

Present: Lascelles C.J. and Ennis J.

1912.

LEBBE v. THAMEEN *et al.*

103—D. C. Galle, 10,612.

Muhammadian law—Expert opinion—Reference to text books where our Code is silent.

On a question of pure law (as distinguished from questions of usage or practice), where our Code of Muhammadian 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.

THE respondent instituted an action for the partition of a land, and among other shares claimed a one-fourth share which at one time admittedly belonged to one Mohamed Cassim Mariatho Umma.

Mariatho Umma died leaving her surviving her paternal grandmother Howwa Umma, a paternal uncle Mohamado Koya, and two uterine sisters, the appellants (children of her mother Rahimatho Umma by a second husband Mohamado Koya).

Mohamado Koya subsequently died leaving his mother Howwa Umma and two daughters, the appellants.

In the year 1907 Howwa Umma purported to convey the one-fourth share in question to one Uduma Lebbe Marikar Mohamed Cassim, who subsequently, in 1908, purported to convey the same to the plaintiff-respondent.

The plaintiff-respondent contended that Howwa Umma was sole heir of Mariatho Umma, and claimed the share in question through her on the two deeds of 1907 and 1908.

The eighth and tenth defendants-appellants, on the other hand, contended that under the Muhammadian law on Mariatho Umma's death her one-fourth share devolved as follows:—

Howwa Umma, one-sixth; the appellants, one-third jointly; and Mohamado Koya, half. That on Koya's death his half share devolved as follows:—Howwa Umma, one-fifth; and appellants, four-fifths of the said half of one-fourth share.

The learned District Judge (F. J. Smith, Esq.) delivered the following judgment:—

(1) The only question in this partition case is the manner in which the share (one-fourth) belonging to Mariatho Umma, who died childless, is to be distributed.

(2) The plaintiff claims the whole one-fourth by purchase from Howwa Umma, who represents herself the sole heir of Mariatho Umma, and who shows that before selling in 1907 she leased this share in

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October, 1902, for ten years (it is still under lease), her son Koyapulle signing the lease as a witness. Her lessee was called as a witness at the trial, and says he duly possessed the one-fourth, and the contesting defendants have been taking no share.

(3) Howwa Umma is the paternal grandmother of Mariatho Umma, and it is not seriously disputed that at her death Mariatho Umma left also her mother's second husband (her uncle before marriage) and her half-sisters by same mother, the eighth and tenth defendants, who now state that under the Muhammadan law they are entitled each to half (one-twelfth by one-tenth) as uterine sisters of Mariatho Umma and heirs of their father.

(4) The case is not one specially provided for by the Ceylon special "laws." But following the principles of Shafei law, as stated on pages 12 *et seq.* of Mr. F. H. de Vos's Manual, the paternal grandmother would get one-sixth as her "share"; neither the paternal uncle nor the "uterine sisters" are "residuaries," so the residue should return to the "sharer," and in effect the paternal grandmother inherits the whole. This is supported in the present case by the fact that the grandmother has been allowed to deal with the whole, with the full knowledge and consent of her son Koya, the father of the present claimants, and the presumption is, as stated by Mr. C. E. de Vos, that she dealt with what she was in fact entitled to.

(5) I find the plaintiff's title proved to the shares claimed by him. The first to third defendants have not appeared to contest the proposed distribution amongst themselves of the balance 25/72.

(6) I find the parties entitled to the shares and interests as named in the plaint and the surveyor's report (excluding third defendant from share of second plantation, claim to which he has not troubled to prove).

(7) Fifth defendant as lessee of a portion with a couple of years to run he will be entitled to occupy a proportionate part of the lot apportioned to plaintiff.

(8) Issue commission for partition. Costs payable *pro rata*.

(9) Enter preliminary decree accordingly. Contesting defendant to pay plaintiff extra costs of contest.

The eighth and tenth defendants appealed.

Bawa, K.C., for the appellants.

H. A. Jayewardene, for the respondent.

Cur. adv. vult.

August 20, 1912. LASCELLES C.J.—

In this case the only question is whether we are entitled to go beyond the terms of what is known as the Muhammadan Code in cases where that Code is found to be defective. It is admitted very fairly by the counsel for the respondent that, according to the rules of succession set out in Ameer Ali's Muhammadan Law, in Vandenberg's work on the Muhammadan Law, and also in Mr. de Vos's work on Muhammadan Law, the scheme of inheritance set out by the appellants in their petitions of intervention is correct, and that the judgment of the District Judge is erroneous. Now, I think

I am right in saying that it has been the practice of this Court for many years past to refer to text books of authority on questions of Muhammadan law where our own Code is defective, as it very often is. It would be easy to cite a large number of instances where this has been done, and personally I do not see how our own so-called Code can be understood or administered without reference to the text books on the subject. It is suggested that the proper course, when a difficult question of Muhammadan law arises, is to resort to the opinion of experts on Muhammadan law. It may be that there are cases in which that would be a reasonable course to adopt. But on a question of pure law, as distinguished from questions of usage or practice, it seems to me that the proper course is to refer to the standard authorities on the subject. There being no doubt at all as to the principles of succession that are applicable in this case, the judgment of the learned District Judge must be set aside and a decree entered in accordance with the scheme of shares set out in the appellants' intervention. The appellants are entitled to the costs of the appeal.

ENNIS J.—

I entirely agree, and have nothing to add.

Appeal allowed.

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LASCHELLES
C.J.

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