1913.

Present: Wood Renton A.C.J. and De Sampayo A.J.

UMMAH *v.* PATHUMMA *et al.*

67—D. C. Batticaloa, 677.

Muhammadan law—Collation.

The principle of collation cannot be grafted into the Muhammadan law of succession.

THE facts appear from the judgments.

Balasingham, for the defendants, appellants.—The intestate died before he could have executed a donation deed in favour of the appellants. He had executed donation deeds in favour of the other heirs. The respondents should either leave to the appellants the remaining property, or they must bring into hotch potch all the properties they had received by way of donation. [Bartholomeusz.—The parties are Muhammadans.] There is nothing in the record to show that the parties are Muhammadans. Even if they are Muhammadans, there is nothing in the Muhammadan law which expressly excludes the principle of collation.

It has been held that a *casus omissus* in any of the special laws is governed by the Roman-Dutch law. [De Sampayo A.J.—Ordinance No. 15 of 1876 specially excludes Muhammadans from the operation of its provisions.] The appellants do not rely on that Ordinance. They rely on the Roman-Dutch law.

The fact that this principle of the common law has been codified in the Ordinance is not a ground to deny the principle to the Muhammadans if they are otherwise entited to the benefit of it.

Tamils of Jaffna have been excluded from the operation of the Ordinance, and yet it has been held that in the case of a *casus omissus* in the *Tesawalamai* the general law of the country might be applied. *Puthatampy v. Mailvakanam.*[2]

[De Sampayo A.J.—The gifts were given for services rendered, and could not therefore be collated even under the Roman-Dutch law.]

[1] *(1897) 1 Ch. 196.*

[2] *(1897) 3 N. L. R. 42.*

It was conceded in the lower Court that the donations were executed for dividing the estate between the heirs. That is the evidence in the case, and there is no evidence the other way.

Counsel cited *Grotius 2, 11, 10; Van der Linden 1, 10, 3.*

Bartholomeusz, for the respondents, not called upon.

Cur. adv. vult.

June 20, 1913. WOOD RENTON A.C.J.—

The appellants are the daughter and the son-in-law respectively of Meera Lebbe Marikar, who died intestate in March, 1910. The respondents are respectively the widow and another son and daughter of the intestate. Before his death Meera Lebbe Marikar donated certain properties to the respondents. One of these donations was executed in 1908, and the other in 1909. It would seem that the intestate had intended to make a donation also in favour of his daughter, the first defendant-appellant, and that he gave instructions to a notary to prepare the deed of donation, but that he ultimately declined to complete the transaction, as her husband, the second defendant-appellant, would not pay him a sum of Rs. 100 which he demanded. The contemplated deed of donation in the appellants' favour was in fact never executed. The appellants claim the land which the intestate had intended to give to his daughter as their separate property, and if they cannot succeed on this point, contend that the respondents should be compelled to bring the properties comprised in their deeds into collation. The District Judge has over-ruled both contentions, and I think that he has done so rightly.

The appellants' counsel did not maintain before us in argument the contention that his clients could have any claim to the property which is dealt with in the abortive deed of donation, but he challenged the judgment under appeal on the point as to collation. It is clear from the record, although there is no affirmative evidence on the subject, that both the appellants and the respondents are Moors, and are, therefore, subject to the Muhammadan Code of 1806. That Code contains no provision for collation, and no such principle can be grafted into the Muhammadan law of succession, proceeding as it does on the principle of inequality of shares as between a widow and sons and daughters of a deceased intestate, whereas the very basis of the law of collation is equality of distribution.

The appeal, in my opinion, must be dismissed with costs.

DE SAMPAYO A.J.—

Collation is part of the Roman-Dutch law of succession to the estate of a deceased person; and as the Muhammadans in Ceylon have a special law of inheritance, I do not think that it is allowable to annex to the law governing Muhammadans an incident like collation which is peculiar to the Roman-Dutch law, whose whole

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fabric and spirit in respect of marriage and inheritance are so alien to the Muhammadan law. It is true that in such cases as *Puthatampy v. Mailvakanam* [1] and *Ibrahim Sayibu v. Muhamadu* [2] resort was had to the common law of Ceylon for the purpose of supplying omissions in special laws governing particular communities. But in my view it is not in every case of silence that the common law would be thus applied, but only where the Court is necessarily obliged to discover and apply some law to a new situation which would otherwise be left undetermined. In this case there is no such necessity for finding a way out of any insoluble problem. The Court is not bound to discover a law merely for the purpose of giving to the appellant a larger share of property than the estate left by the deceased at his death admits of. Moreover, the law regarding collation is now to be found in section 39 of the Ordinance No. 15 of 1876, which expressly excludes Muhammadans from its operation. The appellant, therefore, is obliged to fall back on the Roman-Dutch law pure and simple. Can this be allowed? To do so would be directly to set aside the expressed intention of the Legislature. There are also other reasons, even if the Roman-Dutch law applied, why the appellant cannot succeed. One of the lands which she seeks to have brought into collation is a land gifted as dowry to the intestate's granddaughter, Kasinavallebbe Kalendar Umma, daughter of Pattumah, the third respondent to this appeal. The granddaughter is not an heir of the deceased and does not claim any distributive share in his estate, and the land gifted to her cannot under any circumstance be the subject of collation. As to the gifts given to the widow, the first respondent, and to the son, the second respondent, they are not pure gifts, but come under the description of what Roman-Dutch writers call *munus* as distinguished from *donum*. The deed in favour of the widow especially recites that the gift is given in consideration of her having attended him and looked after him, supplying him with food and clothes and medicine, and also in consideration of *magar* due to her from the deceased, and the deed to the son also recites similar services rendered, and adds that the gift is given in consideration of such services and on condition that the donee should defray the expenses of the funeral of the donor at his death and perform certain specified religious ceremonies. These gifts are therefore remuneratory gifts, which Voet (*39, 5, 1*) says are not gifts properly so called. Such gifts are not liable to collation. (*Voet 37, 6, 13; Maasdorp's Institutes, vol. I., p. 154.*) Again, the gifts in favour of the first and second respondents are simple donations, and not donations *propter causas*, and as such are not subject to collation (*Cooray v. Perera* [3]).

The appeal fails in every respect, and I agree that it should be dismissed with costs.

Appeal dismissed.

[1] *(1897) 3 N. L. R. 42.* [2] *(1898) 3 N. L. R. 116.* [3] *5 S. C. 113.*