

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

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KHAN *v.* MARICAR.

159—D. C. Batticaloa, 3,671.

Muhammadan law—Code of 1806—Law applicable to immigrants from India professing the Muhammadan faith—Law relating to immovables—Lex loci rei sitæ—Donation—Acceptance—Delivery.

The Muhammadan law is based on religion, and is applicable to all followers of Islam; it applies to Malays and to immigrants from India known as the Coast Moormen.

The Muhammadan law is applicable not only in respect of movables and personal relations, such as marriage, but also with regard to immovable property situated in Ceylon. Where an Afghan donated a land to his minor son, held that the law applicable to the donation was the Muhammadan law and not the Roman-Dutch law.

DE SAMPAYO A.J.—It may be assumed then that, the property donated in this case being situated in Ceylon, the law of Ceylon governs. But why should this be the Roman-Dutch law and not the special law applicable in Ceylon to the parties concerned? The Muhammadan law in this respect is as much part of the local law as any other of the various systems of law prevailing in Ceylon. When a question arises as to the right to any immovable property wherever situated in Ceylon, it may be necessary to look for the law to some special law which prevails among the particular persons concerned.

THE facts and arguments appear from the judgment.

J. Grenier, K.C., and G. Koch, for the defendant, appellant.

H. Jayewardene and Balasingham, for the plaintiff, respondent.

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The plaintiff-respondent, who is a minor, claims in this action through his next friend a garden and tiled house which belonged to his father Palavan Khan, and which Palavan Khan gifted to him by deed P 1, dated November 6, 1910. The defendant, as trustee of the mosque at Puliyantivu, claims the same property by deed of gift dated March 1, 1912, from the same donor. It was admitted at the trial that Palavan Khan was an Afghan who had been long settled in Ceylon, and that his wife, the mother of the plaintiff, was a Moorish woman of Badulla. The case proceeded in the District Court on the assumption that Palavan Khan was, and that his son the plaintiff is, a Muhammadan by religion. He appears to have

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retained the donation deed of 1910 in his possession, and to have also continued in possession of the property donated. On the same day on which he executed the deed of donation in favour of the mosque he revoked the earlier deed in favour of the plaintiff. In his last will, which was executed on March 15, 1912, he made independent provision for the plaintiff, and excluded from the operation of the will the property donated to the mosque. Four or five days later Palavan Khan died.

The defendant relied in support of his claim to the property on the donation deed in favour of the mosque. He contended that the earlier deed in favour of the plaintiff was invalid, inasmuch as there had been no acceptance of the donation on the minor's behalf, and argued, in the alternative, that the plaintiff could not, in any event, retain the benefits conferred on him by the will and at the same time repudiate the donation, which the will specially mentioned, in favour of the mosque. The defendant's counsel, Mr. Joseph Grenier, however, at the argument of the appeal, conceded that we are not at present concerned with the question of election, and confined his argument to the first alternative contention. The plaintiff's answer to the defendant's case in regard to that point is that Palavan Khan and his sons are Muhammadans subject to the provisions of the Muhammadan Code of 1806, that under the Muhammadan law as it exists in Ceylon no acceptance of a donation by a father in favour of his son is necessary (*Affefudeen v. Periatamby*¹), and further, that by the same law such a donation cannot be revoked. Mr. Grenier, on behalf of the defendant, did not contest the correctness of this statement of the rules of Muhammadan law. But he denied that either the plaintiff or his father was a person to whom that law was applicable, and argued that Roman-Dutch law must determine the validity of the donation in the plaintiff's favour.

The learned District Judge held that the plaintiff and his father were subject to Muhammadan law, and I think that his decision was right. The Code of 1806 is extended by section 10 of Ordinance No. 5 of 1852 to " Muhammadans " in all parts of the Colony, and there is ample authority for the proposition that it extends to the whole Island (*In re; Mohamadu Canny*² and D.C. Batticaloa, 17,825.⁴) Muhammadan law recognizes no distinction between movable and immovable property,³ and the decisions of the Supreme Court show that no such distinction has been recognized in so far as the applicability of the Code to this Colony is concerned.⁵ There can, in my opinion, be no room for the application in Ceylon of any *lex loci rei sitæ* as regards immovable property. I do not think that Palavan

¹ (1911) 14 N. L. R. 295.

² (1866) Ram. 1863-68, 159.

³ Wilson's Anglo-Muhammadan Law, 3rd ed., p. 254 (1873).

⁴ (1877) Ram. 1877, 87.

⁵ Cp. D. C. Colombo, 59,578, Gren., D. C. iii., p. 28; *Cassim v. Periatamby* (1896) 2 N. L. R. 200.

Khan's last will itself can help us in solving the only question that we have at present to decide. By the Muhammadan law his donation in favour of his son was valid and irrevocable. The plaintiff is, therefore, entitled to succeed. I would dismiss the appeal with costs.

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It was argued in the Court below that, even if the Muhammadan law applied, the donation to the plaintiff was invalid because there had not been any delivery of possession, and *Affefudeen v. Periatamby*¹ was cited in support of that argument. But that decision itself shows, and it is good law, that actual change of possession is not necessary and constructive delivery is sufficient, and that a donation by a father to his minor son, as in this case, is one of the exceptions, because the continued possession of the father will be presumed to be on behalf of the minor son. The principal question was whether the Muhammadan law applied at all, because if it did, acceptance of the donation would admittedly not be necessary. It was admitted in the Court below that the plaintiff, and presumably his father Palavan Khan also, were Muhammadans; at all events, the arguments proceeded on the footing that Palavan Khan being an Afghan was a Muhammadan. The contention, however, was that in Ceylon the Muhammadan law applied only to native-born Muhammadans. There is no foundation for this contention, and it was not pressed in appeal, though the matter was put in a slightly different form. For it was suggested, but not seriously contended, that the Muhammadan law applied only to "Moors." But even this position cannot be maintained. It is true that the Muhammadan Code of 1806, entitled "Special Laws concerning Maurs or Mohammedans," was to be observed "by the Moors in the Province of Colombo." But it is clear that the words "Maurs" and "Mohammedans" were used as synonymous terms. When the Ordinance No. 5 of 1852 extended the Code to the whole Island, the only word used was "Mohammedans," and the Ordinance No. 8 of 1886, which provided a system of marriage registration for Muhammadans, is still plainer, and in section 17 speaks of "persons professing the Muhammadan faith." The Muhammadan law has certainly been applied without any question to Malays and to immigrants from India known as the Coast Moormen. The fact is that the Muhammadan law is based on religion, and is applicable to all followers of Islam. Even before the Ordinance No. 5 of 1852 the Supreme Court applied it to Moors in Kandy, observing that they were "governed by their own laws and customs of inheritance and marriage which are founded on their religion." (*Saibo Tamby v. Ahamat*.²)

¹ (1911) 14 N. L. R. 295.

² (1851) Ram. Reports 168.

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The main argument in appeal is that the Muhammadan law is applicable only in respect of movables and personal relations, such as marriage, and that with regard to immovable property the *lex loci rei sitæ*, that is to say, the general law of Ceylon, applies. But the Code of 1806 and Muhammadan law generally regulate inheritance and succession, and surely an estate may consist of immovable property. Ameer Ali's *Mohammedan Law*, vol. II., p. 151, is cited as an authority to the effect that the *lex loci* governs all questions which relate to immovable property. That is no new proposition or one special to India. There the learned author is discussing the question as to what law would govern the succession to the real estate of a Moslem, if, for instance, the property were situated in England, and he says that under the general rule of International law, whatever might have been the person's domicile, the *lex loci* and in the supposed case the English law would govern. There is no doubt as to that, nor, on the other hand, as to the Muhammadan law governing if the property were situated in India. This is the whole effect of the passage cited. It may be assumed then that, the property donated in this case being situated in Ceylon, the law of Ceylon governs. But why should this be the Roman-Dutch law and not the special law applicable in Ceylon to the parties concerned? The Muhammadan law in this respect is as much part of the local law as any other of the various systems of law prevailing in Ceylon. When a question arises as to the right to any immovable property wherever situated in Ceylon, it may be necessary to look for the law to some special law which prevails among the particular persons concerned. The special law or custom to be so applied may be, to borrow an expression from the judgment of the Privy Council in *Kumari Debi v. Chunder Dhabal*,¹ "a personal as distinguished from geographical custom," but it would nevertheless be a part of the local law of Ceylon. To hold otherwise would be to upset the law as applied for over a century to titles to immovable property, not only among men like Palavan Khan and the plaintiff, but among the entire Muhammadan population of Ceylon.

In my opinion the District Judge is right in applying the Muhammadan law to this case, and in upholding the validity of the donation by Palavan Khan to the plaintiff. The appeal should therefore be dismissed with costs.

Appeal dismissed.

¹ (1902) I. L. R. 29 Cal. 433.