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

1915.

MARIKAR *v.* MARIKÅR *et al.*

407—D. C. Puttalam, 2,515.

Muhammadan law—Marriage of boy of seventeen years of age—Father and grandfather dead—Application by paternal uncle for injunction to prevent marriage—Courts Ordinance, 1889, s. 87—Is consent of parents or guardian necessary to contract marriage?—Capacity to marry—Age of majority.

Where a paternal uncle of a Muhammadan boy of seventeen years of age (whose father and grandfather are dead) applied for an injunction to restrain the defendants from marrying the boy (second defendant's son) to first defendant's daughter,—

Held, the plaintiff was not entitled to the injunction prayed for.

Wood Renton C.J.—Even if the boy is to be regarded as a minor for the purposes of marriage, the plaintiff is not his *wali* or guardian for marriage.

No relative except a father or paternal grandfather has the power of contracting any marriage for a boy or a girl under the age of puberty.

Ceteris paribus, capacity to marry under the Muhammadan law is dependent on the attainment of puberty, provided that the *pubes* has also reached the age of discretion.

There is nothing in the provisions of section 1 of Ordinance No. 7 of 1865 (fixing twenty-one years as the legal age of majority in this country) that can be regarded as altering the Muhammadan law as to the effect of the attainment of puberty on the capacity to marry.

De Sampayo J.—The Court has no power to grant the injunction prayed for, as the alleged cause of action is not of the species of injury contemplated in section 87 of the Courts Ordinance.

According to Muhammadan law, not only has Cader Saibo Marikar (the boy) attained the age of "majority" and become capable of contracting himself in marriage, but the authority of the plaintiff as guardian, if any, has ceased.

THE facts are set out in the judgment of De Sampayo J.

A. St. V. Jayewardene, for plaintiff, appellant.

Samarawickreme (with him *Arseculeratne*), for defendants, respondents.

Cur. adv. vult.

December 16, 1915. Wood Renton C.J.—

This case raises an interesting point of Muhammadan law. The plaintiff, as the alleged *wali* or guardian for marriage of a boy Cader Saibo Marikar, brings this action for an injunction to restrain the

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defendants from marrying him to the first defendant's daughter, a girl Beebi. The second defendant is Cader Saibo Marikar's mother. The boy was born on October 12, 1898, and has, of course attained the age of puberty. The plaintiff is his eldest paternal uncle, and he claims that, according to Muhammadan law the proposed marriage cannot take place without his consent. The learned District Judge dismissed the action with costs, and, in my opinion, his decision is right.

The locale Muhammadan Code of 1806 throws no light on the question. But it is well settled that, subject to any customary modifications of its provisions, the Shafei law governs the status of Muhammadans in Ceylon. Now it is clear that, even if Cader Saibo Marikar is to be regarded as a minor for the purposes of marriage, the plaintiff is not his *wali*. No relative except a father or paternal grandfather has the power of contracting any marriage for a boy or a girl under the age of puberty[1]. The plaintiff's action fails, therefore, on this ground alone. But, in my opinion, it fails upon another ground also. *Ceteris paribus*, capacity to marry under Muhammadan law is dependent on the attainment of puberty, provided—a condition satisfied by the evidence in the present case—that the *pubes* has also reached the age of discretion. There are no doubt authorities to the effect that "puberty" and "majority" are one and the same.[2] But in so far as these *dicta* are accurate, they appear to me only to show that the age of puberty was regarded as a period of life with which legal capacity in its various forms might be treated as coinciding. "As a matter of fact," says *Ameer Ali*,[3] "the Islamic system recognizes two distinct periods of majority, one of which has reference to the emancipation of the person of the minors from the *patria potestas*, and the other to the assumption by them of the management and direction of their property. These two periods are designated as *bulugh* and *rushd*, the age of puberty and the age of discretion. There are cases, however, in which a boy or a girl may have arrived at puberty and may yet not be sufficiently discreet (possessed of understanding) to assume the direction of his or her property. In such cases the Muhammadan law separates the two ages of majority, and whilst according to the minor personal emancipation from the right of *Jabr*, takes care, in the minor's own interest, to retain the administration of his or her property in the hands of the legal guardian. If a minor should not be discreet at the age of puberty, he or she is presumed to be so on the completion of the eighteenth year, unless there is any direct evidence to the contrary".

The principle of two distinct periods of majority is expressly recognized in the Indian Majority Act, 1875.[4] I do not think that

[1] *Wilson's Digest of Anglo-Muhammadan Law, third edition, p. 410, s. 403.*

[2] *Hedaya 482, book 35, chapter 2.*

[3] *Vol. II, pp. 467 and 468.*

[4] *Act IX of 1875.*

there is anything in the provisions of section 1 of Ordinance No. 7 of 1865 fixing twenty-one years as the legal age of majority in this Colony that can be regarded as altering the Muhammadan law as to the effect of the attainment of puberty on the capacity to marry. The decision of the Supreme Court in *Muttiah Chetty v. Dingiriya*,[1] that a Kandyan woman under the age of twenty-one years does not, by virtue of her marriage, become capable of entering into and binding herself by a contract, is no authority by way of analogy for any such proposition. If we were to uphold the contention of counsel for the plaintiff on this point the result would be curious. Capacity to marry is acquired in the case of Kandyans at the age of sixteen as regards males, and twelve as regards females.[2] The Marriage Registration Ordinance, 1907,[3] validates marriages, so far as age is concerned, the male party to which has completed sixteen, or the female twelve, or, if a daughter of European or Burgher parents fourteen years of age. The Muhammadan Marriage Registration Ordinance, 1886,[4] contains no express provision upon the subject. But section 17 of that Ordinance enacts that "nothing contained in it shall be construed to render valid or invalid, merely by reason of its having been registered or not having been registered, any Muhammadan marriage which would otherwise be invalid or valid." It would be singular if the Legislature, after having made provision for the attainment of capacity to marry in all other cases at an age practically coincident with, or at least not far removed from, that of puberty, were to be held to have in substance postponed the age of puberty in the case of Muhammadans to that of ordinary legal majority. The provisions of the Muhammadan Marriage Registration Ordinance, 1886,[4] seem to me to corroborate the conclusion, at which I should have otherwise arrived, that no result of this kind was intended or has been brought about.

On these grounds I would dismiss the appeal, with costs.

DE SAMPAYO J.—

This is an extraordinary case, both in respect of its constitution and purpose and in respect of the point of law which it raises. The plaintiff is the paternal uncle of a minor, Cader Saibo Marikar, whose mother is the second defendant. The first defendant is the father of a minor named Beebi. It is admitted that Cader Saibo Marikar is in his seventeenth year and has attained puberty. The age of Beebi is not disclosed, but there is no dispute that she, though a minor, is of a marriageable age according to Muhammadan law. Both the father and paternal grandfather of Cader Saibo Marikar are dead. It appears that the first defendant and the second defendant have arranged a marriage between Cader Saibo

[1] *(1907) 10 N. L. R. 371.*

[2] *Amended Kandyan Marriage Ordinance, 1870, s. 12.*

[3] *No. 19 of 1907, s. 16.*

[4] *No. 8 of 1886.*

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Marikar and Beebi, and the plaintiff, alleging that he is "the guardian for marriage" of Cader Saibo Marikar, and as such entitled to contract a marriage for him, and that the proposed marriage, which has been arranged without the plaintiff's consent, is injurious to the interests of Cader Saibo Marikar and in violation of the planitiff's rights, asked for an injunction to restrain the defendants from marrying the first defendant's daughter Beebi to the said Cader Saibo Marikar. The defendants deny that the plaintiff is Cader Saibo Marikar's guardian for marriage, or that Cader Saibo Marikar requires any such guardian, or that the plaintiff's consent is necessary for the proposed marriage.

It will be noticed that the persons chiefly concerned, namely, the two minors, are not parties to the action, and I fail to see how a case so vitally affecting them can be determined in their absence. But, apart from that, it is a serious question whether a Civil Court has jurisdiction to interfere in such a matter as this. The minors are not wards of Court, and any marriage between them does not come within its ordinary cognizance, and no case has been cited to show that the Court can prevent a marriage between minors at the instance of a private individual. Under section 87 (1) of the Courts Ordinance the Court has power to grant an injunction restraining any act the commission of which "would produce injury to the plaintiff." In my opinion the plaintiff's alleged cause of action in this case is not of the species of injury contemplated in that section. If, as alleged, the proposed marriage is invalid without the consent or concurrence of plaintiff as guardian or *wali*, the parties immediately concerned may run a risk, but I have grave doubts as to the plaintiff's right to invoke the intervention of the Court to prevent the marriage. This appeal may, however, be disposed of on the question of Muhammadan law, which alone has been decided by the District Judge, namely, whether in the circumstances of this case the plaintiff is the guardian for marriage of Cader Saibo Marikar, and whether his concurrence is necessary for the proposed marriage.

I shall assume for the purpose of this case that the pure Muhammadan law on the point raised is applicable, though I entertain a doubt whether it has ever been adopted here, or is a part of the customary law locally observed.

The rule, according to the doctrine of the Shafie sect, to which the Ceylon Muhammadans belong, appears to be that a male minor can contract a marriage, without the assistance of the parents or guardian, when he attains puberty, but if he is below that age of maturity, then the marriage can only be contracted by the father or paternal grandfather, or in their absence by certain agnatic collaterals. If the marriage is contracted by the father or grandfather, the contract is absolutely binding, but if it be contracted by the other relatives referred to, the minor has the "option of

puberty," that is to say, he is at liberty to repudiate the marriage when he attains puberty. In this connection it may be noted that in both these cases the function of the guardian for marriage is not merely to give consent as understood in other systems of law, but he is the contracting party, and, as it were, marries on behalf of the minor. This circumstance has, I think, an important bearing on the question. For the reason why the intervention of the guardian for marriage is required appears to be that the minor cannot contract himself in marriage, and therefore needs some one else to contract it for him. Now, the age of capacity is the attainment of puberty, which is settled at fifteen years of age. This is sometimes spoken of as the age of majority also, because, as a rule, capacity and majority coincide. But it is clear from the recognized text-books on the Muhammadan law that they are not necessarily the same, and that there are, so to speak, two kinds of majority: one is majority for the purposes of marriage and is the same as puberty, and the other is majority in the general sense, which is conditional on the possession of " discretion ," that is to say, sufficient judgment for managing property and conducting business. The latter kind of majority cannot be attained before fifteen years of age, and may not be even then, if the minor has no " discretion." As authority for the above propositions I may refer to *Tyabji's Muhammadan Law, pp. 55, 89, and 95; Ameer Ali's Muhammadan Law, vol. I., p. 41, and vol. II, pp. 467 and 468; Wilson's Anglo-Muhammadan Law, pp. 98, 170, and 171.* According to Muhammadan law, therefore, not only has Cader Saibo Marikar attained the age of " majority " and become capable of contracting himself in marriage, but the authority of the plaintiff as guardian, if any, has ceased. But some difficulty arises out of the provisions of the Ordinance No. 7 of 1865, which fixes the legal age of majority at twenty-one years. In my opinionn the Ordinance has regard only to the attainment of legal majority for general purposes, or the majority which under the Muhammadan law is conferred by " discretion," and does not affect the age of capacity for purposes of marriage. Under the Marriage Ordinance applicable to persons generally in Ceylon, the capacity to contract a marriage is acquired before twenty-one years, but consent of parents or guardians is required up to that age. But as Muhammadans are expressly exempted from the operation of that Ordinance, no such consent is required in their case, provided that the age of capacity as determined by the Muhammadan law has been reached.

In my opinion the appeal fails and should be dismissed, with costs.

Appeal dismissed.