1914.

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

RABIA UMMA *v.* SAIBU.

71—D. C. Kandy, 3,019.

Muhammadan law—Right of wife to divorce husband on the ground of desertion—Expert evidence.

The Shafei law, which is applicable to Moormen in this Colony, recognizes the right of a wife in certain circumstances to divorce her husband on the ground of desertion.

The case was sent back to ascertain how far, if at all, and subject to what conditions, that right has been admitted as a matter of custom in Ceylon.

APPEAL from a judgment of the District Judge of Kandy (P. E. Pieris, Esq.). The facts appear from the judgment of Wood Renton A.C.J.

Hayley, for the intervenient, appellant.—The appellant, prior to her marriage with Ossen Saibu Mohamadu, had dissolved her marriage with Ahamadu Lebbe, and is therefore the legal wife of Ossen Saibu. Husband's inability to maintain or desertion is a good ground for divorce under the Muhammadan law. The wife may divorce the husband for desertion without the intervention of Court. Counsel cited *Amir Ali's Muhammadan Law, vol. II., p. 25 ; Tyabji's Principles of Muhammadan Law 168 ;* Muhammadan Code of 1806, sections 92 and 93; *Ageska Umma v. Abdul Carim*[1]*; Bandirala v. Mairuma Natchia* [2].

If the evidence of the nature of the ceremony required for a divorce is insufficient, the case may be sent back for further evidence on that point.

Bawa, K.C. (with him *J. W. Silva*), for the petitioner, respondent.—It is not open to a Muhammadan wife to get a divorce from a husband without an order of a Judge. There is no reason shown for not having led all available evidence at the trial, and for obtaining an indulgence from this Court to lead further evidence.

Counsel cited *Nell's Muhammadan Law 44 and 45; Tyabji, p. 170 (s. 211);* Muhammadan Code of 1806, sections 74 and 75.

Hayley, in reply.

Cur. adv. vult.

July 24, 1914. WOOD RENTON A.C.J.—

The question involved in this case is whether the intervenient, the appellant, Rabia Umma, was one of the legal wives of Ossen

[1] *(1880) 4 S. C. C. 13.* [2] *(1912) 16 N. L. R. 235.*

Saibu Mohamadu, who has died intestate, and whose estate is being administered by the petitioner, the respondent, his son-in-law. The learned District Judge has held that Ossen Saibu Mohamadu was legally married to the appellant, and that they lived together as husband and wife for some years, until his death, but that the appellant, before her marriage to Ossen Saibu Mohamadu, was the lawful wife of Ahamadu Lebbe. The respondent does not dispute the former of these findings for the purpose of this appeal, and the appellant accepts the latter. She contends, however, that, prior to her marriage with Ossen Saibu Mohamadu, her former marriage with Ahamadu Lebbe had been dissolved by her own act on the ground of his desertion. The learned District Judge held, on the materials before him, in the first place, that it was not competent for the appellant under Muhammadan law to dissolve her marriage with Ahamadu Lebbe in the manner which she indicated, and, in the next place, that even if such a dissolution could have been legally effected, the evidence was insufficient to show that it had taken place.

In regard to both of these points, the findings of the District Judge are, on the evidence with which he had to deal, in my opinion, quite right. The appellant did not call the Hadjiar, who, according to her, administered to her the oath of renunciation. Her witnesses, Mohamadu Tamby and Ana Mohamadu Lebbe, had the vaguest possible recollection of the character of the ceremony which they said they had witnessed. The evidence of Habibu Lebbe was obviously interested, and although the Lebbe by whom the appellant was married to Ossen Saibo was called, not a single question was put to him on her behalf with a view to showing that, according to the Muhammadan Code of 1806, a wife could divorce her husband on the ground of desertion without his consent.

After careful consideration, however, I have come to the conclusion that the case is one in which the appellant might fairly be allowed, on strict terms as to costs, the benefit of a further inquiry in the District Court. The Moormen of Ceylon belong to the Shafei sect (see *Amir Ali's Muhammadan Law, vol. II., p. 15*, and *Mangandi Umma v. Lebbe Marikar* [1]). According to Shafei doctrine, it would appear that a deserted wife has a right to a divorce on the ground of her husband's desertion, and it is stated that the Kazi may cancel the marriage in such a case, although the husband is absent (*cf. Amir Ali, vol. II., pp. 364-365 ; Hamilton's Hedaya, vol. II., p. 397 ;* and *Tyabji's Principles of Muhammadan Law 168.*) Sections 92 and 93 of our own Muhammadan Code would seem to recognize a similar right under circumstances which are not very clearly defined, and although the question whether a divorce of the character that we are here concerned with is competent in Ceylon was raised in *Ageska Umma v. Abdul Carim*,[2] it still remains undecided. So much

[1] *(1906) 10 N. L. R. 3.*

[2] *(1880) 4 S. C. C. 13.*

1914.

WOOD RENTON A.C.J.

Rabia Umma v. Saibu

for the law. On the facts, we have in the appellant's favour the circumstances that Ossen Saibu, to whom the learned District Judge gives a high character, is proved to have married her and to have lived with her as his wife until his death, and that according to Noohu Lebbe, who celebrated the marriage between them, and asked the bridegroom if his intended bride had another husband, the bridegroom replied that she had had another husband but had divorced him. In the case of *Pitche Umma v. Modely Atchy*,[1] the Supreme Court attached some weight to an admission of this kind when made by a defendant in proceedings raising a similar issue. Perhaps the admission above referred to should not be excluded altogether from consideration when it was made by an intestate through whom the respondent claims, and when the only question is whether or not there should be a further inquiry.

On the ground that I have stated I would set aside the order under appeal, and send the case back for further inquiry and adjudication in the District Court on the sole question whether or not the appellant was divorced from Ahamadu Lebbe. Noohu Lebbe should certainly be examined as a witness, and I would leave it open to either side to call whatever additional evidence as to either the custom of Ceylon Moormen in this matter or the fact of a divorce having been effected may be considered desirable. The appellant must pay all costs of this appeal, and the costs of the original proceedings in the District Court, except in so far as those may be attributable to the proof of her marriage with Ahamadu Lebbe and her subsequent marriage with Ossen Saibu. As to any costs so attributable, the order of the District Judge should stand.

I have not lost sight of the question whether, and, if so, how far, expert evidence as to the interpretation of the Muhammadan Code of 1806 should be admitted. There is no doubt but that it has long been the practice of the supreme Court to allow evidence to be taken as to what the customary law in force in this Colony is where uncertainty on the point exists. This practice (to go no further back) is recognized in *In re Segu Meera Lebbe Ahamadu Lebbe Marikar*[2] and *Cassim v. Peria Tamby*.[3] The recent decision of Sir Alfred Lascelles C.J. and Ennis J. in the case of *Lebbe v. Thameen*[4] might at first sight appear to be in conflict with it. It was there held that, on a question of pure law as distinguished from questions of usage or practice, where our Code of Muhammadan law is silent, the proper course is to refer to the standard text books on the subject, and not to resort to the opinions of experts. It seems to me, however, that the present case really comes within the category of questions of custom or usage. I have endeavoured to show above that the Shafei law, which is applicable to Moormen in this Colony, does recognize the right of a wife in certain circumstances to divorce

[1] *(1850) 3 Lorz. 261.*
[2] *(1890) 9 S. C. C. 42.*
[3] *(1896) 2 N. L. R. 200.*
[4] *(1912) 16 N. L. R. 71.*

her husband on the ground of desertion. That right is partially recognized in sections 92 and 93 of the Muhammadan Code itself. What has to be ascertained is how far, if at all, and subject to what conditions, it has been admitted as a matter of custom in Ceylon.

DE SAMPAYO A.J.—

This appeal raises several important questions under the Muhammadan law as prevailing in Ceylon. Shortly stated, they are (1) whether and for what causes a married woman can obtain a divorce without the consent of her husband; (2) whether a decree of Court is necessary for that purpose; and (3) if not, what are the formalities that should be observed.

Section 75 of the Muhammadan Code of 1806 states: "The bride wishing to be divorced is obliged to inform the priest thereof, who, after having deliberated with the commandants on both sides in the presence of the native commissioners, accedes to the divorce, which they are obliged to record; should the parties, however, not wish to abide by the decision, they shall be at liberty, according to custom, to lay their case before the competent Judge." The "commandant" and the "native commissioners" are no doubt those referred to in sections 70 and 71, whose intervention was required for the purpose of the marriage itself. The matrimonial affairs of the Muhammadans in those days would appear to have been strictly regulated, but these restrictive regulations have long since fallen into disuse, and the machinery provided no longer exists. Section 75, however, refers not to ordinary cases of divorce, but rather to proceedings in the nature of nullity of marriage for causes mentioned in section 74. In the present case a divorce is said to have been obtained for desertion and for failure to maintain the wife, and the sections more applicable to the case are 92 and 93, which, broadly read, seem to me to recognize the right of the wife to obtain a divorce for the causes just mentioned. This is in accordance with the general Muhammadan law as gathered from the recognized text books. See *Hamilton's Hedaya, vol. II., p. 397; Amir Ali's Muhammadan Law, vol. II., p. 25; Tyabji's Principles of Muhammadan Law 168.* The question as to the necessity for the intervention of a Judge is somewhat more difficult. The *Hedaya* puts it as if it is for the husband primarily to divorce his wife if he cannot maintain her properly, and if he does not do so, then the Kazee (*i.e.*, the Judge) is to effect the separation as his substitute. Amir Ali, however, distinguishes between the Mutazalas and the principal schools (*i.e.*, the Shafees and Shiahs), and says that the essential point of difference consists in the fact that, according to the Mutazalas, the order of a Judge is in every case necessary to constitute a legal divorce, and that therefore "a divorce is held to be invalid until confirmed by or effected in the presence of the Hakim-ush-sharaa." The last sentence here cited appears to show that

1914.

DE SAMPAYO A.J.

Rabia Umma v. Saibu

all that is absolutely required, even according to the Mutazalas, is that the divorce should take place in the presence of a Judge. Moreover, the Hakim-ush-sharaa or Kazee in this connection is not the Judge of a Court in the ordinary sense, but one having *quasi*-judicial authority among Muhammadans in matrimonial matters. However that may be, the point is that, according to the Shafees, to which the Ceylon Muhammadans belong, an order of a Judge is not required. Tyabji, *ubi supra*, is explicit on this point, for he lays down that "under Shiah and Shafee law a marriage may be annulled by the wife without the intervention of the Court on any of the following grounds," and then he proceeds to state the ground, among others, "according to Shafee, but not under 'Shiah law,' the husband's inability to provide maintenance for his wife." Amir Ali (*page 451*) shows that the inability may be wilful or otherwise.

In *Ageska Umma v. Abdul Carim*,[1] the question as to whether a Muhammadan wife could maintain an action for divorce on the ground of malicious desertion was discussed. But the main point considered was as to the applicability of the Ordinance No. 6 of 1847 to Muhammadans, and no decision was given on the general question under the Muhammadan law. The Court there rather deprecated reference being had to text books on Muhammadan law, but this practice has been recognized and sanctioned by *Lebbe v. Thameen*[2] when the subject is one of pure law or where the Muhammadan Code is silent or obscure, and I think that in the present case the somewhat imperfect provisions of the Muhammadan Code may rightly be elucidated and completed by the references I have above made. As to the necessity of the order of a Judge, it may be noted that the Code, while section 75 in the case of nullity of marriage refers a wife in the last resort to "a competent Judge," nowhere requires it for the purpose of a divorce under sections 92 and 93, and in illustration of how even the express provisions of the Code must of necessity be sometimes modified I may mention *Pitche Umma v. Modely Atchy*,[3] where it was held that in the absence, since the time of the British Government, of an official corresponding to the "commandant," the recording of tollocks under section 90 was no longer required, and that the fact of divorce may be proved by oral evidence.

I think that these authorities and considerations indicate that the wife, as much as the husband, may obtain a divorce before the priest by going through the proper formalities, but as the case is going back for further proceedings the matter may well be left open, so that the law as understood and applied among the Muhammadans in Ceylon may be more definitely ascertained. What the formalities are, so far as the evidence in this case goes, is a matter of some uncertainty. The witnesses appear to speak of some form

[1] *(1880) 4 S. C. C. 13.* [2] *(1912) 16 N. L. R. 71.*

[3] *(1850) 3 Lorz. 261.*

of declaration by the wife, repeated three times before the priest, which they refer to as *passe* or *paffor*. The District Judge is right in considering the evidence as unsatisfactory, both as to what the formality is and as to whether it was observed in this case. But in view of the fact that on the basis of a legal divorce the deceased Ossen Saibo Muhamadu, whose estate is administered in this case, *bona fide* married the appellant and lived with her until his death, and in view also of the fact that the issue to which the parties' attention was principally directed in the Court below was only as to a real marriage between the deceased and the appellant, I think that the appellant should have a further opportunity of satisfying the Court on the above points. The District Judge at such further inquiry should examine the Lebbe or priest who took part in the ceremony, and any witnesses whom either party may wish to call.

I would set aside the judgment appealed against and send the case back for further proceedings. I agree to the order proposed by the Chief Justice as to costs.

Sent back.