[IN THE PRIVY COUNCIL]

1952 *Present :* **Viscount Simon, Lord Morton of Henryton, Lord Cohen and Sir Lionel Leach**

A. H. M. ABDUL CADER, Appellant, *and* A. R. A. RAZIK *et al.*, Respondents

Privy Council Appeal No. 37 of 1951

S. C. 27—D. C. Colombo, 4518/G

Muslim Law—Marriage—Minor's capacity to marry—Age of majority—Significance of sect—Muslim Marriage and Divorce Registration Ordinance (Cap. 99), s. 50—Age of Majority Ordinance (Cap. 53).

For the purpose of marriage a Muslim in Ceylon attains "majority" on reaching the age of puberty.

In a matter of marriage or divorce a Muslim is governed by the law of the sect to which he or she belongs. A Hanafi girl, therefore, who has attained the age of puberty can marry without the assistance of a Wali or appoint whom she chooses to act as a Wali.

APPEAL from a judgment of the Supreme Court reported in (*1950*) *52 N. L. R. 156.*

D. N. Pritt, Q.C., with *Stephen Chapman*, for the appellant.

Christopher Shawcross, Q.C., with *R. K. Handoo* and *Sirimevan Amerasinghe*, for the respondents.

Cur. adv. vult.

December 2, 1952. [*Delivered by* LORD COHEN]—

The proceedings in this matter originated with an application by the appellant for the appointment of a guardian of the person and a curator of the property of his daughter the fourth respondent, but the only question to be determined on this appeal is the validity or invalidity of the marriage which took place on the 11th December, 1947, between the fourth respondent who was then age 15 years and two months and one Rasheed Bin Hassan.

The parties are Mahommedans; Mahommedans are divided into various sects, the two sects relevant to the issues in this appeal being the Shafi and the Hanafi. The fourth respondent was married as a member of the Hanafi sect, having appointed her uncle as her Wali for the purpose of the marriage. In the Ceylon Courts the appellant disputed the validity of the marriage on the following grounds.

I. He alleged that the fourth respondent was a member of the Shafi sect and could therefore not be married without his consent as her Wali or agent.

11. He contended that even if she was a member of the Hanafi sect the marriage was invalid either :

(*a*) because under Moslem law as applied in Ceylon even a Hanafi girl of 15 could not be married without the consent of her father as Wali or ;

(*b*) because the rules that would otherwise apply to her under Mahommedan Law were overridden by the provisions of the Majority Ordinance, No. 7 of 1865 (Cap. 53 of the New Legislative Enactments), which he alleged makes twenty-one years the legal age of majority for all persons for all purposes.

The trial Judge found as a fact that the fourth respondent was a Hanafi at the time of her alleged marriage, rejected the legal arguments advanced by the appellant and upheld the validity of the marriage. His judgment was confirmed by the Supreme Court on the 28th September, 1950, and it is from that decision that the appellant appeals to this Board.

At the hearing of the appeal Mr. Pritt for the appellant sought to advance a new legal argument which may be stated as follows.

The fourth respondent was the child of Shafi parents. She was born a Shafi and could not become a Hanafi except by exercising a real choice with knowledge of the distinction between the two sects and declaring that choice. In any event she could not while a minor change her religion without the consent of her father.

This argument was not advanced on behalf of the appellant in either Court in Ceylon. It is essentially the kind of argument on which their Lordships would desire the assistance of the Ceylon Courts and their Lordships are not satisfied that if it had been advanced in the Ceylon Courts no further evidence would have been admissible. In all the circumstances their Lordships do not consider that Mr. Pritt should be allowed to advance it before this Board. In face of this ruling Mr. Pritt admitted that he could not go behind the concurrent finding of the Ceylon Courts that the fourth respondent was a Hanafi at the time of the alleged marriage. Their Lordships have therefore only two points to determine.

(1) Whether the Mahommedan Law as incorporated into the Law of Ceylon included the provision, which it was admitted exists in general Mahommedan Law, that a Hanafi girl who had attained the age of bulugh (puberty) could marry without the assistance of a Wali or appoint whom she chose to act as a Wali and

(2) Whether the Majority Ordinance overrode the provisions of the Mahommedan law as to marriage and thus made it impossible for the fourth respondent while under 21 to enter into a valid marriage contract, at any rate without the consent of her father.

On the second point their Lordships find themselves in complete agreement with the Supreme Court. Mr. Pritt called their attention to a number of authorities which indicated a difference of opinion in the Courts of Ceylon as to whether for all purposes a Muslim minor attained majority on reaching the age of puberty. Like the Supreme Court their

Lordships do not find it necessary to resolve this difference. In *Narayanen v. Saree Umma* [1] De Sampayo J. referred to his earlier decision in *Marikar v. Marikar* [2] and pointed out at p. 440 that " there are two kinds 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 ".

Their Lordships agree with the Supreme Court that for the purpose of marriage a Muslim in Ceylon attains " majority " on reaching the age of puberty and would add that none of the cases cited suggested a contrary conclusion.

There remains for decision only the first point. Mr. Pritt admits that under the Mahommedan Law as laid down in the text books a Hanafi girl who attained the age of puberty does not require a Wali and may appoint whom she chooses to act as Wali, but he contends that this provision has not been incorporated into the law of Ceylon. He founds himself on the Mahommedan Code of 1806 which purported to record the usages of the caste in force in that year and in particular on Article 64 which provides that " a person wishing to marry, application must be made to the bride's father and mother for their consent ". But the code of 1806 has been repealed ; the place of those sections which dealt with intestate succession has been taken by the Muslim Intestate Succession and Wakfs Ordinance, No. 10 of 1931 (Cap. 50 of the New Legislative Enactments), and the place of those sections which dealt with marriage and divorce has been taken by Ordinance No. 27 of 1929 as amended by Ordinance No. 9 of 1934 (Cap. 99). Section 50 of Cap. 99 reads as follows :— " The repeal of sections 64 to 102 (first paragraph) inclusive 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. Pritt argued that notwithstanding this provision their Lordships must look at the repealed Code and on any matter covered by it must treat the code as laying down the Mahommedan law which was incorporated into Ceylon. He found himself bound to admit that where the code was silent on any matter recourse should be had to text-books for the relevant Muslim Law, but he argued that unless the code was ambiguous on the point under consideration, recourse to the text-books on any matter covered by the code was not permissible. He relied on the observations of Schneider A.J. in *Rahiman Lebbe and anr. v. Hassan Ussan Umma and others* [3] where he said that recourse to treatise is only had " to elucidate some obscure text in our written Mohammedan Law or in corroboration of evidence of local custom ". Their Lordships think that this was too narrow a limitation even when the code was in force but in any event they agree with the Supreme Court that the argument cannot prevail now that the code has been repealed. As the Supreme Court pointed out the code was adopted at a time when it was thought that all Muslims in Ceylon were adherents of the Shafi sect, and when the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) was adopted it was provided that the law applicable

[1] *(1920) 21 N.L.R. 439.* [2] *(1915) 18 N.L.R. 481.*
[3] *(1916) 3 C.W.R. 88 at p. 99.*

to the intestacy of a deceased Muslim domiciled in Ceylon should be the Muslim Law governing the sect to which he belonged. In these circumstances the Supreme Court sum up their conclusion on this point in language which their Lordships would respectfully adopt :

> " The Marriage and Divorce (Muslim) Ordinance, No. 27 of 1929, as amended by Ordinance 9 of 1934 was proclaimed on 1st January, 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 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. "

For these reasons their Lordships agree with the Supreme Court that a valid contract of marriage was entered into between the fourth respondent and Rasheed Bin Hassan on the 11th December, 1947, and will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondents' costs thereof.

Appeal dismissed.