1950 *Present :* **Jayetileke C.J. and Swan J.**

ABDUL CADER, Appellant, *and* RAZIK *et al.*, Respondents

S. C. 27—D. C. Colombo, 4,518/G

Muslim Law—Marriage—Muslim maiden of Hanafi sect—Below 21 years of age—Her right to marry without assistance of wali—Age of Majority Ordinance (Cap. 53)—Muslim Marriage and Divorce Registration Ordinance (Cap. 99), Sections 8 (1) and 50.

A Muslim attains "majority", for purposes of marriage, on reaching the age of *bulugh* or puberty.

There are Muslims of other sects than the Shafi sect in Ceylon, and, in a matter of marriage or divorce, a Muslim is governed by the law of the sect to which he or she belongs. A Muslim maiden, therefore, of the Hanafi sect, who has reached the age of *bulugh*, can enter into a contract of marriage without the intervention of a wali or marriage guardian, or appoint a wali herself for the purpose of her marriage. In the case of a maiden of the Shafi sect, whatever her age may be, a wali is necessary.

A Muslim maiden, who was below the age of 21 but who had reached the age of *bulugh*, entered into a contract of marriage without the consent of her father and having appointed her own wali. Her father was of the Shafi sect, but there was evidence to show that she herself was a Hanafi at the time when the marriage was solemnized:—

Held, that there was a valid contract of marriage according to Muslim law.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, with *N. M. de Silva*, *P. Navaratnarajah* and *V. Arulambalam*, for the appellant.—Sithy Zubeida, a Muslim minor girl, married at the age of about 15 without the consent of her father. The parents of the girl were admittedly Shafis. Zubeida's position

is that she being a Hanafi could marry in accordance with Hanafi tenets, without the consent of her father. The case of the appellant (the father) is that the marriage so contracted is bad.

Firstly:—Even if the Hanafi law of marriage was held applicable to Sithy Zubeida the effect of the Majority Ordinance No. 7 of 1876 (Cap. 53) has to be considered.

Capacity to be married and competency to contract a marriage are two different concepts. In the general Marriage Registration Ordinance (Cap. 95), section 14 deals with capacity to be married while section 21 relates to competency to contract a marriage. Similar provision is found in the Kandyan Marriage Registration Ordinance (Cap. 96) in sections 9 and 10. In Muslim law there is no corresponding statutory provision.

Thus in Ceylon if the pure Hanafi law is held applicable child marriages may well be had. In India the Child Marriages Restraint Act 19 of 1929 had effectively abolished child marriages. A male under 18 and female under 14 cannot enter into the married state. This act is of general application and supersedes Muslim law. Thus in India a Hanafi Muslim female may only marry on her own when she attains puberty. The Indian Majority Act 18 of 1875 specially exempted from its operation all questions relating to marriage—But in Ceylon the Majority Ordinance expressly enacts in section 2 that "Any law or custom notwithstanding" the age of majority for all purposes is 21. In that context "any law or custom notwithstanding" means "personal or local law" while in section 3 the word "law" is used in reference to the law of the land or the common law or the residuary law. In the result even a Hanafi Muslim female minor is not competent to enter into a contract of marriage. The case of *Assanar v. Hamid* [1] was wrongly decided and is in conflict with the view taken by de Sampayo J. in the case of *Narayanan v. Saree Umma et al.*[2]. The Full Bench judgment in *Deeresekere et al. v. Goonesekara et al.*[3] is of binding authority and has not been correctly applied in *Assanar v. Hamid* [1]. See also *Muthia Chetty v. Dingiria* [4] and *Marikar v. Marikar et al.*[5]

Secondly:—Whether Zubeida be a Shafi or a Hanafi the law applicable is the Muslim law that obtains in Ceylon. The sources of Muslim law in Ceylon are usages and customs, judicial decisions and Statute law, and not the Muslim law found in text books. Indeed the doctrines available to the Hanafi sect are different in different parts of India and text writers deal with the Hanafi system obtaining in the particular area with which they were concerned.

The Mohammedan Code of 1806 codified the customs and usages prevalent amongst the Moors in the Colombo District. This was extended to all the Muslims in Ceylon by section 10 of Ordinance No. 5 of 1852. A Muslim girl who is a virgin, whatever her age and whatever her sect, cannot, in Ceylon, enter into a contract of marriage without the consent of her wali. The Muslim law found in text books written by Indian authors and in decisions of the Privy Council in Indian

[1] *(1948) 50 N. L. R. 102.*
[2] *(1920) 21 N. L. R. 439 at 440.*
[3] *(1903) 1 A. C. R. 135 (F. B.) at 136.*
[4] *(1907) 10 N. L. R. 371.*
[5] *(1915) 18 N. L. R. 481 at 483.*

appeals are of no value here. See *Abdul Rahiman et al. v. Ussan Umma et al.*[1]; *Sultan v. Peiris*[2]; *Alia Marikar Abuthahir v. Aliyar Marikar Mohamed Sally*[3]; *Weerasekera v. Peiris*[4]; *Zainabu Natchia v. Usuf Mohamedu*[5]; *Kalenderumma v. Marikar et al.*[6].

Even Muslims from other countries settled in Ceylon are governed by our own system of Muslim law—*Bandirala v. Mairuma Natchia*[7] and *Khan v. Maricar*[8].

These customs and usages are assumed as part of our law in the Muslim Marriages Ordinance, No. 27 of 1929, as amended by Ordinance No. 9 of 1934 (Cap. 99). See *Noorul Naleefa v. Marikar Hadjiar*[9]. For the statement of objects and reasons of Ordinance No. 10 of 1931 (Cap 50) see the *Ceylon Government Gazette* of March 1, 1929, Part II page 178. Only in the absence of usages and customs can resort be had to textbooks—*Lebbe v. Thameen et al.*[10]; *Bandirala v. Mairuma Natchia*[7].

Lastly, on the facts, Zubeida is a daughter of Shafi parents. For a change over to the Hanafi sect there must be (*a*) an overt act—Tyabji, 3rd Edition, page 56—and (*b*) the party changing over must have the age of discretion. In this case all overt acts point to the fact that Zubeida is a Shafi. Also the presumption is that she is a Shafi—see *Helen Skinner v. Sophia Eveline Orde and 3 others*[11] and Amir Ali on Evidence, page 783, under section 114. Every Ceylon Moor is a Shafi, *Rabia Umma v. Saibu*[12]; *Mangandi Umma v. Lebbe Marikar*[13]. Only the father can change the religion of a child—*Silva v. Silva*[14].

M. I. M. Haniffa, with *M. H. A. Azeez* and *M. Markhani*, for the 1st and 2nd respondents.

H. V. Perera, K.C., with *U. A. Jayasundera, K.C.*, *M. Markhani* and *M. S. Abdulla*, for the 4th respondent.—The majority of the Ceylon Moors belong to the Shafi sect. In this case the 4th respondent has been brought up as a Hanafi by her grandmother who belongs to the Hanafi sect. There is her uncontradicted evidence supported by her grandfather who has changed his sect from Shafi to Hanafi.

The Muslim law allows a Muslim to change his or her sect. See *Mohamed Ibrahim v. Gulam Ahamed*[15], Fitzgerald's Muhammedan Law, page 18. Change of sect is not like a conversion from one religion to another.

The Age of Majority Ordinance (Cap. 53) does not affect "majority" for the purpose of contracting a marriage in the case of Muslims. If a Muslim attains puberty he or she has the capacity to contract a marriage. See *Assanar v. Hamid*[16].

[1] *(1916) 19 N. L. R. 175 at 178 at 183.*
[2] *(1933) 35 N. L. R. 57 at 67 and 81.*
[3] *(1942) 43 N. L. R. 193.*
[4] *(1932) 34 N. L. R. 281.*
[5] *(1936) 38 N. L. R. 37.*
[6] *(1936) 38 N. L. R. 271.*
[7] *(1912) 16 N. L. R. 235.*
[8] *(1913) 16 N. L. R. 425.*
[9] *(1947) 48. N. L. R. 529.*
[10] *(1912) 16 N. L. R. 71.*
[11] *(1871) 14 Moore's I. A. 309.*
[12] *(1914) 17 N. L. R. 338.*
[13] *(1906) 10 N. L. R. at 3.*
[14] *(1947) 49 N. L. R. 73 at 76.*
[15] *(1864) 1 Bombay High Court Reports 236*
[16] *(1948) 50 N. L. R. 102.*

Section 50 of the Marriage and Divorce (Muslim) Ordinance (Cap. 99) refers to the repeal of the Sections in the Mohammedan Code of 1806 which deal with matrimonial matters. The Code of 1806, as its preamble states, was a compilation of the customs of the Moors by the Head Moormen of Colombo, who submitted these to the Council through the then Chief Justice. The preamble is no law. Section 50 of the Marriage and Divorce (Muslim) Ordinance (Cap. 99) clearly states that the *Muslim law* of marriage and divorce shall not be affected by such repeal. The *Muslim law* contemplated in section 50 is the pure Muslim law which is to be found in treatises and text books. In *Lebbe v. Thameen*[1] it was held that on a question of pure Muslim law (as distinguished from usage or practise) the proper course is to refer to the standard text books on the subject and not to resort to the opinion of experts. See also *Narayen v. Saree Umma*[2]. In *King v. Miskin Umma*[3] Bertram C.J. held that the Mohammedan Code is not exhaustive.

The Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) states that the law applicable to the property of a deceased Muslim shall be the Muslim law governing the sect to which he or she belongs. This recognizes the existence of sects other than the Shafi sect in Ceylon.

A guardian called the wali is necessary under the Shafi law to give a Muslim girl in marriage. Amir Ali (1917 edition) on Mohammedan law, Vol 2 at p. 351 states that under the Hanafi law a wali is not necessary but it is becoming for a wali to be present. Amir Ali also states that the girl can in such a case choose her own wali (at page 350). See also Fitzgerald's Mohammedan Law pages 56, 57 and 58 to the same effect. A Hanafi girl therefore can as in this case nominate anyone as her wali provided she has reached the age of discretion (Bulugh). The evidence of the Muslim Registrar of Marriages stands uncontradicted. He says that a Hanafi bride can nominate anybody as her wali.

Section 7 of the Marriage and Divorce (Muslim) Ordinance (Cap. 50) requires the wali of the bride to sign declarations before the priest. To comply with this procedural requirement the 4th respondent chose a wali, although under Hanafi law it was not necessary.

C. Thiagalingam, in reply.—According to Muslim custom a wali is necessary. The pure Hanafi law is not available to the 4th respondent. The Muslim law in force in Ceylon is in the Code of 1806—See Walter Perera's Laws of Ceylon, page 16.

Cur. adv. vult.

September 28, 1950. SWAN J.—

We are concerned in this appeal with the validity of an alleged marriage between the 4th respondent and one Rasheed Bin Hassen. The matter came up indirectly before the District Court in the following circumstances. The appellant, who is the father of the 4th respondent—a Muslim young lady below the age of 21—applied to the District Court

[1] *(1912) 16 N. L. R. 71.*
[2] *(1920) 21 N. L. R. 439.*
[3] *(1925) 26 N. L. R. 330.*

of Colombo to have himself appointed curator of the property of the 4th respondent and the 3rd respondent, who is the married sister of the 4th respondent, appointed guardian over the person of the minor. Later he moved that a guardian *ad litem* be appointed over the minor for the purpose of the substantial application he had made for the appointment of a curator and guardian. Chapter 35 of the Civil Procedure Code deals with actions by or against minors and persons under other disqualification. Section 502, which is the last section in that chapter, states that " for the purposes of this chapter a minor shall be deemed to have attained majority or full age on his attaining the age of 21 years, or on marrying, or obtaining letters of *venia aetatis*." The application by the appellant for the appointment of a curator and guardian was an "action" within the meaning of section 6 of the Civil Procedure Code which declares that "every application to a Court for relief or remedy through the exercise of the Court's power or authority, or otherwise to invite its interference, *constitutes an action*." The second application of the appellant for the appointment of a guardian *ad litem* was therefore, as a matter of procedure, entirely correct. When, however, the question of the appointment of a guardian *ad litem* came up the minor herself appeared and said that she had married Rasheed Bin Hassen in the interval between the appellant's application and her appearance. The appointment of a guardian *ad litem* was, therefore, unnecessary if section 502 governed the matter as undoubtedly it did. The appellant, however, challenged the validity of the marriage and the Court was, therefore, required in an incidental proceeding to decide this issue. After a lengthy inquiry the learned District Judge held that there had been a valid marriage. One would, in the circumstances, have expected a wise and tolerant father to have accepted that decision as final and conclusive. But he has pursued the matter further and has now asked this Court to reverse the finding of the lower Court and declare that marriage invalid.

It has been held by our Courts that marriage does not confer majority upon a Muslim below the age of twenty-one (see *Narayen v. Saree Umma et al.* [1] and *Kalendralevvai v. Avaumma* [2]). Therefore it was competent for the learned District Judge to have taken the view that, whether or not the alleged marriage was valid, he could still proceed to appoint a guardian over the person of the 4th respondent and a curator of her property. It is only in respect of actions by or against minors that the procedural requirements of Chapter 35 of the Civil Procedure Code are applicable. In point of fact what happened after the learned Judge's finding regarding the validity of the alleged marriage shows that the parties accepted this as the correct legal position, for on January 27, 1949, of consent Rasheed Bin Hassen was appointed curator "without prejudice to the rights of either party with regard to the validity of the marriage which question is now under appeal."

As regards the question at issue on this appeal the following facts should be noted. The 4th respondent was, at the date of the impugned marriage, 15 years and 2 months old. By letter X2 addressed to Katheeb A. J. M. Warid, Muslim Registrar of Marriages, she requested

[1] *(1920) 21 N. L. R. 439.* [2] *(1947) 48 N. L. R. 508.*

him to marry her to Mr. Rasheed Bin Hassen according to the Hanafi Law. In the same letter she informed the Registrar that she had appointed her uncle, Mr. Marikar Mohideen, as her *wali*. X3 is the act of appointment, X4 is an affidavit in which the 4th respondent gives the date of her birth, declares that she has passed the age of *bulugh* or discretion, and states that she belongs to the *Hanafi* sect and follows her religion accordingly. The marriage was solemnized according to Muslim rites by Katheeb Warid on December 11, 1947, as appears from the certificate of marriage issued by him marked XI.

The first point to consider is whether the 4th respondent was or was not a Hanafi at the time of the alleged marriage. The learned District Judge has held that she was a Hanafi and with that finding we agree. I would say that, on the evidence, a contrary view would have been unreasonable, especially if one bears in mind the fact that the 4th respondent was brought up from her infancy by her maternal grandmother, the 2nd respondent, who is a *Hanafi*.

The next point is whether, being a Hanafi, the 4th respondent could contract herself in marriage. Mr. Thiagalingam admits that under what he calls "*pure*" Muslim Law a Hanafi girl who has reached the *age of bulugh* can marry without the assistance of a *wali* or marriage guardian. He contends, however, that that law is not applicable to Muslims in Ceylon.

Mr. Thiagalingam firstly relies upon the Age of Majority Ordinance, No. 7 of 1865 (Cap. 53 of the New Legislative Enactments). That Ordinance makes twenty-one years the legal age of majority for all persons for all purposes. Mr. Thiagalingam points to section 2 of the Indian Majority Act 9 of 1875 which provides "that nothing herein contained shall affect (*a*) the capacity of any person to act in the following matters, namely marriage, dower, divorce and adoption" and argues that, in the absence of a similar reservation in our Age of Majority Ordinance, twenty-one years is the age of majority for Muslims in all matters including marriage. But our Courts have considered the effect of the Age of Majority Ordinance on the rights of Muslims in the matter of marriage and taken the view that "*majority*" for the purpose of a marriage contract in the case of Muslims is not affected by that Ordinance. In *Marikar v. Marikar*[1] Sampayo J., having discussed the age of capacity for Muslims, made the following observations :—

"According to Muhammadan Law, therefore, not only has Cader Saibo Marikar attained the age of 'majority' and become capable of contracting himself in marriage but the authority of the plaintiff as guardian, if any, has ceased. But some difficulty arises out of the provisions of Ordinance 7 of 1865 which fixes the legal age of majority at twenty-one years. In my opinion the Ordinance has regard to the attainment of *legal majority for general purposes, or the majority which under the Muhammadan law is conferred by 'discretion', and does not affect the age of capacity for purposes of marriage.*" In *Narayen v. Saree Umma*[2] Sampayo J. referred to the earlier case mentioned above and said "as was pointed out in *Marikar v. Marikar* there are two kinds

[1] *(1915) 18 N. L. R. 481.* [2] *(1920) 21 N. L. R. 439.*

of majority under Muhammadan law, namely *one as regards capacity to marry without the intervention of a guardian and the other as regards a general capacity to do other acts as a major.*" With regard to those other acts it was held that the Age of Majority Ordinance was applicable to Muslims as well. But this decision has been dissented from in *Assanar v. Hamid*[1] where it was held in effect, that for all purposes a Muslim minor attained majority on reaching the age of puberty. We are content, in this case, to say that for the purpose of marriage a Muslim attains "majority" on reaching the age of *bulugh* or puberty.

The last point for determination is whether a Muslim girl can enter into a contract of marriage in Ceylon without a wali or marriage guardian. For a virgin of the Shafi sect, whatever her age may be, a wali is necessary. For a Hanafi girl who has attained the age of "bulugh" a wali is not required. Mr. Thiagalingam, however, contends that the latter principle has never been adopted in Ceylon and, in support of his contention, points to sections 64 and 65 of the Mohammedan Code of 1806. But that Code has been repealed, and in place of those sections which dealt with intestate succession we have the Muslim Intestate Succession and Wakfs Ordinance 10 of 1931 (Cap. 50), and in place of those sections which dealt with marriage and divorce we have Ordinance 27 of 1929 as amended by Ordinance 9 of 1934 (Cap. 99). Section 50 of Cap. 99 reads as follows—"The repeal of sections 64 to 102 (first paragraph) of the Mohammedan Code of 1806 which is effected by this Ordinance shall not affect the Muslim law of marriage and divorce and the rights of Muslims thereunder." Mr. Thiagalingam says that although sections 64 to 102 have been repealed we must still look to those sections for the relevant Muslim law. With that contention we do not agree. We know that the Code of 1806 was compiled at a time when it was believed that all Mohammedans in Ceylon were of the Shafi sect. In fact, when that Code was submitted to the Governor it was stated to be "the Code of the laws observed by the Moors in the province of Colombo and acknowledged by the head Moormen of the district to be adopted to the present usages of the caste." It was soon realized that the Code was not exhaustive, and our Courts have held that where it is silent recourse should be had to text books for the relevant Muslim law. It was also found, in course of time, that there were other sects than Shafis in Ceylon. The right of every Muslim to deal and be dealt with according to the law of the particular sect to which he belongs is expressly stated in the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50). That Ordinance was proclaimed on June 17, 1931. In it we find a declaration that the law applicable to the intestacy of any deceased Muslim domiciled in Ceylon shall be the Muslim law governing the sect to which he belonged : and as regards donations not involving fidei commissa, usufructs and trusts a declaration to the like effect. The Marriage and Divorce (Muslim) Ordinance, No. 27 of 1929, as amended by Ordinance 9 of 1934 was proclaimed on January 1, 1937. By that time the Legislature had openly recognised the right of Muslims in certain matters to deal and be dealt with according to the law governing the

[1] *(1948) 50 N. L. R. 102.*

sect to which they belonged. It was, therefore, in our opinion, unnecessary to say so in so many words in section 50 of Cap. 99. The words " Muslim Law " in that section cannot mean anything more or less than the Muslim law governing the sect to which the particular person belongs. We would, therefore, hold that in a matter of marriage or divorce a Muslim is governed by the law of the sect to which he or she belongs.

Even then, contends Mr. Thiagalingam, under Cap. 99 a *wali* is necessary for a Muslim woman whatever her sect may be. Undoubtedly section 8 (1) provides that the marriage register shall be signed by the *wali* of the bride except where the Kathi has expressly authorised such marriage under section 21 (2) which enables a Kathi to sanction a marriage even against the express wishes of the wali. The proviso to that sub-section also empowers the Kathi to authorise the registration of a marriage where a woman has no wali. We do not think it therefore follows that even where the Muslim law does not require the intervention of a wali in a particular case section 8 (1) supersedes that law. The reasonable interpretation of that section read in conjunction with section 50 appears to be that where the Muslim law requires a bride to be represented by her wali he shall sign the marriage register on her behalf, where it does not the signature of a wali to the marriage register is unnecessary.

In this case, however, the bride appointed her uncle as her wali and the Kathi approved of the appointment and permitted the wali so appointed to sign the marriage register. Fitzgerald in his book on Muhammadan law at page 56 says—" Even where a guardian is superfluous in law it is considered respectable to have one. " At the next page the writer goes on to say—" A woman of full age who can dispose freely of her own hand as in Hanafi and Shia law can obviously ask any one she chooses to give her away. " Ameer Ali (4th Ed. Vol 2, p 350) sets out the law in these words—" The Hanafis hold that an adult woman is always entitled to give her consent without the intervention of a wali. When a wali is employed and found acting on her behalf he is presumed to derive his power solely from her. "

It seems to be clear that under Muslim law a Hanafi maiden can act without the intervention of a *wali* or marriage guardian, or appoint a wali herself for the purpose of her marriage. We would therefore hold that a valid contract of marriage according to Muslim law was entered into between the 4th respondent and Rasheed Bin Hassen on December 11, 1947, and that the marriage was duly registered in accordance with the provisions of the Marriage and Divorce (Muslim) Ordinance—Cap. 99.

The appeal fails and is dismissed with costs.

JAYETILEKE C. J.—I agree.

Appeal dismissed.