

Oct. 17, 1911

Present : Lascelles C.J. and Middleton J.

SHARIFFA UMMA *et al.* v. RAHAMATHU UMMA.

D. C. Kandy, 2,501.

Muhammadan law—Right to dispose of property by will—Ordinance No. 21 of 1844, s. 1.

The provisions of Ordinance No. 24 of 1844, section 1, enable Muhammadans in Ceylon to dispose of the whole of their property by will.

THIS was an application by the second petitioner for leave to appeal *in formâ pauperis*. The facts appear from the judgment.

Ahamado Lebbe (second petitioner) appeared in person in support of the application.

H. A. Jayewardene, for the respondent.

Cur. adv. vult.

¹ 4 *App. Cases* 733.

² 1 *I. R.* 76.

³ 20 *Ch. D.* 780.

⁴ 2 *Ch.* 684 : 67 *L. J.* *Ch.* 690.

October 17, 1911. LASCELLES C.J.—

This application has reference to the estate of one Pakir Tamby Habbibu Lebbe, who died at Kandy on July 5, 1906, leaving a will by which he bequeathed the bulk of his property to his widow, to whom probate was granted by the District Court of Kandy.

Oct. 17, 1911
 ———
Shariffa
Umma v.
Rahamathu
Umma

The testator, shortly before his death, had donated certain other property to his wife, and had also, in May, 1905, leased an estate known as Hakbawa to a Mr. Hayes, who appears as the third respondent to the petition. The widow, shortly after the will was proved, sold certain house property to the Kandy Hotels Company for, it is stated, Rs. 12,000.

In July, 1908, a petition was presented to the District Court by Pakir Tamby's widow Shariffa and Ismail Lebbe Marikar Ahamado Lebbe, who are respectively the mother and step-brother of the deceased, impeaching the will, on the ground that the testator could not, under the Muhammadan law, have legally disposed of so large a proportion of his estate, and praying that the will, the deed of gift executed by the deceased to his wife, the deed of transfer to the Kandy Hotels Company, and the lease in favour of the third respondent should be declared void, and also that they might be allowed to proceed with the matter of the petition *in formâ pauperis*. The petition was referred to a proctor under section 447 of the Civil Procedure Code. After a delay of over a year the proctor submitted a somewhat indefinite report, on which the learned District Judge made the following order: "I do not understand the proctor to say that the applicants have a good cause of action, and I must therefore reject the application." From this order the petitioners now appeal.

We are willing to waive technical objections, and to treat the appeal as an application for leave to appeal under section 778 of the Civil Procedure Code. The application, in my judgment, must be disallowed on at least two grounds.

In the first place, the applicants' claim cannot be made in the form of a petition in the testamentary action. The claim puts in question the title to valuable property which has been sold or leased by the testator or by his legatee to third parties for good consideration. A claim of this nature cannot be disposed of except by a duly constituted action, in which proper issues can be framed and tried. In the second place, the claim of the petitioners, based as it is on the ground that a Muhammadan in Ceylon cannot dispose of more than one-third of his estate, must inevitably fail. It is quite true that by Muhammadan law a testator cannot lawfully dispose of more than one-third of his estate; and before the passing of Ordinance No. 21 of 1844, the Courts in Ceylon gave effect to this rule of Muhammadan law in District Court, Colombo, 51,428.¹ But Ordinance No. 21 of 1844, by section 1, made it lawful for

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Oct. 17, 1911

LASCELLES
C.J.*Shariffa
Umma v.
Rahamathu
Umma*

“ every person competent to make a will to devise, bequeath, and dispose of by will all the property within the Colony which at the time of his death shall belong to him or to which he shall then be entitled.”

This provision has uniformly been construed to enable Muhammadans in Ceylon to dispose of the whole of their property by will, and the Muhammadan population in Ceylon has freely taken advantage of the privilege. There are, at present, two cases pending in appeal in which Muhammadan testators have disposed of the whole of their property by will, and though the wills are impeached on other grounds, the power of the testators to dispose of the whole of their property is not questioned in either case. The Indian authorities referred to by the second applicant are not in point, as there is in India no enactment which extends to all persons, without distinction of race or creed, the privilege of disposing of all their property by will. The point raised by the second applicant was raised in No. 241 Puttalam, Testamentary, where an appeal was filed against the ruling of the District Judge that the restriction imposed by Muhammadan law on the power of testamentary disposition was not in force in Ceylon. In appeal the judgment of the District Judge was affirmed without reasons stated, either because the Court considered the point too well established for argument, or possibly because the appeal was not pressed by counsel. In my opinion the application must be dismissed.

MIDDLETON J.—

I entirely agree, and have nothing to add.

Application refused.

