GHOUSE
v.
GHOUSE

SUPREME COURT.
SHARVANANDA, C.J., WANASUNDERA J., ATUKORALE, J., L. H. DE ALWIS, J., AND H. A. G. DE SILVA, J
S.C. No. 19/86.
C.A. No. 621/75(F).
D. C. MT. LAVINIA No. 26908/T
NOVEMBER 9, 10 AND 11, 1987.

Muslim Law–Muslim intestate succession–Adoption by a Muslim couple–Adoption of Children Ordinance No. 24 of 1941 s. 6(3)–Muslim Intestate Succession Ordinance No. 10 of 1931–Special law and general law–Generalia specialibus non derogant.

Is a child adopted under the provisions of the Adoption Ordinance (No. 24 of 1941) by a Muslim couple entitled to succeed to the intestate estate of his adoptive parents?

Held–

(Wanasundera J. dissenting)

The Muslim law postulates consanguinity to qualify oneself for intestate succession. The Adoption of Children Ordinance being a general law does not abrogate the special law set out in the Muslim Intestate Succession Ordinance which prescribes that intestate succession to any deceased Muslim domiciled in Sri Lanka or owning immovable property in Sri Lanka shall be governed by the Muslim Law applicable to the sect to which the deceased Muslim belonged. The maxim *generalia specialibus non derogant* applies and the claim of an adopted child to succeed to the estate of his adoptive Muslim parent fails as the Muslim law does not recognise adoption, but only birth in lawful wedlock for intestate succession.

Cases referred to:

(1) *Muhammed Alfhabad v. M. Ismail (1888) 10 All 289, 337.*
(2) *Umar Khan v. Niaz-ud-Din Khan (1911) 39 IA 19, 25.*
(3) *Fitzgerald v. Champneys 2 J & H 31, 54.*
(4) *The Vera Cruz 10 AC 59, 68.*
(5) *The Queen v. Ramasamy (1964) 66 NLR 265 (PC).*
(6) *Garnet v. Bradbury (1878) 3 App. Cases 944, 950.*
(7) *Cohen v. Minister of Interior (1942) TPD 151.*
(8) *Pedley-Smith v. Pedley-Smith (1953) 88 CLR 177.*
(9) *Ahamet v. Sariffa Umma (1931) 33 NLR 9 (PC).*
(10) *Sariff Umma v. Rahamathu Umma (1911) 14 NLR 464, 466.*
(11) *Abdul Rahaman v. Ussan Umma (1916) 19 NLR 175*
(12) *Noorul Muheetha v. Sitthe Leyandeen (1953) 54 NLR 270.*
(13) *Sunniathangam v. Meera Mohideen (1958) 60 NLR 394*

APPEAL from judgment of the Court of Appeal reported at [1986] 1 Sri L R 48

Dr. H. W. Jayewardene Q.C. with *A. A. M. Marleen, Miss. T. Keenawinna* and *Harsha Amerasekera* for petitioner-appellant.

K. N. Choksy P.C. with *K. Kanag-Iswaran, Ifthika Hassim* and *Nigel Hatch* for respondent.

Cur adv vult

December 16, 1987

SHARVANANDA, C.J.

The Appellant instituted testamentary proceedings seeking letters of administration in respect of the intestate estate of Hafila Ghouse as an intestate heir. The Respondent filed objections and claimed that he was the sole heir to the estate of the deceased on the ground that the deceased Hafila Ghouse and her pre-deceased husband Abdul Majeed Mohamed Ghouse, being Muslims governed by the Laws of Ceylon, made application in May 1950 for the adoption of the Respondent and the Court of Requests, Colombo, had duly authorised the adoption in terms of the provisions of the Adoption of Children Ordinance No. 24 of 1941 and that hence he was for all purposes a child of the deceased intestate, entitled to succeed to the estate of the deceased.

After inquiry, the District Judge held that the Respondent was the sole intestate heir of the deceased by virtue of the said adoption order. On appeal by the Appellant, a Divisional Bench of the Court of Appeal upheld by a majority the decision of the District Judge and dismissed the appeal. The Appellant has preferred this appeal, from the said order of the Court of Appeal. As an important question of law was involved in the appeal a Bench of five Judges of this Court was constituted on the direction of the Chief Justice to hear this appeal.

The question of law that arises for decision on the undisputed facts of the case is 'Is a child adopted under the provisions of the Adoption Ordinance by a *Muslim Couple,* entitled to succeed to the intestate estate of his adoptive parents?'

The Muslim Intestate Succession Ordinance No. 10 of 1931, (Cap. 62) Vol. III, L. E. page 73) which is an Ordinance to define the law relating to Muslim Intestate Succession and Donation provides:

> "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 Ceylon or was the owner of any immovable property in Ceylon shall be the Muslim law governing the sect to which such deceased Muslim belonged."

It is not disputed by the parties that the several persons involved in these proceedings are Muslims, domiciled in Sri Lanka and belong to the Shafie Sect. The assets of the estate sought to be administered, include immovable property situate in Ceylon. So the law applicable to the intestacy of the deceased Muslim is according to the aforesaid Section the Muslim Law governing the Safie Sect. But the Respondent relies on section 6(3) of the Adoption of Children Ordinance No. 24 of 1941 as amended by No. 54 of 1943 (which is operative from 1.2.1944) which provides "upon an adoption order being made the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter" and submits that on account of the adoption order made with reference to him, he should in law be regarded as 'a child born in lawful wedlock' of the deceased and is entitled to succeed the intestate estate of the deceased. The appellant's counter-submission is that under the Muslim Law, an adopted child cannot succeed the intestate parent, that the Muslim Intestate Succession Ordinance of 1931 is a special law applicable to the Muslims and that this special law of 1931 has not been abrogated by the latter general law, viz: The Adoption of Children Ordinance of 1941. He invokes the principle "generalia specialibus non derogant."

For the decision of the aforesaid question of law, it is not necessary to embark on an inquiry into how much of the Muslim Law of succession has been adopted into the legal jurisprudence of the country. Section 2 of the Muslim Intestate Succession Ordinance relieves us of the task researching this abstruse topic. It clearly and unequivocally provides that the Muslim Law governing the Sect to

which the deceased Muslim belonged shall apply to the intestacy in question. This statutory provision imports the whole body of the Muslim Law governing the Sect to which the deceased belonged to decide the question of succession to the intestacy in question irrespective of whether any part thereof has been accepted earlier or not. The entire body of Muslim Law governing the Sect to which the deceased Muslim belonged has become applicable from the date of the Ordinance to the intestacy in question.

Mulla's Principles of Mohammedan Law (17th Ed. at page 328) states categorically that the Mohamedan Law does not recognise adoption.

Tyabji on Muslim Law (4th Ed.) states at page 208-209, para 228–

"Paternity or maternity is not established in a Muslim who purports to adopt another, nor is the latter considered in law to be the child of the former. Adoption is not known to Muslim Law."

Louis Nell in his book 'The Mohammedan Law of Ceylon showing the Principles and Rules of the Distribution of Inheritance" (1873) states:

"When compared with the other laws of inheritance obtaining in Ceylon, we observe that the Mohammedan law calls parents, children and surviving spouse, to inherit together..... Adoption is not recognised as conferring any right on the children adopted."

Tyabji (supra) at page 800 et seq. in formulating the general principles and scheme of the Muslim Law of inheritance and succession finds the basis of Muslim Law of succession in the Quran:

"The Muslim Law of inheritance consists primarily of (1) the rules relating thereto laid down in the Quran or by the Prophet in his teachings; and (2) the customs and usages prevailing amongst the Arab tribes near Mecca and Medina at the time of the Prophet in so far as they have not been altered or abrogated by the said rules and teachings." He continues "the title to succession previous to Islam, was that of comradeship in arms. It was on this basis that women and children who were unable to bear arms were disqualified in regard to inheritance. The law was not amended on this point for the first two or three years during which the Prophet preached. Later this rule was abrogated by the Quran and it was laid down that nothing could furnish so strong a claim to inheritance as blood relation. This was indeed only a part of the general scheme of the new religion to strengthen the family tie."

Dealing with the law of succession, the Quran states:

"and they who believed and left their homes afterwards, and have striven along with you, these are also of you, but these who are united by ties of blood are nearer to each other by the books of God. Verily God has knowledge of all things – Quran VIII – 72-75. Nearer to the believers is the Prophet than they are to their own selves, and his wives are (as) their mothers. In the Book of God they who are related by blood, are nearer the one to the other than the (other) believers and those who fled, but you should show kindness to your kindred. This is written in the Book – XXXIII.6."

Tyabji 4th Ed. at 803.

Thus blood-relation title to succession came to replace comradeship in war.

Under all schools of Muslim Law the question who shall be heirs, and who, as such, shall be entitled to take the estate is determined by determining who are the nearest in accordance with the rules of proximity to the deceased.

Tyabji at 813.

In Wilson's Anglo-Muhamedan Law, 6th Ed. para. 209, at page 262, it is stated in the Chapter on Inheritance that–

"The first step in the distribution is to assign certain specified fractions of the whole heritable property to the blood relations hereinafter mentioned, should any such happen to exist, and also to the wife or wives, if any, or to the husband, as the case may be, of the deceased. Such persons are called sharers."

Sharer means a person who takes a definite fraction of the estate, under the provisions contained in the Quoran. Sharers owe their rights to Islam.

Blood-relationship, except in the case of husband or wife of the deceased is basic to the right of succession to the intestate deceased. The Quoran preferred consanguinity to any artificial modes of ties not based on actual parentage. The law, in its original and rigorous shape which was the aim of Islam to see enforced, was that "parentage is only established in the real father and mother of a child and only if the child is begotten by them in lawful wedlock." Tyabji at page 200. Though various presumptions later modified this rigorous

rule, the principle of the rule viz. actual parentage continued in operation. Maternity is established under Muslim law only in the woman who gives birth to a child. The question of paternity is a question of fact which the court will decide in accordance with the evidence. The paternity of a child is presumed in any man who acknowledges it with the intention of admitting that it has been established. It can be disproved only by positive proof that no marriage took place. Where the evidence establishes conclusively that a person is not the legitimate son of another, then by acknowledgment or otherwise that person cannot be given the status of a legitimate son. Acknowledging as a child, prima facie means acknowledging as a legitimate child. The offspring of adulterous intercourse cannot be legitimated by any acknowledgment. *Muhammed Allhabad v. M. Ismail (1).*

Paternity or maternity is not established in a Muslim who purports to adopt another, nor is the latter considered in law to be the child of the former.

The Privy Council in *Umar Khan v. Niaz-ud-Din Khan (2)*

"Under the general Mohamedan law an adoption cannot be made; an adoption, if made in fact by a Mohamedan, could carry with it no right of inheritance."

An adopted son has no right of inheritance since the principle of Muslim Law based on the Quoran, is that one must be a consanguine relative of the deceased to become entitled to inherit the property of the deceased; there should be actual or natural parentage, not legal parentage over other people's children in order to found a claim for inheritance under the Muslim Law.

A form of adoption was in vogue in Arabia previous to Islam. But this was abrogated by the verses preferring consanguinity to any artificial modes of creating ties not based on actual parentage.

"Allah has not made
For any man two hearts
In his one body, nor has
He made your wives whom
Ye divorce by Zihar

Your mothers; *nor has He.*
Made your adopted sons
Your sons, such is (only)
Your (manner of) speech
By your mouths. But Allah
Tells (you) the Truth, and He
Shows the (right) way"

Quoran XXXIII 4.

Adoption is inconsistent with the truth. "Truth cannot be altered by men's 'Adopting sons'." Natural parentage which is so fundamental to entitlement in the Muslim law of intestate succession cannot be established in the case of Adopting and hence an adopted child under Muslim Law, whatever be the Sect of the deceased Muslim, is not qualified for want of consanguinity to succeed to the intestacy of the deceased Muslim—no amount of deeming can make the blood of his adoptive parent flow in his body.

The Adoption of Children Ordinance of 1941 (Cap. 61) came into operation on 1st February 1944. Section 2 of the Ordinance provides—

"Any person desirous of being authorised to adopt a child may make application to the court.... and the court may.... make an order (*adoption order*) authorising the person to adopt the child."

Section 6(1) provides:

"Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents .... of the adopted child in relation to the future custody, maintenance and education of the adopted child.... shall be extinguished; and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and be enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock."

Section 6(3)

"Upon an adoption order being made, the adopted child *shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter.*

Provided, however, that unless the contrary intention clearly appears from any instrument (.....) such adopted child shall not by such adoption–

(*a*) acquire any right, title or interest in any property–

(i) devolving on any child of the adopter by virtue of any instrument executed prior to the date of the adoption order;

(ii) burdened with a fideicommissum in favour of the descendants of the adopter; or

(iii) devolving on the heirs *ab intestato* of any child born in lawful wedlock of the adopter;

(*b*) become entitled to any succession (whether by will or *ab intestato) jure representationis* the adopter.

Section 16 of the Ordinance provides–

"The provisions of this Part shall be in addition to and not in substitution of the provisions of any written or other law relating to the adoption of children by persons subject to the *Thesawalamai* or the Kandyan law; and notwithstanding anything to the contrary in such other law, an adoption order may be made authorising any such person to adopt a child, and where made, shall have effect in accordance with the provisions of this Part."

It is to be noted that the institution of adoption was known both to Thesawalamai and to the Kandyan law. Even though the the sections on adoption in the Thesawalamai are now considered obsolete, the underlying assumption of that code is that adoption under the Thesawalamai was an existing institution. Both systems recognised adoption as a device for instituting an heir who could succeed to the adoptive parents' property. Hence the rule of an adopted child becoming an intestate heir, as prescribed by the Adoption of Children Ordinance did not conflict with the principles of Thesawalamai or Kandyan Law and did not operate to alter these laws.

The Adoption Ordinance enables "any person desirous of being authorised to adopt a child" to apply for an adoption order. Hence a Muslim too is competent to apply for an adoption order and can adopt children in terms of the provisions of that Ordinance.

An Adoption Order establishes parentage in law as distinct from natural parentage and vests in the adopting parents all the rights, duties, obligations and liabilities of the parents of the child, as though the adopted child is a child born to the adopting parents in lawful wedlock. Section 6 (3) provides that upon an adoption order being made the adopted child shall *for all purposes* whatsoever be deemed in law to be the child born in lawful wedlock of the adopter. A literal application of this provision will enable a child adopted by Muslim parents to succeed to the intestate estate of his deceased parents in total derogation of the Muslim Law of intestate succession which does not recognise adoption for purposes of inheritance. Such an eventuality is inconceivable in Muslim Law which postulates ties of consanguinity to qualify oneself for intestate succession. Counsel for the Respondent rightly conceded that according to the Quoranic Law, an adopted child is not recognisable for the purpose of intestate succession. The issue is whether the Adoption Ordinance has abrogated the prescription of Muslim Law of intestate succession that an adopted child cannot inherit his adopting parents' estate. Has section 6 (3) of the Adoption Ordinance of 1941 impliedly repealed the principle of Muslim Law of intestate succession relating to the inability of an adopted child to inherit the properties of his deceased adopting parents?

Counsel for the appellant contended that there has been no express or implied repeal of the relevant provisions of the Muslim Intestate Succession Ordinance, a special law relating to Muslim inheritance by the general law contained in section 6(3) of the Adoption Ordinance.

Counsel for the Appellant invoked the principle 'generalia specialibus non derogant' in support of his submission and submitted that a general Act is to be construed as not repealing a special Act. In *Fitzgerald v. Champneys* (3), Wood V. C. said–

> "In passing the special Act, the legislature had their attention directed to the special case which the act was meant to meet, and considered and provided for all the circumstances of that special case; and having so done, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which by their own special Act, they had thus carefully supervised and regulated."

In *The Vera Cruz* (4) Lord Selbourne said "where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

"If the legislature makes a special act dealing with a particular case and later makes a general act, which by its terms would include the subject of the special act and is in conflict with the special act, nevertheless unless it is clear that in making the general act, the legislature has had the special act in mind and has intended to abrogate it, the provisions of the general act do not override the special act" *Bindra–Interpretation of Statutes,* 7th Ed. 149.

An illustration of the principle is provided by *The Queen v. Ramasamy* (5). The Criminal Procedure Code *No. 15 of 1898* by section 122(3) prohibited the use of oral, as well as written, statements given to the Police in an investigation, whereas section 27 of the Evidence Ordinance *No. 14 of 1895,* allowed evidence of information given by the accused in an investigation which related distinctly to a fact discovered in consequence. The accused, in an oral statement to the Police, had given information leading them to find a gun and he was accused of attempted murder. The Privy Council, being of opinion that the correct way to solve the question, what effect section 122(3) of the Criminal Procedure Code had upon section 27 of the Evidence Ordinance which had been passed three years earlier was by applying the maxim of interpretation *'generalia specialibus non derogant'* held that section 27 of the Evidence Ordinance, overrode section 122(3) of the Criminal Procedure Code. Lord Radcliffe in the course of his judgment said:

"the evidence falling under section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of investigation under section 122."

The principle *'generalia specialibus non derogant'* sums up the presumption against implied repeal. A subsequent general act does not affect a prior special act by implication. A general provision should yield to a special provision. When a general act is subsequently passed it is logical to presume that the legislature has not repealed or modified

the former special act unless it appears that the special act again received consideration from Parliament. Lord Hatherley stated the rule thus:

> "An act directed towards a special object or special class of objects will not be repealed by a subsequent general act embracing in its generality these particular objects, unless some reference be made, directly or by necessary inference, to the preceding special act." *Garnett v. Bradbury* (6).

The Muslim Intestate Succession Ordinance is a special law dealing with the rules relating to Muslim Intestate Succession as to who can or cannot inherit the property of a deceased Muslim and in what proportion etc. As against this special law, section 6 of the Adoption Ordinance is a general provision defining the incidents and consequences of an 'adoption order.' There is nothing in the Adoption Ordinance which indicates that the attention of the legislature had been directed to the special Muslim law of intestate succession and that the general provision of section 6(3) of the Adoption Ordinance was intended to embrace the special cases covered by the Muslim Law Intestate Succession Ordinance. The Adoption Ordinance does not manifest any intention in explicit language to alter the special act viz: the Muslim Intestate Succession Ordinance or to abrogate any basic principle of Muslim Law. Under the Muslim Law, an adopted child cannot succeed on intestacy. On the other hand under the Adoption Ordinance an adopted child can succeed. To this extent, the Adoption Ordinance derogates from the Muslim Law of Intestate Succession. In accordance with the maxim *'generalia specialibus non derogant'* therefore, nothing in the Adoption Ordinance can derogate from the Muslim Intestate Succession Ordinance and the former must yield to the latter whenever a dispute involving a question of Muslim Intestate Succession arises. A dispute whether an adopted child can succeed to the intestate estate of a deceased Muslim parent clearly comes within the area of the law applicable to the intestacy of a deceased Muslim. A fundamental rule of Muslim Law of intestate succession is that consanguinity alone is the basis of a claim to succeed on intestacy and hence an adopted child who is unable to establish paternity or maternity in the adopting parents cannot, under the Muslim Law succeed on the intestacy of his adopting parents.

Hence on the principle of the aforesaid maxim, the rule of Muslim Law of intestate succession which bars an adopted child inheriting property on intestacy of his adopting parents overrides section 6(3) of the Adoption Ordinance and the Respondent's claim fails.

Counsel for the Respondent relied heavily on the South African case of *Cohen v. Minister of Interior* (7) which interpreted section 8(1) of the South African Adoption of Children Act of 1923 which reads–

> "an order of adoption shall, unless otherwise thereby provided, confer the surname of the adopting parent on the adopted child and the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopting parent."

Construing that section the court said

> "such a child has all the rights and all the liabilities appertaining to a child born in lawful wedlock–As far as law possibly can make it so, the law has in fact said that strange child you have adopted is in fact your own flesh and blood."

In the above case, the court was called upon to construe the aforesaid section 8(1) of the South African Adoption Act, which corresponds to section 6(3) of our Adoption Ordinance without reference to any other law. There was no other law competing with section 8(1) and the court had not to consider the application of the maxim *'generalia specialibus non derogant.'* In our law, the question is, has the specific statutory provision declaring that Muslim Law relating to intestacy with its requirement of consanguine relationship to be necessary to inherit been displaced by the general provision viz: section 6(3) of our Adoption Ordinance; has the latter impliedly repealed the earlier special provision?

The construction of section 6(3) of the Adoption Ordinace is not the issue, it is the impact of that section on the Muslim law of intestate succession, that is in question here. For the same reason, the judgment in the Australian case of *Pedley Smith v. Pedley Smith* (8) is not of persuasive value.

Counsel for the Respondent referred to the case of *Ahamet v. Sariffa Umma* (9) where Privy Council affirming the judgment of the Supreme Court held that the Wills Ordinance No. 21 of 1844 applied to the will of a Muslim testator and that a Muslim domiciled in Ceylon was competent to dispose of all his property by will regardless of any limitation imposed by the Muslim Law. Under the Muslim Law, a Muslim is precluded from making by Will dispositions exceeding one third of his net assets. The recognition of Muslim Law in these matters was secured by the special laws concerning Mohamedans of 1806.

The question that arose was whether these special laws have not been modified by the Wills Ordinance of 1844 so as to make the disposition of the entire estate by the Muslim testator valid in law. Their Lordships examined the language of the Wills Ordinance and observed–

"The words of the enactment are of themselves sufficiently comprehensive to include Muslims within their scope. When read in connection with the preamble, which shows the purpose of the Ordinance is to secure uniformity with respect to testamentary disposition of property, it is not in their judgment possible to limit or restrict the operation of the Ordinance so as to exclude the Wills of Muslim testators from its purview... The Ordinance then being applicable to the will of a Muslim testator it is clear to their Lordships that it enables the testator to dispose of the whole of the property and not merely one third part of it. And such has been the declared judicial view in Ceylon since the year 1911 when the decision of the Supreme Court in *Shariffa Umma v. Rahamathu Umma* (10) was pronounced." In *Shariffa Umma's case at 466* the Chief Justice said that 'section 2 of the Wills Ordinance has uniformly been construed to enable Muhamedans in Ceylon to dispose of the whole of their property by will and the Muhammedan population in Ceylon has freely taken advantage of the privilege.'

The Privy Council said "in the face of a practice so well authenticated and so long continued, any alteration in the law as so authentically laid down must now come from the legislature and not from the courts." Since neither the Privy Council nor the Supreme Court directed its mind to the presumption against implied repeal or the maxim of *'generalia specialibus non derogant'*, the case is authority only for what it actually decides and has no application to the issue in this case.

In my view since section 6(3) of the Adoption Ordinance does not supersede or abrogate the Muslim Law of intestate succession which does not recognise an adopted child for purposes of intestate succession, the respondent's claim to succeed to the intestate estate of his adopting parents being based solely on the aforesaid section 6(3) of the Adoption Ordinance cannot be sustained and therefore fails.

I allow the appeal and set aside the majority judgment of the Court of Appeal and the judgment of the District Judge and declare that the Respondent is not an intestate heir of the deceased. In the special circumstances of the case, I direct that parties bear their own costs in all the courts.

ATUKORALE, J.,—I agree.

L. H. DE ALWIS, J.,—I agree.

H. A. G. DE SILVA, J.,—I agree

WANASUNDERA, J.

I have had the benefit of reading the judgment of the Chief Justice and I agree with him in regard to one of the two issues that arise for our decision. I regret however that I am unable to agree that this is a case which calls for the application of the principle *"generalia specialibus non derogant"* of statutory interpretation.

It is unnecessary to recapitulate the facts which are set out in his judgment. In brief, the question is whether a Muslim child legally adopted by a Muslim couple under the provisions of the Adoption of Children Ordinance (Cap. 61) is entitled to succeed as a son to the intestate estate of the adopted father.

It is agreed by all parties that both in terms of the Koran and the general principles of Muslim law, adoption *de jure* is not recognised by the Muslim law. Accordingly, the question of the intestate succession by an adopted son cannot arise as such in the Muslim law. However, in the matter before us it was also conceded by both counsel that there is nothing to prevent a Muslim in Sri Lanka taking advantage of the provisions of the Adoption of Children Ordinance and adopting a child.

An adoption can involve more than a legal relationship. It can engender paternal feelings in the adopter and evoke filial responses from the adopted and help to create the institution of a real family. The Chief Justice in his judgment has accordingly held that "a Muslim too is competent to apply for an adoption order and can adopt children in terms of the provisions of the Ordinance".

Section 6 (3) of the Adoption of Children Ordinance states that *"upon an adoption order being made, the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter"*. Mr. Choksy brought to our notice a decision of the South African courts where the identical collocation of words, namely "shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter" has been judicially interpreted. In fact, counsel for the respondent stated that the provision in our law was borrowed from the corresponding South African Act.

In *Cohen v. Minister for the Interior,* (7), the court, in construing these words, said–

> "Such a child has all the rights and all the liabilities appertaining to a child born in lawful wedlock subject to the exceptions which I have mentioned. As far as the law possibly can make it so, the law has in fact said: that child you have adopted is in fact your own flesh and blood."

The Australian Child Welfare Act 1939 had a somewhat similar provision. Section 168 of that Act stated that an adopted child–

> "shall be deemed to be a child of the adopting parent, and the adopting parent shall be deemed to be a parent of the adopted child, as if such child had been born to such adopting parent in lawful wedlock."

In *Pedley-Smith v. Pedley-Smith,* (8), the High Court of Australia interpreting this provision said:

> "That in law an adopted child must be considered the 'issue' of the adopting parent has been decided in New Zealand under a similar provision; *in re a Deed of Trust; Peddle v. Beattie; In re* Stevenson; Public Trustee v. X.; (c.f. In re Kingi; Thompson v. Kingi; where Myers C. J., as it seems, reserved the question for future consideration).
>
> "No doubt logic appears to require that if you 'deem' a child to be born to a man or woman you must deem the child to be his or her issue."

Referring to the provisions of section 6(3) of our Ordinance, the Chief Justice has therefore rightly said:

"literal application of this provision will enable a child adopted by Muslim parents to succeed to the intestate estate of his deceased parents in total derogation of the Muslim law of intestate succession which does not recognise adoption for purpose of inheritance."

As stated earlier, there is no dispute here that a Muslim can take advantage of the provisions of the Adoption of Children Ordinance and adopt a child. In fact, both counsel referred to a work by Professor Savitri Goonesekera on Parent and Child, where she, expresses the view that the Adoption of Children Ordinance was intended to apply to all communities, including the Muslims. The fact that the legislature must have given its mind to this aspect of the matter is shown by the fact that it specifically mentions that the law would be supplementary to the existing provisions relating to adoption in the Kandyan law and Thesawalamai. The Muslim law did not recognise *de jure* adoption and did not therefore need any special mention as in the case of the other two systems of law. On the other hand we do not find here the familiar provisions for the exclusion of its application to Muslims if that were intended as we find in numerous other enactments. Vide section 3 (2) of the Married Women's Property Ordinance No. 18 of 1923; section 2 of the Matrimonial Rights and Inheritance Ordinance; section 627 of the Civil Procedure Code; section 2 (1) of the Legitimacy Act, No. 3 of 1970.

Dr. Jayewardene, as stated earlier, conceded the application of the Adoption of Children Ordinance to Muslims but challenged only that part of the Ordinance that would enable an adopted son to succeed to the intestate estate of his adopted father. The Chief Justice has accordingly said that:

"the construction of section 6(3) of the Adoption Ordinance is not the issue, it is the impact of that section on the Muslim law of intestate succession that is in question here."

And more specifically–

"The issue is whether the Adoption Ordinance has abrogated the prescription of Muslim law of intestate succession that an adopted child cannot inherit his adopting parents' estate. Has section 6(3) of the Adoption Ordinance of 1941 impliedly repealed the principle of Muslim law of intestate succession relating to the inability of an adopted child to inherit the properties of his deceased adopting parents?"

This then is the only issue now to be decided and to make it even more precise, the question is which of the two competing enactments–the Adoption of Children Ordinance or the Muslim Intestate Succession Ordinance–should prevail in this matter.

The Chief Justice is of the view that the Adoption of Children Ordinance is in direct conflict with the provisions of the Muslim Intestate Succession Ordinance 1931, which is to the effect that the law applicable to the intestacy of a deceased Muslim is the Muslim law governing the sect to which he belongs, which in this case is the Shaffie sect. The Chief Justice has invoked the well-known principle *"generalia specialibus non derogant"* to resolve this conflict.

Mr. Choksy has, on the other hand, submitted that it is possible for the two enactments to be read harmoniously and that there is no warrant for the application of the *generalia specialibus* principle. It is Mr. Choksy's contention that once the adopted child is regarded in law as a son, then the provisions of the Muslim Intestate Succession Ordinance can continue to operate on that basis. I am inclined to agree with Mr. Choksy that this is the correct method of approaching this matter.

If however the issue before us involved a tenet of religion or some special factor fundamental to the practice of Islam, then there is no question that we would have without any hesitation given effect to it. But there are no such religious or special reasons in this case. It was admitted by both counsel that this was a purely secular matter. Further, the admission that a Muslim can take advantage of the Adoption of Children Ordinance and adopt a child, which is otherwise foreign to the concept of Muslim law, has to a great measure undermined the basis of the appellant's case.

The appellant has relied solely on what he termed, the biological requirements of consanguinity in intestate succession in Muslim law, as the reason for excluding an adopted child. But this is not something special or peculiar only to the Muslim law. In fact, consanguinity is in the first instance the basis of succession in the other personal laws of succession in this country, whether it be the Roman-Dutch law, the Kandyan law, or the Thesawalamai. In point of fact, in the Muslim law of intestate succession, the sons, who are agnates, take after the sharers while in the other systems of personal laws the children are given precedence over others.

There is also nothing in the Muslim law to indicate that for a religious or some special social reason the property belonging to a Muslim family must be confined to itself and must devolve only on the blood relations and cannot be transferred or disposed of outside the family. Admittedly this property could have been disposed of *inter vivos* by the adopting father to anybody, even to a stranger. If the adopter had donated or transferred this property to his adopted son during his lifetime by instrument of deed, that would have been a perfectly valid transaction. Why then is there this objection when the same result is reached by way of an intestacy? It seems to me that even the majority judgment which has chosen to dispose of this matter on a principle of statutory interpretation has not attached much weight to the argument based on consanguinity.

I have carefully considered the dissenting judgment of Jameel, J. and find that he has relied on no other ground but on the need of consanguinity for purpose of succession for his decision. I do not think that it is necessary to say anything more on this matter except to mention that Jameel, J. has himself set out the case of "Acknowledgment" as a legitimate mode of intestate succession in the Muslim law. He stated:

> "Acknowledgment is a method of filiation that is known to and recognised by Muslim law. Indeed, it is the only other method, other than birth in lawful wedlock, known in Muslim law. But for this method to be operative three conditions must co-exist, namely,
>
> (*a*) the Acknowledger and the Acknowledged must be of such ages that they are capable of being regarded as father and son.
>
> (*b*) the Acknowledged must be of unknown descent for if parentage is known no Acknowledgment is possible.
>
> (*c*) the Acknowledged must believe himself to be a child of the Acknowledger, except when he cannot consent due to infancy."

It would be observed that an admitted consanguinity in this context would be regarded as a positive disqualification.

To place my decision in its proper context I would also like to mention very briefly something of the relevant Muslim law background which is extensively referred to in all three judgments of the Court of Appeal.

It is clear that the whole body of Muslim jurisprudence does not obtain here and whatever principles that apply in this country do not operate *proprio vigore* but derivatively by virtue of legislation or judicial decision of our country. *Abdul Rahiman v. Ussan Umma.* (11) *Noorul Muheetha v: Sittie Leyaudeen,* (12), *Sinnathangam v. Meeramohaideen* (13).

Custom has also to some extent varied the "pure Muslim law". Some customs foreign to pure Muslim law is followed by Muslims here and certain principles of such pure Muslim law have been abrogated by non-adoption.

Justice Jameel has set out the legal position of Muslim law as follows:

> "It cannot be gainsaid that the entire bulk of Muslim law does not obtain in Sri Lanka. For instance, the HUDUD laws (pertaining to sin or crime and punishment) have never been introduced and are not part of the law of Sri Lanka. Nor can it be denied that so much of the Muslim law as has in fact been introduced, and so obtains here, has the full force of law. In the same manner, so much of the local custom of the Muslims as have been recognised and accorded legal sanction by the decisions of our courts, have become part of the law of Sri Lanka."

The authority for the application of Muslim law in Sri Lanka goes back to the Proclamation of 1799 issued by Governor North. Prior to that, under Dutch occupation, the Dutch administration had applied to the Muslim residents of Ceylon the laws, institutions and customs which were prevailing among them. But the Charter of Justice of 1801 could be considered as the first enactment in this regard. In 1806 the Code of Mohamedan law was enacted. Intestate succession of Muslims was governed by this Code although sections 1 to 63 did not as such set out the relevant principles of law but merely gave examples. This law prevailed until it was repealed by section 2 of the Muslim Intestate Succession Ordinance, No. 10 of 1931, which is the one we are now considering.

it is interesting to find that an issue similar to the one confornting us has come up for decision earlier. Under the Muslim law a testator cannot dispose of more than one third of his estate and this was the

prevailing law in this country by reason of the application of the principles of pure Muslim law in terms of the Code of Mohamedan law. But the Wills Ordinance No. 21 of 1844 stated that–

> "It shall be lawful for every person competent to make a will to devise, bequeath, and dispose of by will all the property.....which at the time of his death shall belong to him, or to which he shall be then entitled....."

Dispositions by Muslims of more than one third share of the estate by will have thereafter been consistently upheld.

The Privy Council in *Ahamat v. Sariffa Umma* (9) dealing with this question said:

> "The recognition of the Moslem law in these matters is secured to the Moslems of Ceylon by the special laws concerning Maurs or Mohamedans of August 5, 1806, but such recognition is subject always to repeal, alteration or amendment by ordinance enacted from time to time. The whole question, therefore, is whether these special laws have not been modified by the terms of this Ordinance of 1844; and, if they have, whether they have been so far modified as to make the testator's will a valid disposing instrument according to its tenor."

"Now, approaching the consideration of the Ordinance first, apart from authority, their Lordships cannot doubt that it applies to Mohamedan testators as much as to all other domiciled Cingalese. The words of the enactment are of themselves sufficiently comprehensive to include Moslems within their scope. When read in connection with the preamble, which shows that the purpose of the Ordinance is to secure uniformity with respect to testamentary dispositions of property, it is not in their judgement possible to limit or restrict the operation of the Ordinance so as to exclude the wills of Moslem testators from its purview. Their Lordships are struck by the fact that where such limitation is intended to be placed on words of general import with reference to just such a subject as that with which this Ordinance is dealing, it can clearly and easily be done. A provision with such a result will, for example, be found in the Ordinance No. 15 of 1876, section 2.

The Ordinance then being applicable to the will of a Moslem testator, it is clear to their Lordships that it enables the testator to dispose of the whole of this property and not merely one-third part of it. And such has been the declared judicial view in Ceylon since the year 1911, when the decision of the Supreme Court in *Shariffa Umma v. Rahamathu Umma* (10) was pronounced.

Their Lordships agree with that decision in the terms in which it was given, but even if they had felt more doubt on the matter than they do, they would have hesitated now to interfere with it after 20 years, especially as they find the learned Chief Justice saying that the Ordinance has always been construed to enable Mohamedans in Ceylon to dispose of the whole of their property by will and that the Mohamedan population in Ceylon had even then freely taken advantage of the privilege. In the face of a practice so well authenticated and so long continued, any alteration in the law as so authoritatively laid down must now come from Legislation and not from the Courts."

It would be seen from the above that the Privy Council in coming to its decision had to resolve a conflict between "the special laws concerning Maurs or Mohamedans of August 5, 1806" as against the later enactment of the Wills Ordinance. The legal issue before us is identical. It may also be mentioned that one of the main reasons for the decision was the declared intention in the Wills Ordinance to secure uniformity of the law. In the present case I would like once again in this context to stress the fact that Professor Gunasekera's work cited by both counsel states clearly that the Adoption of Children Ordinance was intended to apply to all communities in the island. Further, counsel for the appellant expressly conceded that that Ordinance does apply to all Muslims except on the limited question of intestate succession. "The law so authoritatively laid down" should be followed by us since the issues and the reasoning are identical in both cases.

In these circumstances I would affirm the decision arrived at by both the Court of Appeal and also the trial court. The appeal should be dismissed with costs.

Appeal allowed.