L.R. Appellate side p. 172.
68. *Ibid* p. 173.
69. *Ibid* p. 172, 173.
70. (1870) 6 Beng. L.R. p. 54.

So before paying the debt the heir was at liberty to dispose of the property and pass a good title to a bonafide acquirer for value. The creditor had no right to set aside the transfer but up to the amount of the asset he could sue the heirs personally. The creditor had no lien to follow the property disposed of by the heir.

Hobhouse, J. observed : ".. so that it seems to me it is not the estate as it stood, be it... .. in land or in money, or in what not, which is itself answerable for the debts of the deceased ; but it is the heirs themselves who are anwerable and that to the extent of any asset which they may have received."[71]

In 1878, in *Bazzayet Hossain* V. *Dooli Chand*[72] the Privy Council followed the above case of 1870. The Privy Council observed : "The principle of that case (Wahidunnisa's case) is applicable to the present, and the ruling is quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personality. In Sugden on '*Vendors and purchasers*'.....In Williams on '*Executors*' a similar rule of Law is laid down with regard to executors.....It is said, "it is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate and that they cannot be followed by creditors into the hands of the alienee."[73]

In this case it has been decided that the heir had "the right to convey his own share of the inheritance and was a ble to pass a good title to the alienee notwithstanding any debts."[74]

Conclusion

It is apparent that the existing law ought to be allowed to prevail for various reasons. Firstly, in this sub-continent the law of administration of the estates of the deceased persons purports to be the Muslim law and so there arises a necessity of reversal to the genuine principle of that law. In this sub-continent the restoration of the genuine Muslim law by legislative action is no new thing. The Mussalman Wakf Validating Act, 1913, 1930

71. (1870) 6 Beng. L.R. p. 59.
72. 5 I.A. p. 211.
73. *Ibid* p. 211.
74. *Bazayet Hessein* V *Dooli Chand*, 5 I.A. p. 220.

and the Muslim Personal law (Shariat) Act of 1937 were passed to restore the genuine Muslim law.

The principles of the genuine Muslim law of administration of the estate of the deceased are more just and equitable than those of the existing law in this sub–continent. This is the second and most important reason.

The whole Muslim personal law as applied in Bangladesh should be codified. Until the moment is ripe for a thorough condification of the whole Muslim Personal Law the the legislature ought to make the administration of the deceased's estate compulsory. If this is done it would make certain that the deceased's debts are paid before the property is vested in the heirs. The Succession Act, 1925 is a partial measure because according to this Act where there is no executor, the administration of the estate is optional.[75]

For the compulsory administration of the estate of the deceased more thorough measures have to be taken in Bangladesh.

It may be suggested that in Bangladesh a Code of Muslim Succession ought to be enacted emboding the principles of the Shari'ah which are in conformity with modern requirements to form a part of a general Code of Muslim Personal Law. Amongst others the propose Code slould contain the following : (a) The law of will and life estate ; (b) probate and administration of the estate when all heirs are adult ; (c) Rules relating to the administration of the property of minors. It should be made obligatory to appoint a guardian of property ; and (d) Rules of inheritance.

75 Succession Act, 1925, Secs. 212(2), 213, 269.