AZHAR GHOUSE

v.

MOHAMED GHOUSE AND OTHERS

COURT OF APPEAL.

SENEVIRATNE, J. (PRESIDENT, COURT OF APPEAL), SIVA SELLIAH, J. AND JAMEEL, J.

C.A. 621/75–D.C. MT. LAVINIA No. 26908T.

C.A.L.A. 85/80–D.C. NEGOMBO 138/T.

NOVEMBER 12, 13 14, 15, 18, 19 AND 20, 1985.

DECEMBER 10 AND 11, 1985.

Muslim Law–Intestate succession–Adoption under the Adoption of Children Ordinance No. 24 of 1941–Section 6 (3)–Is adoption valid for purposes of succession as an intestate heir? Section 2 of Muslim Intestate Succession Ordinance No. 10 of 1931–Generalia specialibus non derogant.

Held–(Jameel, J. dissenting):

The Adoption of Children Ordinance has not excluded the Muslims from the provisions of this Ordinance. Hence children adopted under this Ordinance are entitled to succeed to the intestate estate of their adopting Muslim parents. The maxim *generalia specialibus non derogant* has no application.

The entire body of Koranic law was not introduced into this country, e.g. wills and conditional gifts. So much only of the Muslim law as has been specifically recognized as being an inveterate custom of Sri Lanka Muslims obtain in Sri Lanka. The Koranic principle against adoption is not part of the law applicable to Muslims in this country.

Cases referred to:

(1) *Fathima Mirza v. M. H. M. Ansar (1971) 75 NLR 295, 299.*

(2) *Noorul Muheetha v. Sittie Leyaudeen (1953) 54 NLR 270.*

(3) *Ahamed v. Sariffa Umma (1931) 32 NLR 33.*

(4) *Assanar v. Hamid (1948) 50 NLR 109.*

(5) *Korossa Rubber Company v. Silva (1917) 20 NLR 65.*

(6) *Weerasekera v. Peiris (1932) 34 NLR 281.*

(7) *Muhamad Abdul Khan v. Muhamed Ismail Khan–Indian Decisions (N. S.) Allahabad Vol. VI, 1888–1890 L.R. 10 & 12 Allahabad 216; (1888) I. L.R. Allahabad 10.*

(8) *Seward v. Vera Cruz (1884–1885) 10AC 59.*

(9) *Cohen v. Minister for the Interior SALR 1942 TPD 151.*

(10) *Shariffa Umma v. Rahameth Umma 14 NLR 464.*

(11) *Ahmath v. Shariffa Umma 30 NLR 498.*

(12) *Idroos Sathuk v. Sittie Leyaudeen (1950) 51 NLR 509.*

(13) *Mohideen v. Sulaiman 59 NLR 227.*

(14) *Mutalibu v. Hameed 52 NLR 97.*

(15) *Abdul Rahman v. Ussran Umma 19 NLR 175.*

(16) *A.G. v. Reid 67 NLR 25.*

(17) *Perera v. Khan (1905) 2 Bal. Rep. 188.*

(18) *Shariffa Umma v. Mohamed Lebbe 1 SCC 88.*

(19) *Mohamed Umar Khan v. Mohammed Niyazudeen Khan (1911). ILR 9 Cal. 419, 39 Ind. Ap. 19.*

(20) *Ayub Shah v. Bablal 1958 Bombay 150.*

H. W. Jayewardene, Q.C. with *M. S. M. Nazeen, P.C.*

Lakshman Perera and *Miss T. Keenawinna* for petitioner-appellant.

K. Kanag-Iswaran with *Ifthikar Hassim* for intervenient-petitioner-respondent.

Faiz Musthapa with *M. S. M. Suhaid* for respondents.

Cur. adv. vult.

January 24, 1986.

SENEVIRATNE, J.–(President, C/A)

The appeal C.A. 621/75 and the appeal in C.A.L.A. 85/80 deal with the same question of law pertaining to the Muslim law of intestate succession. In C.A. 621/75(F) the facts which have given rise to this question of law are as follows–Mohamed Ghouse and his wife Hafeela Ghouse legally adopted under the Adoption of Children Ordinance, Cap. 61–C.L.E. Vol.: III (which came into operation from 1.2.1944), the child Mohamed Yamin Ghouse, who is the intervenient-petitioner-respondent in this appeal. Mohamed Ghouse died prior to his wife Hafeela Ghouse. On the death of Hafeela Ghouse intestate on 10.3.73, Azhar Ghouse, the petitioner-appellant in this appeal applied for letters of administration in respect of the intestate estate of Hafeela Ghouse, in D.C. Mt. Lavinia Case No. 26908/T. Azhar Ghouse the petitioner, who was a full brother of the deceased Hafeela Ghouse, made the following parties whom he claimed to be the heirs of Hafeela Ghouse, respondents to the application, the 1st respondent Nazir Ghouse, a full brother of the petitioner and 2–6 repondents, the children of the deceased Huzair Azees, a sister of Hafeela Ghouse.

The intervenient-petitioner, Mohamed Yamin Ghouse filed objections to the application for letters of administration made by Azhar Ghouse, and claimed that he was the sole legal heir of the deceased Hafeela Ghouse as the legally adopted son of Hafeela Ghouse, and her late husband Mohamed Ghouse. It is admitted that Yamin Ghouse had been adopted by the said persons under the Adoption of Children Ordinance. At the inquiry into this dispute before the learned District Judge, the parties agreed that they were Muslims who belonged to the Shafi Sect, and governed by Muslim law. At the inquiry the following issues of law were tried as preliminary issues:–

(2) Is the adoption of Mohamed Yamin Ghouse the intervenient-petitioner.....valid under the Muslim law for purposes of succession to the intestate estate of the above?

(3) If issue No. 2 is answered in the affirmative or negative, who are the intestate heirs of the above deceased?

The learned District Judge in his order answered Issue No. 2 in the affirmative and Issue No. 3 as follows–The intervenient-petitioner is the sole intestate heir.

In the appeal C.A.L.A. 85/80, the facts were as follows. Ahamed Mukthar died intestate on 23.6.76. Ummu Fiard Tansia, the widow of deceased Mukthar applied for letters of administration in D.C. Negombo Case No. 138/T. The petitioner averred that the intestate heirs of the deceased were, herself widow of deceased, 1st respondent Pathumma Beebee mother of the deceased Mukthar and the 2nd respondent Mohamed Roshan the adopted child of the petitioner and her deceased husband Mukthar. The intervenient-petitioner, in this appeal Abdul Shakoor filed objections stating that Mohamed Roshan was not a natural child of the deceased Mukthar, and Roshan being only an adopted child was not an heir of the deceased. At the inquiry before the learned District Judge, Negombo the following issues were tried as preliminary issues:–

(1) Is the respondent Mohamed Roshan deemed to be a child of the deceased in terms of section 6(3) of the Adoption of Children Ordinance?.

(2) If so, is the 3rd respondent a legal heir of the deceased?

The learned District Judge answered issue Nos. 1 and 2 in the affirmative.

The original courts have held that a child adopted under the Adoption of Children Ordinance is a legal heir under the Muslim law of intestate succession. The appeals before this Court are in respect of these two orders. As such, this judgment will be in respect of both matters now before this Court.

It is submitted that the relevant law pertaining to Muslim intestate succession is found in section 2 of the Muslim Intestate Succession Ordinance No. 10 of 1931–Cap. 62, Vol. III–C.L.E.

Section 2 of this Ordinance is as follows:–

> "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."

The parties to those two cases are subject to the Muslim law governing their sect, that is the Shafi Sect. It is submitted that under the Muslim law, which is both the religious and the personal law of the Muslims an adopted child is not considered a child and cannot

succeed on intestacy. The respondents to both those matters support the judgments of the original court relying on section 6(3) of the Adoption of Children Ordinance No. 24 of 1941 as amended by 54 of 1943 Cap: 61, Vol. III–C.L.E. (operative from 1.2.1944).

Section 6(3) on which the respondents rely is as follows:

"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".

Due to the importance of the point of Muslim law in issue, it is necessary to consider the background to the applicability of the Muslim law in respect of the Muslims of Sri Lanka. The Muslims have had trade with this country and also have been residents of this country from ancient times–known to the Sinhalese as Moors–Marakkala. But, what is quite clear is that under the Dutch Government the law that was administered to the Muslims was according to their laws, institutions and customs which prevailed in this country. After the capitulation of the Maritime Provinces to the British on 15.2.1796 the British adopted their practice of permitting "the laws of a conquered country to continue in force until they are altered by the conqueror". This principle was given constitutional recognition by Governor North's Proclamation of 23rd September, 1799 which declared that justice should be administered in the Maritime Province–"according to the laws and institutions that subsisted under the ancient government of the United Provinces" of the Netherlands, subject to such changes as might be made by lawful authority". Consequently, in the Maritime Provinces "special laws" were applied in various degrees to particular sections of the inhabitants, and the Roman Dutch Law was applied to those inhabitants who had no special laws. The Charter of Justice of 1801 also contained the provisions which made applicable the "special laws" to certain inhabitants. Thus by the Proclamation of 1799 the "special laws" of the Muslims were made applicable to the Muslims. In 1806 the Governor Maitland commissioned the Chief Justice Alexander Johnstone to make a collection of such special laws administered in different parts of the island. Thus, in 1806 Chief Justice Johnstone submitted to the Governor "the code of Mohamedan laws" observed by the Moors in the province of Colombo, and the Governer in Council resolved that it should be published and observed throughout the whole of the province of Colombo. By statute Ordinance No. 5 of 1850 the applicability of this Mohamedan Code

was formally extended to the Kandyan Province and other parts of the colony. This Mohamedan Code has been considered a rough codification and in any case not a complete codification of the Muslim law, and had at later times been subject to heavy criticism. The learned Judge, Justice Akbar has called it a "calamity" However, this Mohamedan Code prevailed till it was abolished in 1931.

There are only the following statutes pertaining to the Muslim law:–

(1) Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929, repealed by Muslim Marriages & Divorce Act No. 13 of 1951, as amended by Act No. 31 of 1954, and Act No. 22 of 1955;

(2) Muslim Intestate Succession Ordinance No. 10 of 1931;

(3) Muslim Mosques Charitable Trust & Wakfs Act No. 51 of 1956.

The fount of Muslim law is the Holy Koran, and for the Muslims it is both a personal law and a religious law. This is clear from the texts of Muslim law, which are always consulted by the Courts in dealing with matters pertaining to Muslim law. In the text Mohamedan Law, Ameer Ali–3rd Ed. 1929, Vol. I, page 190–Ameer Ali states as follows:

"In the mussalman system, law and religion are almost synonymous expressions and are so intermixed with each other that it is difficult to dis-associate one from the other. In other words generally speaking what is religious is lawful and what is lawful is religious".

In the text Principles of Mohamedan Law–D. F. Mulla, 14th Ed. states as follows:

"Koran is the word of God and as the precepts and usage of Mohamed were inspired by God, they also have the force of law" (Page VI–Introduction)

However, it must be stated that according to the authorities the whole of the Muslim law in the Koran, has not been made applicable as the Muslim law in our country. The content of Muslim law in our country has been the Muslim law adopted in–

(*a*) The Statutes;
(*b*) Custom, and
(*c*) Judicial decisions.

The same position is set out by D. F. Mulla in his text referred to above in Cap. I, Para 1, Page 1–Administration of Mohamedan Law is as follows:

"The Mohamedan Law is applied by Courts in India to Mohamedans not in all, but in some matters only. The power of Courts to apply Mohamedan Law to Mohamedans is derived from and regulated partly by Statutes of the Imperial Parliament read with Article 225 of the Constitution of India but mostly by Indian legislation"

And he cites several authorities in support of this statement. Extent of Application–In paragraph 2, Page 1–Mulla further states as follows:

"As regards India, the rules of Mohamedan Law fall under three divisions, namely:–

(i) Those which have been expressly directed by the Legislature to be applied to Mohamedans, such as rules of Succession and Inheritance;

(ii) Those which are applied to Mohamedans as a matter of justice, equity and good conscience, such as the rules of the Mohamedan Law of Pre-emption;

(iii) Those which are not applied at all, though the parties are Mohamedans, such as the Mohamedan Criminal Law, and the Mohamedan Law of Evidence.

The only parts of Mohamedan Law that are applied by Courts in India to Mohamedans are those mentioned in clauses (i) & (ii). In other respects, the Mohamedans in India are governed by the general law of India".

Much reliance has been placed by the learned counsel for the appellants on the case of *Fathima Mirza, Appellant v. M. H. M. Ansar, Respondent* (1) and the dicta of Weeramantry, J. as follows:

". . . . . .in view of the overwhelming importance of the Qur'an as the fountain head of Islamic law, must necessarily be the point of commencement for any study of Khul".

This dicta has been made use of to drive home the point that a verse in the Qur'an on which the appellants rely for the contention, which will be considered later, sets out the entire Muslim law pertaining to adoption, which must be considered to be in force in this country

also. On the other hand the learned counsel for the respondents submitted that this line is taken out of the context to support the contention of the appellants whereas the basis for the statement was the consideration of section 98(2) of the Muslim Marriage & Divorce Act No. 13 of 1951, which sets out–

> "that in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect to which the parties belong."

As regards the question to what extent Muslim law has been received in this country, there is high authority, the dicta of the Privy Council in the case of *Noorul Muheetha, Appellant v. Sittie Leyaudeen* (2) the judgment of Sir Lionel Leach, wherein His Lordship laid down as follows:

> "There remains for consideration what is the law applicable in Ceylon to the question who is the natural guardian of the property of a Mahomedan infant? There is no doubt that under the Muslim law, as administered in India and laid down in the text books written by Indian authorities on the subject, a mother is not a person who has inherent authority as a guardian of the property of her infant children, *but it is by no means clear that this provision of Muslim law has* found acceptance in Ceylon. . . . . .They would, however, observe *that the authorities as to the extent to which and the form in which general Muslim law has been received into Ceylon* seem very conflicting and they would venture to hope that the question of resolving by legislation the doubts which this conflict of authorities must create may receive early attention". (Page 273–274). (The emphasis is mine).

As regards to the question as to what extent the Muslim law has been accepted in Ceylon by Statute and otherwise, and which content of the Muslim law the Courts will make applicable, one has to consider that our country is a secular State, and the Courts have to administer secular and not ecclesiastical law. The Courts have always taken into account the special laws pertaining to various communities in the Island. The Courts while applying their special laws and customs to the Muslims, have at no time accepted the position that the entire body of

Islamic law stated in Holy Koran is applicable to the Muslims. The entire Kandyan Law applies to the Kandyans, as it is a local law applicable to a group of citizens of this country; the Muslim Law cannot be considered on this footing.

There are instances in which a particular Islamic Law pertaining to the Muslims have been, I should say abrogated by Statute. Such an instance is section 2 of the Wills Ordinance. Under Muslim law there are restrictions, as regards the disposition of property. But under section 2 of the Wills Ordinance "Every person is competent to make a will to devise, bequeath, and dispose of by Will of property within Ceylon", in spite of the fact that–

> "by reason any person who by any law usage, or custom .....would be entitled to a share or portion of the property of the testator has been excluded.....or wholely disinherited or omitted in such Will."

In the case decided by the Privy Council *Ahamed v. Sariffa Umma* (3), the Privy Council held that "a Muslim domiciled in Ceylon has power to dispose of all his property by Will regardless of any limitation imposed by Muslim law". I have referred to this case as the principle set out in this case will be relevant to the main matter considered in this case, that is, the right of a legally adopted child to intestate succession by operation of the Statute Law.

It must be mentioned that in respect of the age of Majority Ordinance No. 7 of 1865, is an Ordinance applicable to all persons - It has been held in the case of *Assanar, Appellant v. Hamid, Respondent* (4) the rule of Muslim law that a minor attains majority on attaining the age of puberty is not affected by the age of Majority Ordinance. As regards the legal proposition that the Roman Dutch Law is the common law of Ceylon, it has been held in the case of *Korossa Rubber Company v. Silva* (5) by a Bench of two learned Judges - Wood Renton, J. and De. Sampayo, J.–

> "that the Roman Dutch law, pure and simple, does not exist in this country in its entirety. It has been modified in many directions, both expressly and by necessary implication by our Statute law, and also by judicial decision."

The field of donation is one in respect of which our Courts and the statute law have departed from the principles of Muslim Law in its applicability to the Muslims. Under Muslim law a donation or gift inter vivos must have three conditions:–

(1) Manifestation of the wish to give,
(2) Acceptance by donee, either expressly or impliedly,
(3) The taking of immediate possession of the subject matter of the gift.

Thus, under Muslim Law, a Muslim cannot make a contingent or conditional gift. Roman Dutch Law recognises contingent and conditional gifts, such as fidei commisa. It had been the practice among the Muslims to execute deeds of gifts with conditions, such as those which would come under the concept of a fidei commissum in Roman Dutch Law. Thus, such gifts inter vivos were contrary to the Muslim law rules set out above. In the leading case *Weerasekera v. Peiris* (6), the Privy Council considered a deed of gift dated March 11th, 1904 executed by one Marikar Hadjiar, a Mohamedan of the Shafi Sect. It was held that this deed of gift created a valid fidei commissum, such as, is recognised by the Roman Dutch Law. It was contended that this gift was invalid under Muslim Law. The Privy Council held that this was a valid gift described as a fidei commissum in Roman Dutch Law, and should be accepted as such. In addition to this conclusion by the Privy Council their Lordships also referred to the Muslim Intestate Succession Ordinance No. 10 of 1931, which became law (17th June, 1931) by the time the Privy Council delivered the judgment on December 9, 1931. Section 3 of the Ordinance lays down that of the law applicable to donations "not involving fidei commissum Usufruct and Trust shall be Muslim Law ". Thus, by Statute the Roman Dutch Law concepts of fidei commissum, Usufruct and Trust have been made applicable to the Muslims governed by their personal laws.

I will now come to the subject matter, the point of law before this Court. The learned President's Counsel for the appellants strongly relied on the Muslim Law principle that adoption is alien to the Islamic Law. His submissions began by reference to averse from the Holy Koran. The learned President's Counsel cited Chapter IV–Suras 4 - 5, which is as follows:

"Nor hath He made your adopted sons your (true) sons . . . . . call (such as are adopted). The sons of their (real) fathers, this (will be) more just in the sight of God."

This verse has been interpreted to mean that the Holy Prophet did not recognise adoption. The texts pertaining to Muslim Law explain this verse in that manner. F.B. Tyabji–Principles of Muhammodan Law–1913 Ed. Cap. 1, p. 182, para 225–states as follows:

> "paternity or maternity cannot be established in a mussalman who purports to adopt, nor is the latter considered in Muhammodan Law to be the child of the former."

The learned President's Counsel also relied on an Indian case *Muhamed Abdul Khan v. Muhamed Ismail Khan* (7). The learned counsel for respondents submitted that this case did not deal with an instance of de jure adoption, such as before this Court, but dealt with a de facto adoption. A study of this decision shows that it dealt with neither of these two problems. This case dealt with the principle of Muslim law–legitimation by acknowledgment as a child. Mahamood, J. in the course of his judgment made this observation obiter–

> "There is nothing in Muhammodan Law similar to adoption as recognised by Roman Dutch Law and Hindu system, or admitting of an affiliation which has no reference to consanguinity or legitimate descent. Before the age of Islam adoption..... . . . . was common and well recognised among ancient Arabs that the cognate as well as agnate rights were attributed to the children so adopted, and that such adoption and its legal effects were abrogated by the express words of the Koran and have never found a place in Muhammodan Jurisprudence in connection with marriage, inheritance or for any other legal purpose." (page 227).

The next submission of the learned President's Counsel for appellants was based on section 2 of the Muslim Intestate Succession Ordinance No. 10 of 1931 which has been cited above. The limb of this section which the learned President's Counsel emphasised is: "..... shall be the Muslim Law governing the sect to which he belongs". The learned President's Counsel submitted that this limb adopted or brought in the full or entire body of the Muslim Law of intestate succession to govern intestate succession in respect of the Muslims. That section 6 (3) of the Adoption of Children Ordinance had no relevance in view of section 2 of the Muslim Intestate Succession Ordinance. The Muslim Law did not recognise even de jure adoption as under our Adoption of Children Ordinance.

The special law applicable to Muslims must prevail over section 6(3) of the Adoption of Children Ordinance which is the general law. Adoption cannot be recognised due to the fact that the very basis of intestate succession in Muslim Law is based on consanguinity. This was the essence of Muslim Law of intestate succession. Adoption of Children Ordinance has no special provision applicable to Muslims one way or the other. It is silent. Learned counsel emphasised that the words in section 6(3) of the Adoption of Children Ordinance–"deemed to be born in lawful wedlock", does not mean consanguinity, but merely means legitimate. The adopted child did not change his status as he still remained an adopted child.

The learned President's counsel relied strongly on the submission that the Muslim Law of intestate succession is a special law applicable to the Muslims, and as such it overrides the general law, the Adoption of Children Ordinance. For this submission, counsel relied on the legal principle–*generalia specialibus non derogant*– Maxwell–the Interpretation of Statutes, Page 196– which cites the dicta of the Earl of Selborne–in the case of *Seward v. Vera Cruz* (8) which sets out that special earlier legislation must prevail over general words on a later Act. The counsel also relied on a passage in Craies on Statute Law, 6th Ed. Page 376, which cites the same case *Seward v. Vera Cruz (supra)* and sets out the principle of law referred to above. The rule as stated by Craies is as follows: "There is a well known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication" – *generalia specialibus non derogant*. In this case referred to by both Maxwell and Craies - *Mary Seward, Appellant v. The Vera Cruz, Respondent (supra)* (House of Lords) Mary Seward filed an action in rem, in the Admiralty Court claiming damages against the owners of the ship Vera Cruz for the loss of life of her husband W. Seward and her son T. W. Seward–occasioned by a collision of two vessels Vera Cruz and Agnes. The Admiralty Court Act of 1861, section 7 gave the Court of Admiralty–"jurisdiction over any claim for damage done by any ship". There was also a later Act known as the Lord Campbell's Act, which provided for liability of any person "whensoever death of a person shall be caused by wrongful act, neglect or default." The House of Lords held that Mary Seward's action cannot be founded on the Admiralty Court Act of 1861, but was an action coming within the Lord Campbell's Act. As regards section 2 of the Campbell's Act, Their Lordships posed the question whether those words were applicable to

an inanimate thing like a ship which is not capable of doing wrong. As section 7 of the Admiralty Court Act provided for any damage done by a ship, it held that the Admiralty Court cannot entertain an action in rem for damages for loss of life provided under Lords Campbell's Act. It is in the course of this judgment that Lord Selborne laid down the principle which has been referred to by both Maxwell and Craies. With respect to their Lordships, who put the principle decided on a very high plane, the real question at issue in the case was whether the action of Mary Seward was one that could be founded under section 7 of the Admiralty Court Act, 1861 or the Lord Campbell's Act. Both these Acts dealt with the same subject matter, action for damages. At this stage, I must in short state that the submission that this principle applicable to special laws should prevail in this matter was sought to be rebutted by learned counsel for the respondents on two grounds–

(1) That section 6(3) of the Adoption of Children Ordinance dealt with the status of a person, not the question of intestate succession,

(2) That section 2 of the Muslim Intestate Succession Ordinance, and section 6(3) of the Adoption of Children Ordinance were complementary provisions of law. So that the principle of a prior special law and a later general law did not arise.

The last point urged by the learned President's Counsel for the appellants was that this was an instance in which the provisions of the Constitution, Chapter 3, Fundamental Rights, Articles 10 and 14(1)(*e*) should prevail. Article 10 refers to freedom of religion and Article 14(1)(*e*) refers to "freedom to manifest the religion". This reference was made to these Articles in the Constitution in view of the submission that the Holy Koran of the Muslims contained ecclesiastical law and the personal law, and must prevail over other laws. This again raises the question–

(1) That our country is a secular State, and not an Islamic State partly as regards Muslims. The learned Counsel for the respondents emphasised that this country is a secular State which applies personal laws to the Muslims,

(2) The accepted position is that the entire Muslim law as laid down in the Holy Koran has not become applicable to the Muslims of our country.

According to the passage cited above from Mulla, even under the British, in India only parts of Muhammedan Law have been applied by the Courts in India to Muhammodans. It is so even now. Thus, the Articles of the Constitution referred to cannot permit and will not permit the entire body of Koranic Law to be a part of the Muslim law of this country.

The learned counsel for the respondents conceded that according to the Koranic Law, an adopted child is not recognised for the purpose of intestate succession. However, this Ordinance of 1931 has no reference at all to an adopted child. Learned counsel have submitted that the Muslim Intestate Succession Ordinance section 2 has only laid down the rules or mode of intestate succession which depends on consanguinity. For the purpose of intestate succession the law has to determine the status of various persons entitled to succession to wit-legitimacy, illegitimacy, adoption, and such. It has been strongly urged by learned counsel for the respondents that the Adoption of Children Ordinance deals with status of an adopted child, and that section 6(3) confers the status on a child adopted under this Ordinance as one "deemed in law to be the child born in lawful wedlock of the adopter". Thus, this section considers an adopted child in the eye of law as one of own flesh and blood of the adopter, a natural child of the adopter. The Adoption of Children Ordinance does not bar a Muslim from adopting a child. Thus, once a child is adopted by a Muslim, section 6(3) of the Ordinance makes him in the eye of law, and by legal fiction, the adopter's own child. By this process an adopted child becomes entitled to succeed by intestate succession to the adopter under section 2 of the Muslim Intestate Succession Ordinance.

Muslims have not been exempted from the operation of the Adoption of Children Ordinance. There are Statutes containing personal laws, and in such Statutes certain categories of communities are either brought within the Statutes or exempted from the Statutes–

(1) Section 16 of the Adoption of Children Ordinance is a saving provision in respect of adoption under the Kandyan Law or the Tesawalamai,

(2) The Married Women's Property Ordinance No. 18 of 1923–Section 3(2) provides that this Ordinance shall not apply to Kandyans, Muslims, or Tamils of the Northern Province, who are or may become subject to Tesawalamai.

(3) The Matrimonial Rights and Inheritance Ordinance, section 2 sets out that the Ordinance shall not apply to Kandyans or Muslims or to Tamils of the Northern Province, who are subject to Tesawalamai,

(4) The Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911, section 2 states–"This Ordinance shall apply only to those Tamils to whom the Tesawalamai applies ..... situate".

(5) Section 627 of the Civil Procedure Code is a like section, which states–

"Save as expressly otherwise provided in the Kandyan Marriage and Divorce Act (Chapter 113) and the Muslim Marriage and Divorce Act (Chapter 115), nothing in this Chapter contained shall be taken to apply to any marriage between persons professing Islam or to any marriage affected by the provisions of the Kandyan Marriage and Divorce Act".

(6) The Legitimacy Act No. 3 of 1970, section 2(1) states this Act shall not apply to–

(*a*) A marriage between persons professing Islam, or

(*b*) A marriage under the Kandyan Marriage and Divorce Act between persons subject to Kandyan Law.

It had been submitted by learned counsel for the respondents that two persons concerned in the matters before this Court, that is Yamin Mohamed Ghouse, and Mohamed Roshan should be considered as real legitimate children of their respective adopters Hafeela Ghouse and Fiard Tansia by virtue of the provisions of section 6(3) of the Adoption of Children Ordinance. The learned President's counsel for the appellants have strongly submitted that the words "deemed to be born in lawful wedlock", does not mean consanguinity, but merely means legitimate, that the adopted child's status as a adopted child remains in spite of this section. At least the learned President's counsel for the appellants has conceded that the above words means "legitimate". If the two persons Yamin Ghouse and Mohamed Roshan are deemed to be legitimate children of their adopters Hafeela Ghouse and Fiard Tansia, then, this legal fiction will graft into these two persons consanguinity in respect of the adopters.

The effect of an adoption order in a like enactment in South Africa has been considered–in the case of *Cohen v. Minister for the Interior* (9). In this case a child had been adopted under the Adoption Act No 25 of 1923 by Cohen. The adoption order had been made under section 3 of the Act. This was an application by the adopted child, the applicant in this case for a certificate of naturalisation, as a Citizen of the Union of South Africa in terms of Act No. 18 of 1926. The applicant annexed to the papers filed the adoption order dated 18.11.1931 obtained in terms of section 3 of the Adoption Act No. 25 of 1923. Thus, in this case the Court had to decide the status of the applicant. The applicant was born in Russia. He had entered the Union of South Africa as one of the orphans brought from Russia to live in South Africa by permission of the Government of the Union of South Africa. He had been adopted by Louis Cohen. At the time this case was heard in 1942 the Act No. 25 of 1923 had been repealed by a New Children Act No. 31 of 1937, but the applicant's rights were held to be governed still by section 3 of Act No. 25 of 1923. Section 8(1) of the said Act contained a provision as follows–

> "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".

It will be noted that the first part of this section, conferment of the surname, is similar to section 6(2) of our Adoption of Children Ordinance, which makes the same provision to confer the surname. The second part of this section–"the adopted child ..... adopting parent" is similar to our section 6(3), except that our section 6(3) uses the words "of the adopter". It had been submitted in this case by counsel for the respondents that an adoption under the said Statute of 1923–"is merely a family arrangement and it confers no rights or obligations on the applicant". In reply to this argument, the learned Judge Maritz, J. has made these observations–

> "I think he must have been speaking with his tongue in his cheek because the language is imperative and as clear as language possibly can be. Such a child has all the rights and all the liabilities appertaining to a child born in lawful wedlock subject to exceptions which I have mentioned. As far as the law possibly can make it so, the law has in fact said: that the strange child you have adopted is in fact your own flesh and blood".

Maritz, J. held that the adopting father Cohen has been a British subject, the applicant who was adopted by him can also claim for naturalisation as a British subject, and that the Minister had no option but to grant the certificate of naturalisation which the applicant asked for. It cannot be said, that the dicta of Maritz, J. regarding the status of the applicant, that is, he has to be considered in fact as the flesh and blood of the adopter Cohen, has been made obiter, as that finding was most essential to a decision in the application. This finding is the ratio decidendi in the case.

I hold that the Adoption of Children Ordinance of No. 24 of 1941 has to be considered along with section 2 of the Muslim Intestate Succession Ordinance to determine whether the said Yamin Ghouse and Mohamed Roshan are entitled to succeed to the intestate estate of their respective adopters. On my considered appreciation of the law, I hold that as the Adoption Ordinance has not excluded the Muslims from the provisions of this Ordinance, these two parties are entitled to succeed to the intestate estate of their respective adopters.

I uphold the judgment of the learned District Judge, Mt. Lavinia in appeal C.A. 621/75(F), and the judgment of the learned District Judge, Negombo in appeal C.A.L.A. 85/80 The appeal C.A. 621/75(F), and the appeal C.A.L.A. 85/80 are dismissed with costs.

This judgment has been delivered in respect of both matters, and as such should be considered to apply to both appeals C.A. 621/75 and C.A.L.A. 85/80.

My brother Siva Selliah, J. has in a separate judgment agreed with my conclusions. My brother Jameel, J. has written a separate dissenting judgment.

SIVA SELLIAH, J.

The facts in these two cases have been very fully set out in the judgment of my learned brothers and do not require repetition by me. I shall accordingly address myself to the questions of law raised which have been strenuously argued before us by counsel.

The respondents involved in both cases (CA621/75 and CA LA85/80)are respectively Yamin Ghouse and Mohamed Roshan. It is conceded that in respect of each of them there is a valid legal adoption order mady by a competent court and that all parties are Muslims, domiciled in this country and belong to the Shafi Sect and are governed by Muslim Law.

The question that has arisen in both these cases is whether an adopted son can succeed as an intestate heir to the property of his adoptive parents or whether Muslim Law prevents him by virtue of the fact that he is an adopted son from succeeding to the estate of his deceased adoptive parent. The arguments in both these cases were consolidated and this order is in respect of both cases. The provisions of law which would apply to this dispute are section 2 of the Muslim Intestate Succession Act No.10 of 1931 (Ch.62) which applies to every Muslim deceased who owned property in Sri Lanka, and section 6(3) of the Adoption Ordinance Ch.61. As these provisions figure prominently in this case, I reproduce them here:

Section 2 of the Muslim Intestate Succession Act 10 of 1931 (Ch. 62) states as follows:

"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.

Section 6 (3) of the Adoption of Children Ordinance (Ch. 61) states as follows:

(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 ....."

It was the contention of learned Queen's Counsel who appeared for the appellants in both cases that in Muslim Law an adopted child, however adopted and wherever adopted could not succeed to the property of a deceased adopter and that Muslim Law did not recognize adoption in so far as intestate succession is concerned and that the special law contained in Ch. 62 section 2 must prevail over the general later enactment contained in section 6 (3) of the Adoption of Children Ordinance. He also contended that it is a significant fact that intestate succession was not dealt with in section 6 of the Adoption Ordinance. He also strongly contended that the whole basis of succession for Muslims is based on blood relationship and consanguinity and that no amount of legislation or deeming clauses contained therein can possibly make the blood of the adopter run in the veins of the adopted child ; it was his further contention

that adoption is not recognized in Muslim Law and that an adoption made by Muslim parents would not result in a valid adoption and that consequently an adoption made under the provision of the Adoption Ordinance would not and cannot result in succession to the intestate estate of the Muslim adopting parent because the law that is applicable is the law of the sect to which the deceased belonged. He contended that in the absence of express provisions in the Adoption Ordinance to repeal whether in whole or in part the provisions of the Muslim Intestate Succession Ordinance, we have to interpret the two Ordinances side by side – the special law to be made applicable to Muslims and the general law to those whom it has application.

All these postulates were strenuously opposed by the two learned counsel who separately appeared for the two respondents concerned in the two separate cases. They were agreed on a common front in their arguments. It was their contention that intestacy was concerned only with the devolution of shares on the heirs upon the death of a parent and must be distinguished from the question of status which concerned itself with capacity to inherit; it was also their contention that to determine this question of status, one must go outside the rule of intestate succession (in this case to the Adoption Ordinance) and that the question of status is not determined by the rules of intestate succession in any system of law. It was their contention that one must first determine the question of status, i.e. capacity to inherit and then thereafter determine to what shares the respective heir became entitled by applying the law pertaining to intestate succession (section 2 of Ch. 62). It was their contention that any pronouncement in the Koran while it represented religious rule and religious law cannot override statute law and that conferment of status was a matter derived from the State or Law and not from any other source and that the Quranic principle against adoption was not introduced into this country and did not have legislative sanction.

Thus we have two conflicting positions posed before us.

Much of the learned counsel for appellant's submissions were based on certain Koranic pronouncements which he contended represented the highest law for Muslims, on the opinion of text writers and judicial decisions; it was his contention that the consensus of all these was that adoption was not recognized in Muslim Law and that an adopted son was no son and could thus not be entitled to succession. Two pronouncements from the Holy Koran in particular

were relied upon : Koran Ch. 33 verse 4 – "Allah has not made for any man two hearts in the body ; nor has he made your adopted sons your sons . . " ; Koran Ch. 4 verse 23 – "Prohibited for you are the wives of your sons proceeding from your loins". It was strongly contended that these pronouncements reveal both that Adoption was never recognised in Muslim Law and that consanguinity was the only test of who was a son and heir and that adoption could give no rise whatever to the status of a son. It was further contended that by no process of deeming could the blood of the ancestors of the adopting parent be said to flow in the adopted son who thus became disqualified for want of consanguinity. The learned counsel met the arguments of counsel for respondents who contended that Koranic pronouncements however inspired and holy they may be still remained only religious precepts and were devoid of any legislative sanction by quoting Weeramantry, J's dictum in the case reported in 75 NLR 295 (1) that –

> "We agree that no juristic interpretation can prevail against the Holy Koran or the Hadiths of the Holy Prophet for the former is the bedrock of all Muslim Law and the latter are second in authority only to the Holy Koran."

Learned counsel contended that although this direction was with reference to marriage laws and the extent to which section 98 (2) of Ch. 115 of the Legislative Enactment statutorily introduced Muslim Law into this country that this direction would apply with equal force to the interpretation of section 2 of Ch. 62. He reinforced his submissions with quotations from the text writers. Ameer Ali on Mohamedan Law, 5th Edition, chapter 3, section 1, p.218 states :

> "The Muslim Law does not recognize the validity of any state of filiation when the parentage of the person adopted is known to belong to a person other than the adopting father and an adopted child has no right to the estate of his or her adoptive parents."

Mc Naughten in Principles of Mohamedan Law, Bock 2, Case VI, p.86 states :

> "during the life time or after the death of the adopting father the adopted son has no claim upon his property."

Mulla Principles of Mohamedan Law, 1955 Edition, p.293 refers to the case reported in 1938, Bombay 150 where it was held that –

> "although a Muslim could according to the law of his native State adopt a son, such a son cannot succeed to property in the absence of evidence establishing a custom to that effect."

It was learned counsel's contention that in the instant case there was no evidence of the prevalence of such a custom in Sri Lanka. Louis Nell in his book Mohamedan Laws of Ceylon – Inheritance at p. 41 states:

"adoption is not recognized as conferring any rights on the child adopted."

Various other authorities were also quoted to buttress the submission that adoption cannot carry the right of inheritance under Muslim Law ..... Fayze in Outlines of Mohamedan Law, 3rd Edition, p.180, section 29. In the case reported in Indian Law Reports, Vol. 39 (P.C.) Calcutta p. 418, 432 – it was held that under Indian Mohamedan Law, adoption cannot be made and even if made cannot carry rights of intestate succession; again in Indian Law Reports 10 Allahabad 289 it was held that "the existence of consanguinity is an indispensable condition for succession." Consanguinity connotes blood relationship which learned counsel contended could never be found in the case of an adopted child whose parents were of a completely different blood. He thus contended once an adopted son always an adopted son and the disability imposed on such a person continued throughout under Muslim Law and could never be altered by any process of deeming under the provisions of the Adoption Ordinance; he also contended that if indeed his adoptive parents intended him to succeed to the inheritance they could have achieved this by a will and this not having been done, the provisions of section 2 of Ch. 62 must prevail and that this law alone provided the basis of Muslim Intestate Succession. It will be seen from the above consideration that the learned Queen's Counsel has quoted the principles enunciated in Holy Koran, the opinion of text writers on the subject and judicial decisions and the provisions of section 2 of the Muslim Intestate Succession Act in support of his contention that Adoption was never recognized in Muslim Law and gave no rights to succession and that consanguinity was the real test for inheritance under Muslim Law.

As against all this the learned counsel for the respondents in both cases have strenuously contended that this approach was fallacious. They maintained that the pronouncements in the Koran while they are held in high authority and respect by the Muslims none the less had no legislative sanction of the State and were thus unenforceable in Law and that one had to decide legally the question of who was a son and then apply section 2 of Ch. 62 only for the purpose of distribution of the wealth. It was their contention that the Adoption Ordinance was

the law of the land, had legal force and validity, and that it must prevail. They relied very strongly on the words in section 6 (3) of the Adoption Ordinance 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". They stressed the words "for all purposes whatever" and "deemed to be a child born in lawful wedlock" and stated that the words were so wide as to include rights to inheritance and the principle of consanguinity as well. They also contended that nowhere in the Adoption Ordinance have the Muslims been excluded from the application of the provision of this Ordinance and consequently urged that Muslims are bound by it. They contended accordingly that the principle of generalia specialibus non derogant as determined in the *Vera Cruz Case (supra)* so strongly canvassed by the learned Queen's Counsel did not apply. They further maintained that status and capacity to inherit were two different concepts and that section 2 of Ch. 6 merely dealt with the question of devolution of the property on intestacy and cannot determine the question who was a son. In the instant case as manifestly the respondent in each case were not the natural children of the adopted parents recourse must be had, they maintained, to the provisions of section 6(3) of the Adoption Ordinance and since there were valid adoption orders they must be deemed to be children born in lawful wedlock and thus had the capacity to inherit.

By section 2(1) of the Adoption of Children Ordinance "any person desirous of being authorized to adopt a child may make application to the court in the manner provided by rule under section 13" and the court may subject to the provisions in Part 1 of the Ordinance grant such authority. Under section 6(3) upon such an 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. There are no constraints placed on the words "any person" in section 6(2) except those provided in section 3 of the Ordinance. It has been held in the case of *Ahamed v. Sariffa Umma (supra)* that a Muslim is competent to execute a will to dispose of his property regardless of any limitation imposed by Muslim Law. I am of the view that "any person" in section 2(1) of the Adoption Ordinance includes a Muslim and that it was competent in law for a Muslim, if he so desired, to adopt a child. The next question then is, is such an adopted child entitled to succeed to the inheritance of the adopter? I need not repeat the submissions of the learned Queen's Counsel that an adopted child could not succeed

to the inheritance of the adopter; I have already set out the pronouncements in the Holy Koran and the views of text writers and decisions which he relied upon. In this connection it is necessary to state that the entire body of Muslim Law was not introduced into Sri Lanka – vide the case of *Ahamed v. Sariffa Umma (supra)* referred to already which held that a Muslim was competent to execute a will to dispose of his property regardless of any limitation imposed by Muslim Law. So too, although a Muslim cannot make conditional gifts, in *Weerasekera v. Pieris (supra)* it was held that such a gift was valid under Muslim law. This Judgement recognized the Roman Dutch Law principle of fidei commissum as being applicable to Muslims. It is necessary accordingly to consider to what extent Muslim Law applies. After the abolition of the Mohamedan Code in 1931, certain statutes were from time to time enacted as applicable to Muslims. There are the Muslim Marriage and Divorce Act (Ch. 115 of the Legislative Enactment), the Muslim Intestate Succession Ordinance (Ch. 62) and the Muslim Mosques and Charitable Trusts and Wakfs Ordinance No. 51 of 1956. Considerable authority in decided cases show that so much only of the Muslim Law as has been specifically recognized as being an inveterate custom of Sri Lanka Muslims obtains in Sri Lanka (vide 42 NLR 86, 51 NLR 509, 54 NLR 270, 59 NLR 227, 52 NLR 97, 19 NLR 175). Thus what has been introduced in Sri Lanka is the Muslim Law as governed by these statutes, as prescribed by custom and formulated in judicial decisions. In Mulla Principles of Mohamedan Law, 14th Edition, Ch. 1, para 1, page 1 it is stated that in India the entirety of what is stated in the Koran has not been introduced; Weeramantry, J's dictum in the 75 NLR case referred to did not, I think, lay down that the principles as laid down in the Koran can be legally enforced. A Muslim considering the fact the Koran has the utmost religious sanctity amongst Muslims, will be slow to violate the precepts – but that is on a religious and moral plane. What is in issue in these two cases is, where a Muslim person has obtained a valid adoption order from a competent court under the provision of the Adoption Ordinance, can it be said that such a valid order can have no legal consequence in view of what is stated in the Holy Koran or in the texts? I am of the considered view that the legal consequences that flow from a valid adoption order made by a competent court must be given effect as they have the full authority of an enabling statute by Act of Parliament and that the respondents are entitled to a construction which gives them the full benefits of the law as enacted by Parliament which represents the law of the land. Accordingly once an

adoption order was made the law deems that under section 6(3) of the Adoption Ordinance – for all purposes whatsoever the child was born in lawful wedlock; if indeed the law deemed that a child though in fact born of the union of different parents is the child born in lawful wedlock of the adopting parents and is entitled to all the rights of a child born in lawful wedlock of the adopting parents there can be no impediment to deeming him a consanguine as well. The effect of an adoption order in a similar enactment in South Africa was considered in the case of *Cohen v. Minister of Interior (supra)*. In that case section 8 (1) of Act 25 of 1923 contained a provision that–

> "An order for 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."

These provisions are similar to section 6 of the Adoption Ordinance in Sri Lanka. Maritz, J. in that case held that "the strange child you have adopted is in fact your own flesh and blood," and the adopted child was held entitled to claim for naturalization through his adopted father. Thus by the deeming clause under section 6(3) of the Adoption Ordinance, this deeming would extend to consanguinity as well and the respondents would thus be entitled to claim as heirs of the intestate estate. The fact that no will was made by the deceased cannot be held to be a detracting factor. Indeed regarding application CA 621/75 where the adopter Ghouse died and testamentary proceedings were instituted by his wife (the adopting parents of Yamin Ghouse, the intervenient petitioner), Mrs. Ghouse has named Yamin (the respondent) as the only heir thus signifying her intention of who the heir was.

For the reason set out by me I am of the view that where a Muslim person has voluntarily invoked the provisions of the Adoption Ordinance with full knowledge of its legal implications and consequences and obtained a valid adoption order, then full legal effect must be given to the legal consequences of that adoption order, and that the Adoption Ordinance being the law of the land must prevail over any religious or moral precepts on this question. I am also of the view that this construction will also fulfil the requirements of justice of this case. I accordingly agree with the conclusions arrived at by the President in these two cases and dissent from the judgement of

Jameel, J. and accordingly hold that the respondents are entitled to succeed to the intestate estate of their respective adoptive parents. The appeal in CA 621/75 and application for leave to appeal in CA LA 85/80 must in my view be dismissed with costs.

JAMEEL, J.

In these two cases, the arguments before us were consolidated by agreement between the several counsel who appeared for the parties to these cases.

The questions that arose before us were:

(1) In case *No. C/A 621/75* is Yamin Ghouse, the Intervenient-Respondent, an heir to the deceased Mrs. Ummul Hafeela Ghouse, who died on 10.3.73.

(2) In case *No. 154/82* whether the second Respondent Mohamed Roshan, is an heir to the deceased Ibrahim Ahmed Muktar, and

(3) In the Mt-Lavinia case a further question as to whether Yamin Ghouse is an heir to Abdul Majeed Mohamed Ghouse, who died in 1972. (The late Mr. Ghouse was the husband of the late Ummul Hafeela. The testamentary case in respect of the late Mr. Ghouse has been laid by pending the decision in this appeal.

In *C/A 621/75* the Mt. Lavinia case, it was common ground between the parties that Abdul Majeed Ghouse and Ummul Hafeela Ghouse had by an adoption order dated 2.6.1950 in *Court of Requests case No. 225* validly adopted Yamin Ghouse, the Intervenient-Respondent, under the provisions of the Adoption Ordinance No. 24 of 1943 – Cap. 61 (1956 L.E.C.).

In *C/A 154/82* the Negombo case Ibrahim Ahmed Muktar and wife Fouzia (the petitioner-respondent) admittedly had made a valid adoption under the Adoption Ordinance of the second responded-respondent, Mohamed Roshan prior to Mr. Muktar's death.

It was also agreed between all the parties that the several persons named above are Muslims, domiciled in Sri Lanka and belonging to the Shafie sect.

"IF A MUSLIM OF THE SHAFIE SECT SHOULD DIE LEAVING BEHIND A SON WHO IS ALSO A MUSLIM, AND WHO IS NOT OTHERWISE DISQUALIFIED THEN THAT SON IS A RESIDUARY HEIR TO THE ESTATE OF THE DECEASED." This is not a passage from the Holy Quran but it is a principle of Muslim Law and how it became so would be elaborated on in the course of this judgment. All the parties to these two appeals are agreed on it and they are also agreed that under *sec. 2 of the Muslim Intestate Succession Ordinance No. 10 of 1931 (Cap. 62 –1956 L.E.C.),* this rule of intestate succession will apply to every deceased Muslim in Sri Lanka, had such deceased either been domiciled in Sri Lanka and/or had owned immovable property in Sri Lanka.

Mr. Kanaga Isvaran, senior counsel for Yamin Ghouse and Mr. Faiz Mustapha, counsel for Mohamed Roshan, both contended that their respective clients are heirs to their respective adopting parents, while learned Queen's Counsel for the appellants in both cases opposed this view.

Sec. 2 (1) of the Adoption of Children Ordinance, Cap. 61, states that "ANY PERSON" desirous of being authorised to adopt a child may make an application to court and obtain an adoption order. *sec. 6 (3),* provides that "UPON AN ADOPTION ORDER BEING MADE THE ADOPTED CHILD SHALL, *FOR ALL PURPOSES WHATSOEVER BE DEEMED* IN LAW TO BE A *CHILD BORN IN LAWFUL WEDLOCK OF THE ADOPTER* (The emphasis is mine).

Learned counsel for the respondents in both cases contend that the words "ANY PERSON" in sec. 2 (1) are so wide that they will include Muslims in Sri Lanka and that the words "ALL PURPOSES WHATSOEVER" are equally wide and will include intestate succession and that the words "CHILD BORN IN LAWFUL WEDLOCK" would mean that an adopted child is deemed to be a legitimate child of the adopter and accordingly that Yamin and Roshan would be "RESIDUARY HEIRS" of their respective deceased adoptive parents.

These arguments are based on the premise that while the question of the quota or share which a son may inherit from his parents is a question pertaining to the law of inheritance and could therefore be obtained from the Muslim Law, the question as to who is a son pertains to the law of status. It is contended therefore that one will have to turn to the general law of the land to determine the status of an individual and more paricularly as to who is a "SON", because

sec. 2 of the Muslim Intestate Succession Ordinance, No. 10 of 1931 makes applicable only the rules of intestate succession. It is contended that all persons who come within the definition of the word "SON" under our general law will be entitled to be called a residuary heir according to the rule of inheritance in Muslim law quoted above.

It is contended that in Sri Lanka the word "SON" would include –

(1) The male offspring of a woman by her lawfully wedded husband.

(2) Her male offspring who, though not born during the subsistence of her marriage, but was in fact born prior to the date of her marriage, if she subsequently married the father of the child and so legitimised his birth.

(3) Any male child when he has adopted under an adoption order duly entered under our Adoption Ordinance Cap. 61 (which came into operation on 1.2.1944).

(4) In the case of Muslims, any male child who has been duly acknowledged by his father as a legitimate son.

It is conceded by Learned Counsel that neither Yamin Ghouse nor Roshan Muktar, namely the two adopted children whose claim to heirship is being discussed in these appeals before us, come within categories (1), or (2), or (4) above. The question therefore is, "Do these adopted children qualify under clause (3) to be called son and heir" to their respective deceased adoptive parent ?

Learned Counsel for the respondents contend that the law of status in any known jurisprudence is not a part of the law of inheritance and accordingly, any definition of a word "SON" in pure Muslim Law will not be germane to the issues before us. They further contend that the Quranic verse "NOR HAS HE MADE YOUR ADOPTED SON YOUR SON" is irrelevant. However, they conceded that adoption is unknown to pure Muslim Law, but they urged that, that part of Muslim Law dealing with status is not part of Sri Lankan law, and was never introduced into Sri Lanka either under sec. 2 of Cap. 62, nor by way of the customary law of the Muslim inhabitants of Sri Lanka.

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.

Elaborating on their contention, Learned Counsel submitted that while the Adoption Ordinance has specifically enacted that it's provisions will be in addition to and not in substitution of the customary laws of adoption under the Kandan Law and the Thesawalamai (vide sec. 16), no reference is mae in the Ordinance either to Muslim Law or to the Muslims of Sri Lank. Accordingly, it is urged that the Muslims in Sri Lanka could do wha "ANY PERSON" in Sri Lanka could do, namely, adopt a child under the Adoption Ordinance and that if a Muslim should choose tc do so, then the full force and effect of all the provisions of that Ordinace would apply to the parties concerned. By way of support to this argument it was submitted that inasmuch as it has been held by our courts that "EVERY PERSON" (vide WILLS ORDINANCE No. 21 of 1844 – Sec. 2 – Cap. 60) in Sri Lanka is entitled to make a will in respect of the entirety of his property (including Muslims – *Shariffa Umma v. Rahmith Umma* (10); *Ahmath v. Shariffa Umma* (11)) "ANY PERSON" in caption 62 can have no other meaning than "ALL PERSONS" and so include Muslims as well.

Our courts have recognised (vide 34 N.L.R. 28122 C.L.W. 113) and so granted validity to deeds and wills written by Muslims of Sri Lanka even though they contain clauses which fall under the category of fidei-commissa, usufructs, and trusts. Indeed, our legislature has given recognition to these decisions by sec. 3 of Cap. 62 whereby, only deeds not involving the above three categories are made subject to the Muslim Law if the donor is a Muslim. Learned Counsel further submitted that whenever our legislature wished to preserve some personal law provisions for the benefit of the Muslims, it specifically said so in its general enactments. Vide General Marriages Ordinance – Cap. 112. Thus, whenever any enactment, such a the Adoption Ordinance, did not exclude from its operation any particular linguistic, ethnic, or religious community, the whole popuation was brought under its ambit, and so, any and everyone could avail the rights and privileges provided for by that enactment. This, no doubt, is a sound proposition of law except when the maxim generalia lex specialibus non derogatis operative. It is the contention of learned Queen's Counsel for the appellant that this maxim does operate in both these cases. It is his contention that the general provisions of the Adoption

Ordinance – Cap. 61 – (which as per sec. 17 thereof became operative on 1.1.1944) do not catch up the Muslims with regard to their intestate succession as special provision had already been made for them in their Intestate Succession Ordinance, Cap. 62 of 1931.

There has been a long line of decisions in our courts, (vide 42 N.L.R. 86; *Idroos Sathuk v. Sittie Leyaudeen* (12) and 54 NLR 270 on capacity to accept; *Mohideen v. Sulaiman* (13) on sale of land; *Mutalibu v. Hamee* (14) on proof of custom) all to the effect that so much only of the Muslim law as has been specifically introduced by way of legislation or specifically given recognition as being an inveterate custom of the Sri Lankan Muslims, obtains in Sri Lanka. (*Abdul Rahaman v. Ussan Umma* 15)). Thus, it is that in the law relating to age of majority (*Assanar v. Hamid (supra)*) and to bigamy (*A. G. v. Reid* (16) as known to Muslim law, have been recognised as applicable to Sri Lankan Muslims.

We have by way of legislation, provisions made for the applicability of the Muslim law of the sect to which the Sri Lankan Muslim belongs in relation to intestate succession (vide sec. 2 of Cap. 61) and marriage and divorce (vide sec. 16, 25, 26 and 98 (1) of the Marriage and Divorce Muslim Act No. 13 of 1951). Furthermore, we have sec. 41 of the Wakfs Ordinance No. 51 of 1956 which has similar provisions for the application of the law and substance of the sect of the Muslim community concerned with such wakf.

Prior to 1931, we had in Sri Lanka special laws dealing with some aspects of their personal rights – for example, the Mohammedan Code of 1806 and the Muslim Marriage and Divorce Registration Ordinance of 1929, which replaced the Mohammedan Marriage Registration Ordinance of 1886.

In *Perera v. Chan* (17) Wendt and Grenier, JJ. of 24.10.1905, it was held:

"The minute of 5.8.1806 does not in any way interfere with the operation of the general principles of Mohammedan law with regard to inheritance *Shariffa Umma v. Mohamed Lebbe* (18). It does not profess to furnish any principle of inheritance capable of being applied generally .... accordingly in sec. 7 (1806 Code) if both parents survive they (being Sharers also entitled to 1/6th each) will take these shares. The wife, 1/8th as stated in that section (that

being the fixed share of a wife when there is issue, according to the Quran) and the residue will go to the son (26/72) and daughter (13/72) *See* Nell, Mohammedan Law of Ceylon pp. 56 and 57".

His Lordship Mr. Justice Weeramantry in the case reported in 75 N.L.R. at page 295 (1) states:

"We agree that no juristic interpretation can prevail against the Holy Quran or the Hadiths of the Holy Prophet (O.W.B.P.) for the former is the bedrock of all Muslim law and the latter are second in authority only to the Holy Quran".

This case dealt with marriage laws in respect of which sec. 98(2) of Cap. 115 has statutorily introduced the Muslim law governing the sect to which the parties belong as the law applicable to the Muslims in Sri Lanka. For all practical purposes, this sec. 98(2) is couched in language similar to sec. 2 of Cap. 62. Accordingly, Dr. Weeramantry's dictum will apply with equal force whenever one has to construe the provisions of sec. 2 of Cap. of 62.

The earlier decisions of our court are all in reference to the law as it stood prior to 1931.

It is the contention of Learned Counsel for the respondents, that while the rules of inheritance under Muslim law are made applicable, to the estates of the respective deceased in the two cases before us in terms of sec. 2 of Cap. 62 yet, since the Quranic injunction "NOR HAS HE MADE YOUR ADOPTED SONS YOUR SONS" (Al Quran – Ch. 33, v. 4) pertains to status, it will not be relevant to the cases before us inasmuch as –

(1) The law of status in Muslim law has not been statutorily introduced, and

(2) As it has not been proved that adoption is unknown among the Muslims of Sri Lanka. (Compare – Oudh Estates Act of 1893 of India, which permits a Mohammedan in that state to adopt a son)

There would be considerable force behind these arguments if this verse of the Holy Quran had effected a change only in the status of the parties. But that is not so. It also had the effect of disqualifying the adopted child from inheritance. It formed the basis of that rule of intestate succession which debars the adopted son from a share in the estate.

Thiabji (2nd Edition, p. 819) states:

"The title to inheritance prior to Islam, was that of comradeship in arms. It was for this reason that women and children (even though born in lawful wedlock) who were unable to bear arms were disqualified with regard to inheritance. The law was not amended on this point for the first two or three years during which the Prophet preached and consequently, the Muhajireens (those who migrated with the Holy Prophet from Macca to Medina) succeeded to each other when, any of them fell in battle. Later, this rule was abrogated by the Holy Quran and it was laid down that nothing could furnish so strong a claim to inheritance as blood relationship".

Al-Quran, Sura 33, Verse 6 ....." THE PROPHET IS CLOSER TO THE BELIEVERS THAN THEMSELVES AND HIS WIVES ARE THEIR MOTHERS: BLOOD RELATIONS AMONG EACH OTHER HAVE CLOSER PERSONAL TIES IN THE DECREE OF ALLAH THAN (the brotherhood of) BELIEVERS AND MUHAJIRS". Thiabji adds that this was indeed only part of the new revelations to strengthen the family tie.

Ameer Ali (5th Edition, Ch. 3, sec. 1, p. 218) states:

"The Musalman law accordingly does not recognise the validity of any mode of filiation when the parentage of the person adopted is known to belong to a person other than the adopting father and an adopted child (Mutabanna) has no rights in the estate of his or her adoptive parents."

Hammeeda Abd al Ati in his book "The Family Structure in Islam" (American Trusts Publications, 1977 copyright) at page 253, under the heading 'Basic dimensions of the law of inheritance – the grounds of inheritance' says, "The pagan Arabian custom was arbitrary and basically determined by the so-called comradeship in arms. Hence it favoured parental male descent, adoption and, sworn alliance or, clientage. The Islamic system on the other hand was founded on two bases, natural bilineal relationship through paternal and/or maternal lines, and actual affinity through marriage and/or its legitimate variant concubinage". *In default* (the emphasis is mine) of these two bases a third was accepted by certain law schools and may be called voluntary mutual patronage or WALA.

"These grounds of inheritance eliminated some traditionally eligible categories and included new classes of heirs. Those who formally succeeded to property on the basis of adoption, outright

sworn alliance and arbitrary will were no longer eligible under the new system of Islam. Adoption in particular was completely excluded from the grounds of inheritance."

Mc Naughton–Principles of Mohammedan Law, in Book 2, case VI, at p. 86:

"Q : What conditions are necessary to the validity of an adoption according to Mohammedan Law and what rights appertain to a person legally adopted. Has he any claim to the property left by his adopting father .....?

A : During the life time or after the death of the adopting father the adopted son has no claim upon his property."

The rationale for these statements is that adoption was legally known, well accepted and an often used procedure among the Pro-Islamic Arabs. Adoption carried with it the status of a son as well as the right of inheritance as a son to the estate of the deceased adopter. No woman – mother, wife and daughters included – had a place in that scheme and she was eliminated by the son or sons who carried arms. These sons excluded from the inheritance even their own full brothers who happened to be minors and consequently, could not have carried arms. In the absence of legitimate sons, the adopted son took the place of the son in all respects. There was then no question of there having been only a de-facto adoption. It was in fact a de-jure adoption, and this practice and rule continued in force during the first two or three years of the Islamic period. The Prophet of Islam (O.W.P.B.) too had an adopted son (Al-Quran, Sura 4; v. 36 to 40 and Notes 3722 to 3724 of Yoosoof Ali in his translation) named ZAID son of Haritha whom he had adopted under the old dispensation. Zaid's marriage was not successful and he divorced his wife who thereafter wished to marry the Prophet of Islam. This could not be done under the then existing law. It was in these circumstances that the injunction referred to above, namely, Quran Ch. 33, v. 4 was revealed. This verse reads, "ALLAH HATH NOT MADE FOR ANY MAN TWO HEARTS IN HIS (one) BODY. NOR HAS HE MADE YOUR WIVES WHOM YOU DIVORCE BY ZIHAR YOUR MOTHERS. NOR HAS HE MADE YOUR ADOPTED SONS YOUR SONS ...". The reference to Zihar is to what was then a well established legal divorce procedure whereby a man divorced his wife by using the formula of comparing her to his mother and thereby letting her know that co-habitation with her thereafter will be akin to his doing so with his mother and so cannot and will not take place in the future.

The pernicious provisions of both Zihar and adoption were swept away by this verse. The institution of adoption with all its attendant circumstances was abrogated. This included the right to inheritance which had hithertofore been enjoyed by the adopted son. The abrogation was completed by the words in verse 23 of Ch. 4 of the Holy Quran, "PROHIBITED FOR YOU (for marriage) ARE .... (those who have been) WIVES OF YOUR SONS PROCEEDING FROM YOUR LOINS .....". There is no mention made of wives of adopted sons.

Only consanguinity could give rise to this type of prohibition in marriage. An adopted son does not have that relationship to the adopter and so, his erstwhile wife was not made unlawful to the adopter. The Holy Prophet of Islam married the wife of Zaid after Zaid had divorced her. It was in these circumstances that in verse 4 of Chapter 33 was revealed. It swept away the institution (de jure) of adoption and its attendant consequences, rights and obligations. Zaid, son of Haritha was at times referred to as Zaid, son of Mohammed. This aspect of adoption was also specifically done away with, by verse 40, which reads as follows, *"Muhammed is not the father of any of you men."*

Therefore, I am unable to accept the contention that it was only a de facto adoption that was referred to and discussed by the Privy Council in the case of *Mohammed Umar Khan v. Mohammed Niyazudeen Khan* (19).

The law which prevailed amongst the Arabs in pre-Islamic times, continued amongst them even after the advent of Islam, unless it had been abrogated or modified by the Holy Quran and/or the Hadiths. If not abrogated of modified, it became part of the law of the Muslims, and along with the new law specially made by the Quran and/or the Hadiths they became the body of laws now referred to as the Muslim Law. One such law which underwent a change with the Quranic Revelations was the law of inheritance. The son (and in the old days even the adopted son) inherited everything including the women in the household of the deceased. This too is changed and abolished. Vide v. 19 of Chapter 4 which reads, "OH YE WHO BELIEVE YE ARE FORBIDDEN TO INHERIT WOMEN AGAINST THEIR WILL ...". Again, in verse 2 of the same Chapter we find the injunction, "AND MARRY NOT WOMEN WHOM YOUR FATHER'S MARRIED.....".

The son was the universal heir. The daughter, the wife, the mother and the father inherited nothing. The change effected by the Quran was to grant specific shares to the daughter, the mother, the father and the wife. No mention is made in the Quran about the son as an heir to any particular share. Thus the son took the residue, that is after the specific shares were given to those designated in the Quran, as customary agnatic heir as of old. That became the rule of inheritance in Muslim law. It is in this context that the adopted son became disqualified in Muslim law to inherit as the Quran said, that he was no son at all. This rule disqualifies the adopted son from inheritance to the adopter. This is a rule of inheritance and, under sec: 2 of Caption 61 is now part of the law of Sri Lanka.

ACKNOWLEDGEMENT 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 acknowledgement is possible.

Acknowledgement is therefore, not applicable to either one or the other of the children who are parties to the cases under review.

(*c*) The ACKNOWLEDGED must believe himself to be a child of the ACKNOWLEDGER, except when he cannot consent due to infancy (Vide Ameer Ali, Vol. 2, p. 220).

The two adopted children before us will not qualify under this third clause either as their birth certificates will negative such a claim.

Muslim law therefore, does not recognise the validity of any mode of filiation where the parentage of the person adopted is known to belong to a person other than the adopting father (or mother for that matter) and the adopted child (or Mutabanna) has no rights in the estate of his or her adopting parents. *Mohamed Abdul Khan v. Mohamed Ismail Khan* (*supra*).

These were the reasons which led Muslim jurists to postulate that there are four means of inheritance in Muslim law. (*See* Fath Ud Dayyan by Seyyed Mohammed Ibnu Ahmed Lebbe – English translation by S.J. Aniff Doray 1963). They are :–

(1) Inheritance by lineage ;

(2) Inheritance by marriage ties ;

(3) Inheritance by a slave obtaining freedom ; and

(4) Inheritance by public body – Baithul Mal, or Public Treasury.

Adopted children do not come under any one of these categories. They are not in the ineage of the deceased adopter.

Lineage, is defined in the Shorter Oxford Dictionary as –

(1) Lineal descendant from an ancestor ; ancestry ; pedigree.

(2) One's ancestors collectively ; the descendants of a specified ancestor ; a tribe or clan.

and the word *Child* is defined as, the offspring of human parents ; descendants ; members of a tribe or clan. The following meanings are also given, namely : expressing origin ; extraction ; dependence ; attachment or natural relation to a place or time ; circumstance of birth, ruling, or quality.

Strouds Judicial Dictionary, Vol. 5, p. 2628 states :

"But when by foreign law children illegitimate by the Law of England are not admitted to full status of lawful children but are recognised as merely entitled to the rights of a natural child, such persons are, NOT LINEAL ISSUE, but are STRANGERS IN BLOOD." (Re Atkin, 2 Ch. – Div. 100)

In the University English Dictionary by Patterson, *Lineage* is defined as, descendants in a line from a common projenitor; Race. In Roget's Thesaurus, as derived from the word kindred, *Lineage* is given the meanings, consanguinity; blood relationship, as derived from the word pedigree, the meaning line or family and as derived from the wmrd posterity the meaning straight descent; sonship; filiation; primogeniture.

In Webster s New Colliegiate Dictionary, *Lineage* is defined as, "Descent in a line from a common progenitor ; A group of persons tracing descent from a common ancestor regarded as its founder."

Adoption according to Webster's Dictionary means, "To take voluntarily (a child of other parents) as one's own child."

Thus, by definition, an adoptee cannot be in the same lineage as the adopter. Indeed, adoption was a procedure commonly resorted to in order to provide an heir where none exists in the line of descent. An adopted child cannot be in the lineage of the adopter and so cannot qualify as an heir under Muslim law.

Al-Haj Moulana Fazlul Karim in his translation (1939) of the Hadis as collected and documented in Miskat-Ul-Masabih, in Book 2, Chapter 22, under the heading 'Inheritance', at page 328, under the sub-head 'Distribution of Property' states :

"The assets left by the deceased must be dealt with in Islam in the following order of preference:

(1) Funeral expenses.

(2) Satisfaction of debts (All-Quran, s. 4 ; v. 11).

(3) Payment of bequests if any to the extent of 1/3 rd of the total assets, and

(4) To divide the residue among the heirs."

The rules to be observed in the division are the following :–

(1) Firstly, the SHARERS (Ashabe-farz) will get their shares as fixed by Allah. (Ibnu Abbas reported from the Messenger of Allah (O.W.P.B.) "Pay the fixed shares of inheritance to the persons entitled to them, what remains thereafter is for the nearest male person." Agreed.)

(2) Secondly, the residue shall be divided among such residuaries as are entitled to the residue.

In default of the first, the second will take the whole.

(3) The distant kindred.

In default of the first and second, the third will inherit, except in one case.

(4) In default of these three, succession will go to one held by Wala ("Amr-bin-Shuaib reported that the Messenger of Allah (O.W.B.P.) said, 'He who inherits property, inherits Wala'").

(5) If that does not occur in a case it will go to the acknowledged kinsmen. That is a person of unknown descent in whose favour the deceased has made an acknowledgement of kinship, not through himself but through another.

(6) In default, it will go to the universal legatee. That is a person to whom the deceased has left the whole of his property by will (Initially, the will, will be held to be valid for 1/3rd only. But if categories (1) to (5) above are absent, then, the universal legatee will get the whole. To that extent, the will of a Muslim granting the whole of his property to one person could be given validity in these circumstances.

(7) In default of (1) to (6) above, the property will escheat to the Baithul-Mal, or Public Trustee.

(8) In default of the Baithul-Mal, it will go to the leaders of the village of the deceased for distribution to the poor (Abu Daug records, Beraidah as having reported that a man of the Khuja'a died. He came to the Prophet (O.W.B.P.) with his heritage. He said, "Search for it an heir or blood relation". They did not find any heir or blood relation. Then, the Messenger of Allah (O.W.B.P.) said, "Give it to the leaders of Khuja'a").

An adopted child, not being a consanguine cannot find a place among any of these eight categories. Such a child is not a blood relation to the deceased.

Both learned counsel for the respondents before us contended that by sec. 6 of Cap. 61, the adopted child is for all purposes deemed to be a child born in wedlock of the adopters. By this it is suggested that the deeming was not only with regard to the status of sonship but also to consanguinity. That is to say, that the blood of the adopters (both that of the husband and that of the wife), is deemed to be flowing in the veins of the child adopted by them. To my mind, this would be carrying the deeming clause to realms beyond reason and is totally unjustified by any of the well-known norms of interpretation.

Learned counsel for Yamin Ghouse contended that, while a natural person is deemed to be and is vested with all possible and known rights except those that the law has specifically withdrawn from him the artificial person or the legal person such as an incorporated company or a statutory office created by a legal fiction, on the other hand enjoys only such rights as are specifically conferred on it by statute and none other. Although an adopted child is a real human being yet, the status he enjoys by reason of the adoption order is one that is artificially created by law. On a parity of reasoning therefore he cannot be said to enjoy more rights than the law specifically confers on him. He is granted the rights that are enjoyed by a child born in lawful wedlock subject however, to the specific provisions of the Ordinance. He will not be conferred with rights that arise out of consanguinity. Indeed, our Adoption Ordinance has very carefully deprived him of such rights as will devolve on him and on his adoptive parents and others had the deeming clause conferred on him consanguinity as well.

By reason of being deemed to be born in lawful wedlock rights pertaining to maintenance; guardianship; control of education; domicile etc; as between the child and the adopters are to be regulated as detailed in Cap. 61. On the other hand, if the child was also consanguine its adopting parents, should –

(1) Be entitled to inherit drom and be inherited by the child, and

(2) Be not entitled to marry the divorced or widowed spouse of the child.

Further, the child's siblings will not be lawful to the child in marriage. Moreover, they will enjoy mutual rights of inheritance with the child. Sec. 6 (3) of Cap. 61 by it's various provisos deprives the adopted child of –

(*a*) Right, title or interest in any property devolving on "any child" of the adopter by virtue of any instrument executed prior to the date of adoption.

(*b*) Any right to property that devolves on "any descendant" of the adopters from any fidei-commissa in favour of "the descendants", and

(*c*) Any rights devolving on the "heirs ab intestate" of any child born in lawful wedlock of the adopter, and

under sec. 6(3)(*b*), the adopted child is deprived of succession (whether by will or ab intestate) jure representationis the adopter, and by *sec. 6(5)* the adopter and those claiming through him (who would be entitled to do so otherwise) cannot inherit from the adopted child and sec. 15 confirms the position of want of consanguinity between the adopter and the adopted, for it states "NOR SHALL ANYTHING IN THIS PART CONTAINED PLACE AN ADOPTING PARENT OR AN ADOPTED CHILD AS AGAINST EACH OTHER'S RELATIVES BY CONSANGUINITY OR AFFINITY WITHIN THE DEGREES WITHIN WHICH MARRIAGE IS PROHIBITED BY THE PROVISIONS OF ANY OTHER WRITTEN LAW".

It will thus be seen that the adopted child, by reason of the adoption order is granted all the rights and duties of a child born in lawful wedlock except those which are specially referrable only to consanguinity. A careful analysis of the several sections of the Adoption Ordinance shows that the legislature has very specifically deprived the adopted child of such rights as would have accrued to it if it had been consanguine with its adopting parents. I am therefore inclined to the view that those special provisions, far from supporting the arguments of learned counsel for the respondents, in fact detracts from the contention that the adopted child is deemed to be not only born in lawful wedlock but also deemed to be consanguine. Lineage, which implies consanguinity is one of the prerequisites to heirship in Muslim law. Accordingly, I hold that a child adopted under our Adoption Ordinance Cap. 61 does not qualify to be an heir under Muslim law.

"DEEMING", as used in legislation is a contrivance use to give something a meaning and quality either in addition to its normal meaning and qualities or to include a meaning or quality it would normally not have. In this instance it is utilized to give the person who is in fact adopted the status of a person born in lawful wedlock to the adopters. By sec. 6(1) of Cap. 61 all rights, duties, obligations and liabilities of a parent or guardian in respect of future maintenance; custody and education are transferred from its natural parents to its adopting parents and for these purposes the child is deemed to have been born in lawful wedlock of the adopters. This deeming is complemented by the provisions of sec. 6(2), whereby the child could be given the surname or family name of the adopter. It is such a deeming that the Holy Quran denied to an adopted child fourteen

hundred years ago. The second half of verse 4 of Chapter 33 of the Holy Quran recites "SUCH IS ONLY YOUR (manner of) SPEECH BY YOUR MOUTHS. BUT ALLAH TELLS (you) THE TRUTH AND HE SHOWS THE RIGHT WAY", and in the very next verse, verse 5 "CALLED THEM BY (the names) OF THEIR FATHERS, THAT IS JUSTER IN THE SIGHT OF ALLAH. BUT IF YE KNOW NOT THEIR FATHERS (names call them) YOUR BROTHERS IN FAITH OR YOUR MAULARS (freedmen). BUT THERE IS NO BLAME ON YOU IF YOU MAKE A MISTAKE THEREIN (what counts is) THE INTENTION OF YOUR HEARTS; AND ALLAH IS OFT RETURNING, MOST MERCIFUL." This deeming, under Cap. 61 proceeds to impute not merely legitimacy to the adopted but a lawful wedlock to the adopter even when the adopter is a bachelor or a spinster or a celebate. Whoever may be the adopter, the child will be deemed to have been born to him or to her as though in lawful wedlock.

Mulla, 1955 Edition, at p. 293, makes reference to the case of *Ayub Shah v. Bablal* (20) where it was held, that although a Muslim in India could according to the law of his native state (such as Punjab; or Oudh) adopt a son, such a son cannot suceed to property in India in the absence of evidence establishing a custom to that effect. *See also* HAMEEDA v. BALDEEN which case too, is quoted in Mulla in Ch. 6, at p. 45.

There is no evidence that such a custom ever prevailed in Sri Lanka. The law obtaining in Sri Lanka as stated by Louise Nell, Q.C., shows the contrary. In his book, 'Mohammedan Laws of Ceylon – Inheritance', at p. 41, under the heading, 'General characteristics' he records: "Adoption is not recognised as conferring any rights on the children adopted". The case of *Perera v. Khan* (*supra*) shows that in 1905 Louis Nell was cited as an authority on the Muslim law as it obtained then in Sri Lanka.

This has been the law followed by the Muslims of Sri Lanka all along

Mc Naughton, in his 'Principles and Precedents of Mohammedan law' *(supra)*, at p. 86, records case No. 6:–

"*Q.*– What rights pertain to a person legally adopted?

A.–Adopted son has no claim on property of adopting father even if left destitute."

The question framed is in respect of a legal adoption and not merely a de facto adoption.

Citing the case of *Cohen v. Minister of the Interior (supra)* counsel for the respondents in the Negombo case contends that the adopted child is deemed to be clothed with the flesh and blood of the adopter and that therefore the law could and does confer not only the status of a child born in lawful wedlock but also consanguinity. The corpus in that case was a Jew born in Russia. He was adopted in South Africa under the provisions of the South African Adoption Ordinance No. 25 of 1923 (very similar to our Cap. 61). Cohen Snr., the adopter, had acquired South African nationality by naturalisation. It was *held* that "as far as the law can possibly make it so, the law has made the child your own flesh and blood". I cannot agree with the contention of learned counsel for, firstly, the House of Lords was not faced with a conflict situation when it decided that case; and secondly, what this decision can be taken to mean is not that it conferred consanguinity but only all rights and privileges short of consanguinity which will devolve on a child born in lawful wedlock. There are many such rights which one may claim not because of consanguinity but because of being deemed to be born in lawful wedlock. That is to say, as a member of the family unit. For instance, statutory tenancy under our Rent Act, deductions and exemptions under the Tax Laws, inter family transfers under the Land Reform Laws, an extra house under the Ceiling on Houses Law and may be inclusion of the name of the adopted minor child in the passport of the adopter.

In all these cases the right is not dependent on consanguinity but on the fact of being deemed to be born in lawful wedlock and so to be counted in and treated as a member of the family unit.

"FOR ALL PURPOSES WHATSOEVER" in sec. 6(3) of Cap. 61 is part of a later general law and so cannot override the earlier special law of inheritance brought in by sec. 2 of Cap. 62. It was conceded in the course of the argument that under pure Muslim law an adopted son does not inherit from the estate of the adopter

It was submitted by the learned counsel that the deceased lady, Mrs. Hafeela Ghouse (in the Mt. Lavinia case) had named the respondent Yamin Ghouse as the residuary heir to the estate of her late husband and that she thereby indicated her intentions, namely, that Yamin should be treated as her heir, as well and that she intended

that the full scope of the Adoption Ordinance should apply to her estate as well. The intentions of a deceased, excepting so far as is expressed in a duly constituted will, (and in the cases before us there are no wills) are irrelevant when considering the rules of intestacy. Her act of nominating Yamin Ghouse as an heir to the estate of her late husband has been challenged. In these circumstances, her not making a will in favour of Yamin Ghouse can only mean that she did not intend giving him anything which the Muslim law of intestate succession will not give him.

An adopted child is not the only category of persons who are deprived of rights to inheritance. Whether a child be born in lawful wedlock or whether he is deemed to have been born in lawful wedlock he could still be deprived of his right to inheritance, as for instance, on apostacy or on account of becoming the causer of the death of the intestate.

In spite of being deemed to be born in lawful wedlock, an adopted child cannot qualify to be treated as an agnate. Under Shafie Law, it is only an agnate who can act as a Wali or marriage guardian of a Muslim girl. (*Vide* Minhaj et Talibin by Navavi, p. 284/285).

Hammudah Abd Al Ati, in his 'Family Structure in Islam' (supra), at p. 194 states:

> "Even beyond the realm of possible implications (of illegitimacy and its consequences) one consequence of adoption is almost certain. When an alien child is fully adopted by new parents it will probably upset the whole structure of kinship as regards inheritance; provisions; solidarity and perhaps marital chances. It may deprive natural relatives from their God given rights or exempt them from their God ordained duty and thus, tamper with the order of society. Tampering with the natural priorities of the kinship system may generate at least covert hostility and/or estrangement among the kin. This is clearly contrary to the teachings of the Quran".

For these reasons therefore, I would allow the appeal in both cases and set aside the respective judgments entered in them as I hold that neither one nor the other of these adopted children is an heir to his respective deceased adopter. The respondents will pay to the appellant costs in both courts. I have read the judgment of Seneviratne, J. (President, C.A.) and Siva Selliah, J. but regret that I am unable to agree with the conclusions reached by them.

Appeal dismissed.