1949 *Present :* **Nagalingam J. and Windham J.**

ISMAIL LEBBE, Appellant, *and* HANIFFA, Respondent

S. C. 313—D. C. Kegalla, 4,048

Partition—Muslim co-owners—Application of Roman-Dutch law of succession—Duty of Judge.

Where the co-owners of a land are Muslims governed by the Muslim system of jurisprudence, the Judge should apply the Muslim law of intestate succession and not the Roman-Dutch Law.

APPEAL from a judgment of the District Court, Kegalla.

M. H. A. Aziz, for fourth defendant appellant.

H. W. Jayewardene, with *T. B. Dissanayake*, for first and second defendants respondents.

C. E. S. Perera, with *C. Seneviratne*, for third defendant respondent.

Cur. adv. vult.

April 4, 1949. NAGALINGAM J.—

This is an action to partition a land the co-owners of which are Muslims governed by the Muslim system of jurisprudence. The contention put forward on behalf of the fourth defendant-appellant is that the learned Judge has failed to appreciate the Muslim Law of intestate succession and has proceeded to apply the Roman-Dutch Law. This contention appears to be sound.

Counsel for the other respondents sought to seek an avenue of escape from this argument by asserting that there was no specific issue raised as to whether the succession that was to govern the parties was to be determined according to the Muslim Law and relied upon the case of *John Sinno v. Pedris Hamy*[1] where the principle was laid down that in an action for partition where the Judge finds that the parties before it are entitled to the land sought to be partitioned it will be improper for the Judge to travel beyond the issues suggested by parties as crystallizing the contest between them and embarking on his own upon a determination of other questions in regard to which no notice had been given to the parties.

That case is clearly distinguishable from the present. Here, not only was the question of Muslim Law expressly referred to in one of the issues (see issue 3) where the question was whether the particular intestate's share devolved on brothers, sisters and the issue of deceased sister and brother, or on surviving brothers alone, but also evidence was led of the order in which the brothers and sisters, the admitted co-owners died, although it was in evidence that all but one sister died leaving issue. Had it been within the contemplation of the parties that the Roman-Dutch Law was the law to be applied, the only relevant question

[1] *(1947) 48 N. L. R. 345.*

would have been as to who were the persons who survived the sister who died without leaving children. I am therefore satisfied that the succession according to Muslim Law was asserted at least by the fourth defendant as forming the basis of devolution of this property.

One might start with the admitted facts, namely, that under the deed P1 of 1894, three sisters Sarah Umma, Amina Umma and Asia Umma became entitled to ¾ share and as there was nothing said in the deed as regards any particular method of division among them the presumption in law is that each of them was entitled to ¼ share and that is the basis on which the action has been fought. The remaining ¼ share was by deed P2 of 1894 gifted to their three brothers, Ismail Lebbe, the 4th defendant and one Hamidu Lebbe, each of them becoming entitled to a 1/12 share of the land.

It is common ground that Hamidu Lebbe was the first to die and that he died issueless; the plaintiff and the defendants other than the 4th defendant, who will hereinafter be referred to as the contesting defendant, were content to accept the position that on Hamidu Lebbe's death his share devolved on his two brothers, Ismail Lebbe, the father of the plaintiff, and the 4th defendant. It certainly was to the advantage both of the plaintiff and the contesting defendant that this proposition should find favour in the eyes of the other defendants but it is quite clear that the 4th defendant is a man of no principles whatsoever. He has been found by the learned District Judge to have been guilty of the most scandalous forgery that one can think of. The contesting defendant, who has vehemently advanced the proposition that the devolution follows according to Muslim Law, has even concealed the fact that even according to Roman-Dutch Law not only the brother but even the sisters would be intestate heirs of Hamidu Lebbe and that they would have inherited from him; so that the first point to be noticed is that the share of Hamidu Lebbe must be allotted not only to Ismail Lebbe and the 4th defendant but also to Sarah Umma, Amina Umma and Asia Umma, who by virtue of their being full sisters of the intestate became residuaries along with the surviving brothers and the share of Hamidu Lebbe will be distributed in the proportion of two to one as between males and females.

The next point that need be noticed is, who were the heirs of Sarah Umma who was the next co-owner to die. I see no reason to take a view different from that expressed by the learned District Judge that Sarah Umma had a daughter, the 5th defendant, and that at the date of her death she was survived by her husband; *vide* certificate of death 1D4. The contesting defendant, however, says that Sarah Umma died issueless and unmarried and that though the other parties may have shown that Sarah Umma died leaving a child and a husband, nevertheless that as the child of Sarah Umma was a daughter, the entire interests of Sarah Umma did not vest in her daughter, the 5th defendant. His contention is that not only was the daughter, the 5th defendant, an heir to Sarah Umma on the basis of the finding of the learned District Judge but that Sarah Umma's husband, Ali Uduma Lebbe Mohammedo Cassim, was an heir as well as the intestate's surviving brothers and sisters, namely, Ismail Lebbe, the 4th defendant, Amina Umma and

Asia Umma. The daughter being a sharer would take a half share of the interests of Asia Umma, the husband being another sharer would take a ¼ share of her interest and the remaining ¼ would vest in the residuaries, the brothers and sisters, who would take according to the principle well understood in Muslim Law that a male takes twice as much as a female.

he husband of Sarah Umma, Ali Uduma Lebbe Mohamedo Cassim, is not a party to these proceedings nor has anything transpired in the course of these proceedings to indicate whether he is alive or dead. If he is alive, he is a necessary party, otherwise his heirs would have to be added parties defendant. If no party is able to establish to the satisfaction of the Court within a reasonable time of the receipt of the record in that Court as may be specified by the District Judge that Cassim is alive or, if he be dead, who his heirs are, his share would remain unallotted and the Court will proceed to enter partition decree in respect of the remaining shares among the other co-owners.

The next co-owner to die was Asia Umma, one of the donees on P1, and the wife of the 6th defendant. The facts established show that Asia Umma herself died leaving a daughter and husband, but it will be clear from what I have said in regard to the devolution of the title of Sarah Umma's interests that the daughter and the husband do not themselves exhaust the entirety of the interests of the deceased, Asia Umma, but that her brothers and sisters would also be heirs. But as other parties including the contesting defendant were prepared to concede to the 3rd defendant, the purchaser from the husband of Asia Umma, a ¼ share, that ¼ share must be allowed to the 3rd defendant. This allocation is in consonance with the principle laid down in the Divisional Bench case of *Kumarihamy v. Weheragama*[1]. It will be apparent that Asia Umma was in fact entitled to more than a ¼ share because she inherited both from her brother, Hamidu Lebbe, and from her sister Sarah Umma. The proper method of dealing with Asia Umma's interests is that if on a devolution of the full interests of Asia Umma according to Muslim Law, it be found that at the date of her death the interests that vested in her daughter and her husband, the 6th defendant, were not less than a ¼, the deed 3D3 would be operative to the extent of the ¼ share conveyed by it and the excess will be treated as having devolved on the brothers and sister then surviving, namely, Ismail Lebbe, the 4th defendant and Amina Umma. If on the other hand, the entirety of the interests that vested in the daughter of Asia Umma and her husband, the 6th defendant, did not exceed a ¼, the deed 3D1 will be given effect to to the full extent, and no part of her interests would be treated as having devolved on any of her other heirs, namely, the brothers and sisters.

Ismail Lebbe was the next co-owner to die and all his interest would devolve on the plaintiff who is the son and who would as a residuary take the entirety of those interests.

Amina Umma was the last of the co-owners to die, and on her death all her interests vested exclusively on her brother, the 4th defendant. The contention of the plaintiff and the other defendants that the plaintiff

[1] *(1942) 43 N. L. R. 265.*

and the 5th defendant, who are the son and daughter of a deceased brother and deceased sister, respectively, are also heirs is a proposition that cannot be sustained under the Muslim Law. The principle of succession *per stirpes* is unknown to that system of jurisprudence. Besides, it is a well known doctrine that as among residuaries the nearer in degree to the intestate excludes the more remote. The 5th defendant, the niece of Amina Umma, is neither a sharer nor a residuary but she is in fact one who falls under the category of "distant kindred" who can take only on the failure of sharers and residuaries. She would therefore be excluded by the residuary, the 4th defendant.

As regards the plaintiff, he being a son of the full brother of the deceased is a residuary, but his rights must be postponed to those of the full brother who is a residuary but nearer in degree to the deceased than the plaintiff.

The judgment of the learned District Judge is set aside and a fresh decree will be entered, the shares being worked out on the basis of the devolution indicated above and, of course, having regard to what I have said in regard to the interests of Sarah Umma's husband.

The costs of partition will be *pro rata*, not exceeding ⅛ the value of the land. As the 4th defendant has not only failed with regard to a substantial part of the claim he made but has also been found guilty of perjury, I think the proper order to make is that he should be allowed no costs of contest in the lower Court to which otherwise he might have been entitled. As the 4th defendant has succeeded only partially in this Court, I would allow ½ costs of appeal as against the 1st and 2nd defendants. The 3rd defendant will bear his own costs.

WINDHAM J.—I agree.

Set aside.

[COURT OF CRIMINAL APPEAL]

1949 *Present:* **Canekeratne, Gratiaen and Gunasekara JJ.**

THE KING *v.* GUNATILLEKE

APPEAL NO. 17 OF 1949

S. C. 68—M. C., Gampaha, 46,118

Court of Criminal Appeal—Evidence of good character led by accused—Direction by Judge that evidence should not be taken into account—Misdirection—Relevancy of such evidence—Evidence Ordinance, section 53.

Where the accused led evidence of good character and the Judge in his charge directed the Jury as a matter of law that they "must not pay the slightest attention" to the evidence of good character—

Held, that there was a misdirection. In criminal proceedings the fact that a person is of good character is relevant under section 53 of the Evidence Ordinance and it is therefore a matter which the Jury should take into consideration before arriving at a verdict.