38, 1952

In the Privy Council.

31470

No. 37 of 1951.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

BETWEEN

A. H. M. ABDUL CADER ... ... APPELLENT

AND

1. A. R. A. RAZIK
2. AMEENA UMMA (wife of A. R. A. Razik)
3. ALAVEE MAZAHIMA (wife of M. S. M. Shafeek and daughter of Appellant)
4. HAMEEDA SITHY ZUBEIDA (daughter of Appellant and maternal granddaughter of Respondents Nos. 1 and 2) ... ... RESPONDENTS.

CASE ON BEHALF OF RESPONDENT No. 4

RECORD

1.—This is an appeal from the Judgment and Decree of the Supreme Court of Ceylon, dated the 28th September, 1950, dismissing, with costs, an appeal from the Order of the District Court of Colombo, dated the 22nd August, 1948, whereby it was held, *inter alia*, that a marriage which, in the circumstances hereinafter stated, this Respondent had contracted as a Hanafi Muslim through a wali* of her own choice was a valid marriage. pp. 69, 74 pp. 58–66

* A "wali" is a marriage guardian

2.—The question for determination on this appeal is concerned with the validity of the said marriage—whether or not the decision of both Courts below that the marriage was valid is correct.

10 3.—Portions of certain Ceylon Ordinances relevant to this appeal are included in an Annexure hereto.

4.—The facts, briefly stated, are as follows :—

The parties to the appeal are all Muslims, some belonging to the Shafi sect (Appellant and Respondent No. 3) and the remainder belonging to the Hanafi sect (Respondents Nos. 1, 2, and 4). p. 46, ll. 37, 38 p. 38, ll. 38–40

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p. 37, l. 41
p. 38, l. 10

All of them lived together in the house of Respondent No. 1 until the 17th December, 1932, when the Appellant's wife (the only child of Respondents Nos. 1 and 2) died, subsequent to which event the Appellant left the house to live separately, taking with him his elder daughter,

p. 83, ll. 1–17

Respondent No. 3, but leaving behind him, to be brought up by her maternal grandparents, this Respondent who, having been born on the 12th October, 1932, was then about 3 months old.

5.—About fifteen years later, on the 14th March, 1947, the Appellant instituted the proceedings out of which this appeal arises.

p. 8

In his petition filed in the District Court of Colombo, under Section 582/587 of the Civil Procedure Code, to which the present

p. 9, ll. 35–37

Respondents Nos. 1 to 3 were made Respondents, he, on the allegations *inter alia* that the present Respondents Nos. 1 and 2 were acting against the interests of this Respondent and were "endeavouring to claim the

p. 10, ll. 1–12

"minor's properties as their own," prayed that he be appointed curator over the said properties and that Respondent No. 3 (his elder daughter who had married one Shafeek on the 14th November, 1946) be appointed

p. 12, ll. 21–22

as guardian over this Respondent's person, and that Respondents Nos. 1 and 2 (her maternal grandparents) be ordered to produce her in Court on every date of inquiry into the said application.

6.—An inquiry into the question of appointing the Appellant as

p. 12

curator was fixed for the 31st October, 1947, but, when the case came up

p. 12, ll. 31.32

on that day, both sides agreed that the inquiry should be adjourned in order to allow of the adjustment of certain objections which were raised in regard to the proposed appointment of the Appellant.

Further, as the learned District Judge recorded :—

p. 12, ll. 33–39

"I also notice that the minor has not been represented by a guardian "*ad litem*. I think this is necessary to proceed further with this inquiry ". . . . Petitioner's Proctor will take steps to appoint a guardian *ad litem* "before the next date before inquiry proceeds. Inquiry refixed for "4.12.47."

p. 13

7.—The question of appointing a guardian *ad litem* came up again on

p. 2 (14) (15)
p. 13, ll. 6–12

the 4th and 5th December, 1947, but this Respondent was, because of illness, unable to be present. Her presence at the formal appointment of the guardian being essential the inquiry was further postponed to the 23rd January, 1948.

p. 13, ll. 13–16

Meanwhile, it was agreed that this Respondent would be sent to visit her father (the Appellant) on the 28th December, 1947, and on the 15th January, 1948, at 8 a.m., and that on each of those days she would return home to the house of her grandparents before it became dark.

pp. 13–14

8.—When the matter came up again on the 23rd January, 1948, this Respondent's Counsel informed the learned District Judge that his client

was no longer a minor as she had, on the 11th December, 1947, married one Rashid bin Hassan. Appellant's Counsel thereupon argued that the marriage was no marriage in law and that, in any event, it did not confer majority on this Respondent. But, later, for the purpose of arriving at a settlement, he, as the learned District Judge recorded, invited the Court " to talk to the girl and to ascertain from her her own desires and wishes " and her own story about this marriage. If the Court is of opinion that " she is happy now and should remain as she is Mr. Thiagalingam " [Appellant's Counsel] " states that he will advise his client not to canvass " the question of marriage. There is no undertaking given at this stage " by the petitioner . . . . Call Case on 26.1.48."

p. 13, ll. 22–25
p. 59, ll. 4–6
p. 13, ll. 28–30
p. 13, l. 37 to p. 14, l. 4

9.—On the 26th January, 1948, the learned District Judge, having interviewed this Respondent, recorded the following note :—

p. 14, ll. 12–28

" At the request of parties I interviewed Zubeida, the minor, who is " now alleged to have got married. I found her to be an educated and " intelligent girl, with a mind of her own. In order to put her at her ease " I first discussed with her matters of topical interest and matters which " would normally interest a girl of her age . . . . and when . . . . she " was at ease and spoke freely, I put to her the question of her marriage. " From what she said she appears to be quite happy with her husband " and created in my mind the impression that she had married him of her " own free will. On the question of her seeing her father, I tried to " persuade her to do so . . . . She was adamant, even obstinate and " would give no reason for not wanting to see her father, except that he had " neglected her from her childhood."

10.—On the 3rd February, 1948, the learned District Judge, on the subject of an inquiry, recorded the following note :—

" Mr. Thiagalingam " [Appellant's Counsel] " states that in pursuance " of the Court's direction on the last date he has pointed out to his client " the consequences of his persisting in his position that the marriage is " invalid. The father, however, desires that the question of validity should " be gone into in the interest of the child herself and her children and in the " interest of Muslim Law. He further states that if the Court holds that " the marriage is invalid the petitioner is quite content to give his consent " to this marriage should the daughter invite him to do so. In these " circumstances Mr. Thiagalingam asks that the matter be set out for " inquiry, one of the questions to be determined being the validity of the " marriage and her alleged right to be represented without a guardian . . . .

p. 14, l. 37 to p. 15, l. 10

" Inquiry is fixed for the 23rd and 24th March, 1948."

11.—In the learned District Judge's view the first question for decision was whether this Respondent had attained majority by her marriage and, accordingly, when the inquiry was resumed on the 24th March, 1948, it purported to be confined to that question only. It would, it is respectfully

p. 15, ll. 34–37

RECORD

submitted, be fair to say that the resumed inquiry was concerned more with the validity of the marriage than with its effect upon the majority of this Respondent it being assumed that a valid marriage would confer majority upon her.

12.—At the resumed inquiry this Respondent supported the validity of her marriage by documentary and oral evidence, and, in reinforcement of the evidence given on her behalf by the Muslim Registrar of Marriages and her grandfather (Respondent No. 1), she herself gave evidence.

No evidence was called on behalf of the Appellant and he himself preferred not to enter the witness-box.

pp. 15–23

13.—In examination-in-chief, the said Muslim Registrar (A. J. M. Warid), who is also a Muslim priest, said :—

p. 16, ll. 2, 3

" I am licensed under the Muslim Marriage Registration Ordinance " to register Muslim marriages . . . .

p. 16, ll. 19–21

" I married the girl Sithy Zubeida to Rashid bin Hassan on the " 11th December, 1947. I registered the marriage . . . . I issued this " certificate of marriage marked XI . . . .

p. 16, ll. 23–33

" I married this girl as a Muslim belonging to the Hanafi sect. The " girl told me she was a Hanafi and that she wanted to be married as a " Hanafi and she made a declaration before me to that effect. On the " 11th December, 1947, she gave me a written explanation which I produce " marked X2 . . . .X3 and X4 were also given to me by the girl . . . . " a short time before I performed the registration of marriage."

pp. 83–84

14.—It may conveniently be explained here that of the said documents, XI is the translation of a Certificate of Marriage issued under the Muslim Marriage and Divorce Registration Ordinance (Cap. 99) and that it contains, in addition to the signatures of the bridegroom and the bride's wali, one Mohammed Zahir Mohideen, the signatures of two witnesses (both of them Justices of the Peace) and that of the said witness (A. J. M. Warid) as " the Officiating Priest solemnising the marriage."

p. 83

X2 is a letter, dated the 11th December, 1947, from this Respondent to the said Muslim Registrar and Priest (A. J. M. Warid) requesting him to marry this Respondent to Rashid bin Hassan " according to the Hanafi law " and notifying him that she had appointed Zahir Mohideen as her wali.

p. 82

X3 is a letter of authority, dated the 9th December, 1947, from this Respondent " as a Muslim of the Hanafi sect " authorising and empowering the said Zahir Mohideen as " my agent wali and wakil to give me in lawful wedlock."

p. 84

X4 also dated the 9th December, 1947, is an affidavit affirmed by this Respondent before a Justice of the Peace in which she states that she was born on the 12th October, 1932, has passed " the age of bulugh and the age of discretion," has always lived in the house of her maternal grandparents (Respondents Nos. 1 and 2), has throughout been maintained and

RECORD

educated by her grandmother (Respondent No. 2), that her mother died on the 17th December, 1932, and that she belongs to the Hanafi sect of Muslims, and follows her religion according to Hanafi rites.

15.—The evidence of the said witness, A. J. M. Warid was continued and in cross-examination he said that a wali's signature was necessary on the registration of a Muslim marriage ; that the father of a girl of the Shafi sect was, if living, the only person who could be her wali ; that a girl of the Hanafi sect could, under pure Muslim Law, marry without a wali but that if, for purposes of registration it became necessary for her to appoint one she could, if she so desired, appoint a person other than her father to act as such ; that this Respondent had informed him of her desire to marry through a wali and that one Zahir Mohideen (the Appellant's first cousin) had been so appointed ; that the bridegroom had told him that he too was a Hanafi ; that he had both performed the religious ceremony (by reciting the Kothuba) and registered the marriage ; and that he himself was a Shafi but that, when necessary, he became a Hanafi by the recitation of certain words and when the necessity ceased to exist he reverted to the Shafi sect.

p. 16, l. 44
p. 17, ll. 33–35
p. 17, ll. 12–14
p. 19, ll. 29–30
p. 18, ll. 7–13
p. 19, ll. 23–28
p. 18, ll. 22–23, 38–39
p. 20, ll. 41–42
p. 21, ll. 13–14
p. 24, l. 18
p. 22, ll. 9–10
p. 22, ll. 16–17
p. 23, ll. 6–7
p. 23, ll. 29–31

The witness said also that this Respondent had informed him, previous to the ceremony, of her desire to marry Rashid bin Hassan.

p. 23, ll. 42–44

On the subject of the Appellant's consent to the marriage, the witness, answering the Court, said :—

" I asked her ' you have your father, why don't you speak about this " ' to your father.' She said ' I only know that father is living, I have not " ' seen him from my younger days and from my small years I have been " ' brought up as a Hanafi and I am a Hanafi '."

p. 19, ll. 7–10

16.—This Respondent, giving evidence in support of her marriage, said, in examination-in-chief (on the 24th March, 1948) :—

" I attended the Muslim Ladies College. Before that I attended the " Holy Family Convent. I am 15 years and 6 months old. I am married " to Mr. Rashid bin Hassan. I married him of my own wish and consent. " I married him on the 11th December, 1947. I attended puberty when " I was 12 years. From my infancy I had been brought up by my " grandfather and grandmother . . . . I was brought up as a Hanafi. " I do not know my father. During all the time I was with my grand- " parents my father did not come to see me. My husband is related to me " on my mother's side. He is my grandmother's brother's son. I knew " him from my childhood."

p. 24, ll. 3–13

Answering the Court, she said : " Rashid bin Hassan and I are living " as husband and wife. My husband is an elected Member of the Municipal " Council. I am quite happy with him."

p. 24, ll. 26–28

She testified to the authenticity of the said documents X2, X3 and X4 all of which, she said, she had signed and handed to the said Muslim Registrar and priest (A. J. M. Warid) before the marriage.

p. 24, ll. 14–23

RECORD

17.—A long and severe cross-examination followed but it did not, it is respectfully submitted, shake the testimony which this Respondent had given in examination-in-chief.

p. 25, l. 12
p. 26, ll. 26–28
p. 36, ll. 19–30

She denied the suggestion that she had been forced into the marriage Of her husband, she said, she had long known, and liked him.

Answering the Court, she said :—

p. 25, ll. 34–38

" I told my grandmother that I wanted to marry him, that I did not " want anybody else. After that grandmother went and told grandfather " Mr. Razik, and I told my uncle to come and be the wali."

p. 29, ll. 14–26

Cross-examined as to the date of her marriage, she said that she, of her own accord, decided to marry when she was informed that her presence in Court (in connection, presumably, with the appointment of a guardian *ad litem*) was essential. As an unmarried girl she objected to coming into Court ; as a married woman she " did not mind." And this, it is submitted, is in accordance with orthodox Muslim tradition.

p. 30, ll. 10–16

On the subject of her religion, she said that she had been brought up as a Hanafi from her " small days," and, on the differences between Hanafis and Shafis (which, it is well-known, are very small and known to very few members of either sect), she spoke of her praying in the Hanafi fashion which was also the way in which her grandmother (a Hanafi) prayed and which, presumably, is not how the Shafis would pray.

18.—Giving evidence in further support of the validity of this Respondent's marriage, her grandfather (Respondent No. 1) said, in examination-in-chief :—

p. 37, l. 38 to
p. 38, l. 10

" Zubeida is my daughter's daughter. Petitioner is my deceased " daughter's husband. I am a member of the Senate. For many years " I have been a member of the State Council. My daughter was my only " child. She died soon after Zubeida's birth. Petitioner left my society " on the day that my daughter was buried—17–12–42 (*sic.* 32)—saying " that he will never return to me. In point of fact he never came back. " Ever since feelings between us have been strained . . . . I have no " objection to the girl's going to her father. My wife and I brought this " girl up as my child. In fact she was the only child in the house.

p. 38, ll. 11–17

" I am a Ceylon Moor. My wife's father was an Arab and her mother " a Seyed who is a descendant of the Prophet. My wife's father was a " Hanafi. My wife has been a Hanafi right through. I am myself a Hanafi. " I brought up Zubeida as a Hanafi for the reason that when her father left " I thought there would be trouble in getting her married. As a Hanafi she could marry with any wali. I do not know what sect her father belongs to."

19.—Answering the Court, Respondent No. 1 said :—

p. 38, ll. 18–20

" It is a simple thing to turn Shafi. When I go into a Shafi mosque and " I conscientiously think I am a Shafi, I am a Shafi. The question of the " father's sect did not arise when he married my daughter."

And, in further examination-in-chief, he said :—

p. 38, ll. 21–26

" Most Moors in Ceylon are Shafis. Hanafi, Shafi, Humbli and Malik

" are divisions of the major Sunni sect. The distinction between Hanafi " and Shafi is minute. A Hanafi when he says his prayers ties his hands " and then leaves them down. The Shafi will hold his hands tied always " . . . . A Shafi says his prayers loud but the Hanafi says his prayers to " himself.

" Zubeida said her prayers with my wife. Most Arabs are of the p. 38, ll. 27–40
" Hanafi sect. When Zubeida was summoned in Court I did not then " think of marriage for her. She knew her husband. He is my wife's " elder brother's youngest son. He is also a Hanafi . . . . We are all " Hanafis and she married as a Hanafi. Ever since she and her husband " are living in my house."

20.—In cross-examination, the Respondent No. 1 said :— p. 38, l. 42 to p. 39, l. 6

" I am a Hanafi for the last 10 years. Before that I was a Shafi . . . .
" My daughter having died and this child being under me, my wife being " a Hanafi, I had to become a Hanafi. I can change over in a minite. " Conversion is absolute religious conviction . . . . Earlier I also said " that there would be trouble when I wanted to give her in marriage and " I brought her up as a Hanafi. I need not be a Hanafi to give my " granddaughter in marriage . . . . "

From statements made by the witness regarding the religious convic- p. 39, l. 33 to p. 40, l. 17
tions of his deceased daughter (this Respondent's mother) it would seem that she was brought up as a Hanafi but, following her marriage to the Appellant, who was a Shafi, she became a Shafi herself and was a Shafi when she died.

In re-examination, on inter-marriages between Shafis and Hanafis, p. 47, ll. 4–6
the witness referred to a well-known person (Dr. Imam) who, although a Hanafi, had married a Shafi girl, and to his own marriage with a Hanafi girl he, at that time, being a Shafi.

21.—By his Order, dated the 2nd August, 1948, the learned District pp. 58–66
Judge held that the marriage of this Respondent was valid and that the pp. 66, ll. 29–31
Appellant was liable for the costs of the inquiry.

22.—The learned District Judge said that the main dispute in the case p. 59, ll. 25–27
was whether this Respondent was a Shafi or a Hanafi and whether the Muslim Law of the Hanafi sect applied to her marriage.

He referred to the cases of the opposing parties, in effect, as follows :—

The Appellant contended that all Muslims in Ceylon are Shafis and p. 59, ll. 27–34
are subject to the laws governing that sect. It is the Shafi law that a wali should consent to a girl's marriage and of those who may act as walis, the father comes first. In this case the girl was a Shafi and the Appellant's (*i.e.*, her father's) consent to her marriage not having been obtained the marriage was invalid.

On the other hand the Respondents Nos. 1 and 2 and this Respondent p. 59, ll. 35–42
contended that this Respondent was a Hanafi who had attained puberty and, as such, she was at liberty to contract a marriage without a wali, or

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alternatively, she could, for purposes of the registration of the marriage, appoint anyone she pleased to act as her wali as in fact she had done.

p. 59, l. 45 to p. 61, l. 32

23.—The learned District Judge then examined the said evidence of the Respondents which, he said, stood uncontradicted as the Appellant

p. 60, ll. 25–28

had chosen not to enter the witness box and no one had testified on his behalf.

p. 61, ll. 18–21

As to the said documents X2, X3 and X4 (see paragraph 14 *ante*), he found that they had all been explained to this Respondent who had subsequently signed them in order that she could be lawfully married to Rashid bin Hassan. He held as follows :—

p. 61, ll. 33–37

" On the facts I am satisfied that Sithy Zubeida was brought up as " a Hanafi and observed the requirements of that sect in matters relating " to her religion. I also hold that she went through a ceremony of marriage, " both she and the bridegroom Rashid bin Hassan consenting, on the day " in question without the consent of her father.

p. 61, ll. 37–39

" The question is whether this marriage is valid in the absence of her " father's consent as a wali. This is a pure question of law which I shall " now proceed to discuss."

24.—After referring to the relevant Ordinances and authorities on the application of the Muslim Law in Ceylon, the learned District Judge held

p. 64, ll. 26–28

that " under statute law as it stands today it is the Mohammedan Law " which should govern parties who are Mohammedans in matters relating

p. 64, ll. 28–30

" to marriage," and that law was not, as had been contended on the Appellant's behalf, " Muslim Law which has been established by custom

p. 64, l. 45 to p. 65, l. 2

" and usuage," but Muslim Law, free of any such qualification.

For reasons that he gave, he rejected the contention that in Ceylon

p. 65, ll. 2–4

there is a presumption that every Muslim belongs to the Shafi sect and, therefore, the law which governs Muslims in Ceylon is the law of that sect. It was his view " that although it must be taken as generally correct that

p. 65, ll. 28–34

" the Muslims of Ceylon belong to the Shafi sect, there is nothing to prevent " a Muslim from belonging to any other sect or from establishing that he " does so belong. The differences between the various sects or sub-divisions " of the Sunni School of law are very small and according to the authorities " a member of one sect may easily convert himself to any of the other sects."

p. 65, ll. 38–39 p. 66, l. 30

25.—In conclusion the learned District Judge said that he was satisfied that this Respondent was a Hanafi governed by the Hanafi School of law, and that her marriage was valid.

p. 65, ll. 22–24 p. 66, ll. 21–25

In his view, in matters relating to marriage and inheritance, the existence of Muslim sects was recognised by the Ceylon Ordinances and such recognition must necessarily extend to the rights of members of the said sects to change from one sect to another.

26.—Against the said Order of the learned District Judge the Appellant, by his petition, dated the 10th August, 1948, appealed to the Supreme Court of Ceylon. p. 67

27.—On the 27th January, 1949, the question of curatorship was again before the said District Court. p. 69

Appellant's Counsel drew attention to the previous proceedings of the 31st October, 1947, 5th December, 1947, and 23rd January, 1948 (see paragraphs 6, 7 and 8 *ante*) and informed the Court that this Respondent was now sixteen years and a few months old.

The parties reached a settlement on the question of curatorship which was thus recorded by the learned District Judge :—

" At this stage the case is settled. The parties are agreed that Rashid " bin Hassan " [this Respondent's husband] " should be appointed as " curator on his giving security to be fixed by the Court. p. 69, ll. 10–14

" This agreement is without prejudice to the rights of either party with " regard to the validity of the marriage which question is now under appeal."

28.—The appeal was heard by a Bench of the Supreme Court consisting of Jayetileke, C.J. and Swan, J. who, by their Judgments, dated the 28th September, 1950, held that the marriage was valid. The appeal was therefore, dismissed with costs. pp. 69–74

29.—In his Judgment Swan, J. (who delivered the main Judgment and with whom Jayetileke, C.J. agreed) said that the appeal was concerned with the validity of this Respondent's marriage, a matter which, in the circumstances hereinbefore stated, had come up indirectly before the District Court. p. 70, ll. 11–13

As to the effect of marriage upon a Muslim girl who was a minor, the learned Supreme Court Judge was of the view that marriage did not confer majority upon a Muslim below the age of twenty-one and it was his opinion, therefore, that the Court below could, whether or not the marriage of this Respondent was valid, have appointed a guardian over her person and a curator of her property. In his view the parties had accepted this to be the correct position when, on the 27th January, 1949 (see paragraph 27 hereof) they had, by consent, appointed Rashid bin Hassan as curator without prejudice, of course, to the question under appeal, *viz.* the validity of the marriage. p. 71, ll. 4–17

30.—On the validity of the marriage, the learned Supreme Court Judge (Swan, J.) said that the first point for consideration was whether this Respondent was a Hanafi at the time of the marriage. He continued as follows :— p. 71, ll. 31–32

" The learned District Judge has held that she was a Hanafi and with " that finding we agree. I would say that, on the evidence, a contrary " view would have been unreasonable, especially if one bears in mind the " fact that the 4th Respondent was brought up from her infancy by her " maternal grandmother the 2nd Respondent who is a Hanafi." p. 71, ll. 32–37

p. 71, l. 38 to p. 72, l. 8

31.—The next point, in the learned Judge's view, was " whether " being a Hanafi, the 4th Respondent could contract herself in marriage." He referred to, but did not accept, the argument advanced on the Annexure Appellant's behalf, that the Age of Majority Ordinance No. 7 of 1865 (Cap. 53) which makes twenty-one years the legal age of majority is applicable to a Muslim's capacity to enter into a contract of marriage. The learned Supreme Court Judge drew attention to the fact that the Ceylon Courts had held that " majority " for the purpose of a Muslim marriage contract is not affected by the said Ordinance, and, after referring to certain authorities, he said :—

p. 72, ll. 29–31 " We are content, in this case, to say that for the purpose of marriage " a Muslim attains ' majority ' on reaching the age of bulugh or puberty." 10

p. 72, l. 32 to p. 73, l. 10

32.—And so the learned Judge of the Supreme Court (Swan, J.) came to " the last point for determination " which was " whether a Muslim girl " can enter into a contract of marriage in Ceylon without a wali or " marriage guardian." He referred to, but did not accept, the argument of Appellant's Counsel that the Hanafi rule that a wali is not necessary on the marriage of a Hanafi girl who has attained the age of puberty has not been adopted in Ceylon, as an examination of Sections 64 and 65 of the old Mohammedan Code of 1806 would show. The learned Judge pointed out that the said Code—which was compiled at a time when it was believed 20 that all Muslims in Ceylon were Shafis and which had been held to be not exhaustive has been repealed, and that its marriage and divorce provisions Annexure are now replaced by the Muslim Marriage and Divorce Registration Ordinance (Cap. 99), and its provisions dealing with intestate succession by the Muslim Intestate Succession and Wakfs Ordinance, X of 1931 (Cap. 50).

p. 73, ll. 10–14

33.—Continuing, the learned Supreme Court Judge said that in course of time it was found that there were Muslim sects other than Shafis in Ceylon and this was provided for in the Muslim Intestate Succession and 30 Annexure Wakfs Ordinance, X of 1931 (Cap. 50) which expressly recognises the right of every Muslim to deal, and be dealt with, according to the law of the particular sect to which he belongs.

p. 72, ll. 43–46 As to marriage and divorce, the learned Judge referred to Section 50 of the said Muslim Marriage and Divorce Ordinance (Cap. 99) which enacts that

> " The repeal of Sections 64 to 102 (first paragraph) of the " Mohammedan Code of 1806 which is effected by this Ordinance shall " not affect the Muslim Law of marriage and divorce and the rights " of Muslims thereunder " 40

p. 72, l. 46 to p. 73, l. 9 and to the argument of Appellant's Counsel, which, he said, the Court did not accept, that to ascertain the relevant Muslim Law recourse must still be had to the said repealed Sections 64 to 102. The learned Supreme

p. 73, ll. 19–24 Court Judge explained that the said Muslim Marriage and Divorce Ordinance of 1929, as amended in 1934, was proclaimed on the 1st January, 1937,

by which time the Legislature had openly recognised the right of a Muslim in certain matters to deal, and be dealt with, according to the law of his sect, and this made unnecessary any specific mention of the matter in the said Section 50.

It was the Court's opinion that the words " Muslim Law " in the said Section 50 " cannot mean anything more or less than the Muslim Law " governing the sect to which the particular person belongs," and it held, therefore, that " in a matter of marriage or divorce a Muslim is governed " by the law of the sect to which he or she belongs." p. 73, ll. 24–28

34.—The learned Supreme Court Judge (Swan, J. with whom Jayetileke, C.J. agreed) said finally :—

" It seems to be clear that under Muslim Law a Hanafi maiden can " act without the intervention of a wali or marriage guardian, or appoint " a wali herself for the purpose of her marriage. We would therefore " hold that a valid contract of marriage according to Muslim Law was " entered into between the 4th Respondent and Rashid bin Hassan on " 11–12–47 and that the marriage was duly registered in accordance with " the provisions of the Muslim Marriage and Divorce Ordinance (Cap. 99). p. 74, ll. 8–15

" The appeal fails and is dismissed with costs."

35.—A decree in accordance with the Judgment of the Supreme Court was entered on the 28th September, 1950, and against the said decree this appeal is now preferred in pursuance of leave to appeal which was granted to the Appellant by decrees of the Supreme Court, dated the 12th October, 1950, and the 24th October, 1950. pp. 74–75 pp. 76–79

This Respondent humbly submits that the appeal should be dismissed, with costs, for the following among other

REASONS

1. BECAUSE the validity of a Muslim marriage in Ceylon is ascertainable by reference to the laws and customs of the sect to which the parties belong.
2. BECAUSE both Courts below have correctly found that at the time of her marriage this Respondent was a member of the Hanafi sect of Muslims.
3. BECAUSE the said marriage was, by Hanafi law and custom, a valid marriage.
4. BECAUSE, for reasons stated in their Judgments both. Courts below were right to hold that the marriage was valid

HARTLEY SHAWCROSS.

R. K. HANDOO.

ANNEXURE.

THE MUSLIM MARRIAGE AND DIVORCE REGISTRATION ORDINANCE.

(Cap. 99)

1st January, 1937.

Short title/and application

" 1. (1) This Ordinance may be cited as the Muslim Marriage and Divorce Registration Ordinance.

(2) This Ordinance shall apply only to subjects of His Majesty professing Islam."

Persons liable to register marriage

" 6. (1) In the case of every marriage contracted between Muslims after the commencement of this Ordinance, it shall be the duty of the bridegroom and the wali of the bride (except where the Kathi as expressly authorised the marriage under Section 21 (2) and the officiating priest who attends the marriage ceremonies at the request of the contracting parties and the priest conducting the marriage ceremonies and the two witnesses to the marriage, immediately upon the performance of such ceremonies, to register such marriage or to cause such marriage to be registered at the wedding meeting held according to custom.

(2) Every person upon whom a duty is imposed by this Ordinance to register a marriage or to cause a marriage to be registered who omits to register such marriage or to cause such marriage to be registered shall be guilty of an offence and shall on conviction be liable to a fine . . . . "

Declarations

" 7. (1) Before the registration of the marriage, the bridegroom and the wali of the bride (except where the consent of such wali has been dispensed with under Section 21 (2)) shall sign before the officiating priest declarations in the form prescribed in the First Schedule. It shall be the duty of the officiating priest to require the bridegroom and the wali, if any, to sign such declarations."

* * * * *

Entries of marriage to be signed and attested

" 8. (1) The marriage register shall be signed by the officiating—priest and by the priest conducting the marriage ceremonies and also by the bridegroom, and by the wali of the bride except where the Kathi has expressly authorised such marriage under Section 21 (2) and shall be attested by the two witnesses present at the marriage.

* * * * *

" 21. (1) . . . .

Additional powers of Kathi

(2) A Kathi may also inquire into and deal with any complaint by or on behalf of a woman made against a wali who unreasonably withholds his consent to the marriage of such woman and if necessary authorise such marriage against the express wishes of the wali :

Provided that where a woman has no wali, the Kathi may, after such inquiry as he may consider necessary, authorise the registration of her marriage and dispense with the necessity for the consent of a wali."

* * * * *

" 50. The repeal of sections 64 to 102 (first paragraph) inclusive of the Mohamedan Code of 1806, which is effected by this Ordinance, shall not affect the Muslim Law of marriage and divorce, and the rights of Muslims thereunder."

Saving of Muslim Law of marriage and divorce

THE MUSLIM INTESTATE SUCCESSION AND WAKFS ORDINANCE

17th June, 1931.

" 2. It is hereby declared that the law applicable to the intestacy of any deceased Muslim who at the time of his death was domiciled in the Island or was the owner of any immovable property in the Island shall be the Muslim Law governing the sect to which such deceased Muslim belonged."

Declaration of law relating to intestacy

THE AGE OF MAJORITY ORDINANCE.

(Cap. 53)

20th October, 1865.

" 2. From and after the passing of this Ordinance all persons when they shall attain or who have already attained the full age of twenty-one years shall be deemed to have attained the legal age of majority, and, except as is hereinafter excepted, no person shall be deemed to have attained his majority at an earlier period, any law or custom to the contrary notwithstanding.

" 3. Nothing herein contained shall extend or be construed to prevent any person under the age of twenty-one years from attaining his majority at an earlier period by operation of law."

In the Privy Council.

No. 37 of 1951.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

A. H. M. ABDUL CADER ... APPELLANT

AND

A. R. A. RAZIK AND OTHERS RESPONDENTS.

CASE ON BEHALF OF RESPONDENT No. 4

BURCHELLS,
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