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No. 37 of 1951.

In the Privy Council.

ON APPEAL  
FROM THE SUPREME COURT OF

UNIVERSITY OF LONDON  
W.C.1  
CEYLON.

21 JUL 1953

INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN—

A. H. M. ABDUL CADER  
(Petitioner) *Appellant*

— AND —

1. A. R. A. RAZIK
2. AMEENA UMMA wife of A. R. A. RAZIK
3. ALAVEE MAZAHIMA wife of M. S. M. SHAFEEK
4. HAMEEDA SITHY ZUBEIDA  
(Respondents) *Respondents.*

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CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from a judgment of the Supreme Court of Ceylon dated the 28th September, 1950, affirming a judgment and order of the District Court of Colombo dated the 2nd August, 1948, on a Petition brought by the Appellant with regard to the guardianship of the person and custodianship of the property of the fourth Respondent (hereinafter called Zubeida) an infant daughter of the Appellant. pp. 69-74; p. 74. pp. 58-66.

2. The basic question which arises for determination on this appeal is whether a marriage entered into by Zubeida when she was just over 15 years of age was valid. This involves as the principal subsidiary questions:—

- (a) whether a Muslim girl of the Shafi Sect can at any age prior to majority herself change her ancestral law based on her religion;

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(b) whether, if Zubeida had effectively ceased to be a Shafi and become a Hanafi, she required according to Muslim law as applied in Ceylon a marriage guardian (Wali) to consent to the marriage;

(The Shafi and Hanafi sects are sub-divisions of the Sunni Moslems).

(c) whether, if Zubeida did require a Wali, any person other than her father the Appellant could according to Muslim law as applied in Ceylon be her Wali.

3. It is necessary in the first instance to set out the relationship 10 of the parties to these proceedings and the undisputed order of events. They are set out in paragraphs 4 to 9 of this Case.

p. 8, l. 27.  
p. 8, l. 35.  
p. 37, l. 37—  
p. 38, l. 10.

p. 37, l. 42—  
p. 38, l. 1.

4. Zubeida was born on the 12th October, 1932, her father being the Appellant and her mother one Sithy Hajara, who died on the 17th December, 1932, i.e., roughly two months after Zubeida's birth. The parents of Sithy Hajara, who are the maternal grandparents of Zubeida, are A. R. A. Razik, the first Respondent, and his wife Ameena Umma, the second Respondent. Zubeida lived with them and was brought up by them from the date of her mother's (Sithy Hajara's) death. Relations between the Appellant and the grand- 20 parents were strained as a result of his subsequent remarriage and it was asserted that he had not been to their house since Sithy Hajara's death.

pp. 8-10.

p. 9, l. 38.  
p. 9, l. 41.  
p. 9, l. 1.

5. Sundry disputes having arisen as to the administration of properties alleged (some admittedly, but some disputably) to be properties to which Zubeida was entitled, the Appellant on the 14th March, 1947, filed in the District Court of Colombo the Petition out of which this Appeal arises asking for the appointment of a guardian of the person of Zubeida and of a curator over her property. In this Petition he suggested the third Respondent—an adult married sister 30 of Zubeida—as the guardian of the person and himself (being already the duly appointed administrator of Sithy Hajara's estate) as curator of her property.

Supplementary  
Record,  
pp. 1-4.

6. On the 29th May, 1947, Zubeida's grandparents, the first and second Respondents, filed a petition in the said District Court praying for the dismissal of the Appellant's said Petition, and alternatively for an order for the appointment of one Mohamed Fuard as curator of Zubeida's property and of the second Respondent as guardian of the person and guardian *ad litem* of Zubeida.

pp. 8-10.  
p. 12, ll. 33-8.  
p. 13, ll. 5-12.

7. At a hearing of the Appellant's said Petition on the 31st 40 October, 1947, the District Judge directed that a guardian *ad litem* of Zubeida should be appointed, and at a resumed hearing on the 5th December, 1947, the Appellant accordingly submitted papers

for such appointment. Zubeida being on that date allegedly incapable of attending Court owing to illness, the proceedings were adjourned.

8 When the proceedings next came on for hearing on the 23rd January, 1948, Counsel appeared stating that he was instructed by a proctor for Zubeida, who, it was alleged, had married one Rasheed bin Hassim on the 11th December, 1947, and was in consequence no longer in need of a guardian *ad litem*. For the Appellant it was replied that the alleged marriage could not in law be valid as he, Zubeida's father, was the only person entitled by Muslim law to be her Wali, and he had not been present at or given his consent to the alleged marriage; and further, that in any case marriage did not confer majority upon a Muslim girl so as to dispense with the need for a guardian *ad litem* or a custodian of property. The proceedings were then adjourned.

9. At a subsequent hearing on the 3rd February, 1948, it was agreed between the parties, and ordered by the Court, that an enquiry should be held on these questions, being directed in the first instance to the issue as to the validity of the alleged marriage of Zubeida.

10. The enquiry was held on the 24th March, and the 14th, 15th and 16th July, 1948. On the first day evidence was given by A. J. M. Warid the Lebbe attached to the Grand Mosque, New Moor Street, Colombo, who was also a registrar of marriages, as to the celebration of the alleged marriage on the 11th December, 1947, at the house of the first and second Respondents, and as to its registration. He produced in evidence in addition to (X1) the certificate of registration, three documents which had been handed to him, namely (1) a "letter of authority" (X3) dated the 9th December, 1947, signed by Zubeida purporting to appoint her maternal uncle Zahir Mohideen to act as her "agent, Wali and Wakil" to give her in lawful wedlock to Rasheed bin Hassen and to take all necessary steps in that behalf; (2) an affidavit (X4) dated the 9th December, 1947, in which Zubeida purported to declare that she had passed the age of bulugh (puberty) and the age of discretion and that she belonged to the Hanafi Sect and followed her religion according to the rites of that Sect; and (3) a letter (X2) from Zubeida to himself dated the 11th December, 1947, asking him to marry her to Rasheed bin Hassen according to Hanafi law. Warid himself was a Shafi but according to him he could at any moment declare himself a Hanafi and then revert to being a Shafi whenever he wanted to.

11. Zubeida next gave evidence, the gist of which was that she had decided when she was 10 that she was going to marry Rasheed, that she married him when she did because she had been summoned

p. 37, ll. 29-33. to go to Court and did not wish to appear there as an unmarried girl; that she had signed the aforesaid documents X2, X3 and X4; without any compulsion; and that, though she could not remember what some of the terms used meant, they had been explained to her at the time. She added, however, that no one had told her what Wali or Wakil meant and that she did not know. She said she had attained puberty at the age of 12, and had been brought up by her grandmother as a Hanafi, but she made it quite clear that she knew of the existence of only one Sect, the Hanafi.

pp. 37-47. 12. The first Respondent was the only other witness. He said 10  
 p. 38, l. 42. that originally he had been a Shafi but had changed to Hanafi ten  
 p. 38, l. 13. years previously. His wife, the second Respondent, had always, he  
 p. 38, ll. 10-14; said, been a Hanafi, and he and his wife had brought up Zubeida,  
 27. his wife saying her prayers with her. His daughter, Zubeida's  
 p. 39, ll. 33-4. mother, was also brought up as a Hanafi. Some doubt was cast on  
 p. 82. his evidence by a document (P.1.) by which he stood, in which as  
 p. 39, l. 41; recently as 1943 he had informed the Public Trustee that his  
 p. 40, l. 14. daughter Sithy Hajara had belonged "to the Shafi Sect and not to  
 "the Hanafi Sect".

p. 38, ll. 14-15. He frankly admitted that he has brought up Zubeida as a Hanafi 20  
 p. 40, l. 42. with the deliberate object of enabling her to get married without  
 p. 44, l. 44. her father's consent.

p. 61, ll. 33-35. 13. It is proper to record that the District Judge decided that  
 p. 65, ll. 38-9. Zubeida was brought up as a Hanafi and belonged to the Hanafi  
 p. 71; ll. 31-3. school of law and in the Supreme Court agreement was expressed  
 with this finding. In so far therefore as this question was a pure  
 question of fact, there are concurrent findings against the Appellant.  
 It is submitted, however, that the validity of her adherence to the  
 Hanafi Sect is a matter of law which is open to debate.

p. 17, ll. 12-14. 14. On the legal aspects of the case certain matters are not in 30  
 p. 17, ll. 3-5. dispute. On the one hand, according to Shafi law, there can be no  
 valid marriage without a guardian for the woman, and the right to  
 this guardianship devolves according to the law of inheritance, i.e.,  
 in the first instance on the father. In Ceylon the Kathi in certain  
 circumstances can dispense with the proper Wali and act himself.  
 p. 17, ll. 15-30. On the other hand, according to strict Hanafi law, a guardian for the  
 woman can be selected by the bride of her own free choice without  
 p. 38, ll. 14-15; reference to any question as to who is the nearest agnate. That was  
 p. 40, ll. 42-4. the basis of the first Respondent's evidence as to his object in bring-  
 ing up Zubeida as a Hanafi. 40

p. 68, l. 25. 15. Within this admitted legal background, the first question  
 which arose was whether Zubeida, the child of a Shafi father and a  
 Shafi mother, was a Hanafi. As already indicated, the answer to

10 this question, in so far as it was a question of fact, has been concurrently found by the Courts in Ceylon in the affirmative. In so finding, however, each court, or at any rate the District Court, has accepted as valid decisions in Indian Courts as to the right of a woman to elect her sect—in one case (*Hayat-Un-Nissa v Ali Khan* (1890) *L.R. 17 I.A. 73*) by reverting after the death of a Shia husband to the Sunni sect; in another case (*Muhammed Ibrahim v. Gulam Ahmad* (1864) *1 Bomb. H.C. 236*) by a bare election after attaining the age of puberty. The latter case was decided largely on the basis of the opinion of the Kazi of Bombay and is, it is submitted, contrary to all principle. Mohammedanism is a strongly personal and ancestral religion, from which it inevitably follows that by birth a child acquires his or her religion from the parents, and no change in this acquired religion can be effective in law unless and until the child has reached, not merely the age of puberty, but an age at which he or she is capable of understanding by a rational intellectual process the inherent religious and legal differences as between one sect or another and their significance. A purported choice by an infant who knows of the existence of only one sect, and does not even know she is making a choice, still less understand the alternatives between which she is choosing, cannot in any principle of law be a choice at all. Nor, it is submitted, can the bringing up of a child according to any particular sect be a determining factor as against her inherited ancestral law, unless and until she is capable intellectually of appreciating and approbating what has been done on her behalf.

16. If, contrary to what is submitted above, it is held that Zubeida must be regarded as having effectively become a Hanafi, the second question which arises is whether the strict Hanafi law as set out above was applicable, or whether on the contrary a different and more limited law was applicable so far as Ceylon was concerned. The Appellant submits that the latter is the true view. Historically, the legal position of Muslims in Ceylon begins with the Muslim Code of 1806 (Vol. 1 Legislative Enactments of Ceylon 1st Ed. p. 34) promulgated in the very early days of British rule. It may well be, as was said in the Supreme Court in the present case, that this code was promulgated at a time when it was believed that all Mohammedans in Ceylon were members of the Shafi Sect; it may even be that it was not then appreciated that there were more than one Mohammedan sect; certainly the Code was soon found to be a rough and ready performance, and Judges with scholarly temperament were quite prepared to supplement its somewhat bare provisions by amplifications derived from the original Mohammedan texts. They were also prepared to find that inhabitants of Ceylon even though Muslims, were ready and willing to be bound in some

matters by the Roman Dutch Common law of the Island where it was in conflict with the Muslim Code. There is, however, no case in which, Muslim law being applicable, it has been held that it could be applied in a sense contrary to the express terms of the 1806 Code. And there is no doubt that this Code postulated the assistance of a Wali as an essential ingredient in the validity of any Muslim marriage.

17. It is, of course, true that the 1806 Code was repealed piecemeal by subsequent legislation. So far as inheritance was concerned it was repealed in 1931 by the Muslim Intestate Succession and Wakfs Ordinance (Chapter 50 of the Revised Legislative Enactments of 1938); and by Section 2 of that Ordinance it was provided that the Muslim law governing the sect to which the deceased belonged should be applicable. By contrast, it was provided in the Muslim Marriage and Divorce Ordinance 1934 (which became law in 1937 and is now Chapter 99 of the Revised Legislative Enactments of 1938) that the repeal of Sections 64 to 102 of the 1806 Code should not affect the Muslim law of marriage and divorce and the rights of Muslims thereunder. From other contexts in this Ordinance it is clear, it is submitted, that it refers to Muslim law as received in Ceylon, and that according to that law a Wali is a prerequisite for the validity of the marriage of any Muslim woman. 10

18. On the third question it is submitted that, even if Zubeida be held to be of the Hanafi Sect, so far as her Wali is concerned she was not entitled to the freedom of choice accorded in other parts of the world to Hanafi women. The Muslim law applicable to her Wali was the Muslim law as received in Ceylon which, rightly or wrongly, was based upon the law of the Shafi Sect which by common consent is the sect to which the vast majority of Ceylon Muslims belong. It is submitted that the Code of 1806 is demonstrative of the basic principles of Muslim law as received in Ceylon and that, however capable that Code may be of further refinement, explanation and even expansion by reference to the basic Mohammedan texts, nothing is admissible which is contrary to its essential intendments. 30

19. In any event it is submitted that a free choice of a Wali cannot be exercised in Ceylon even by a Hanafi woman until she attains majority, and that that for all legal purposes is fixed at 21 years (Ch. 53 of the Revised Legislative Enactments 1938).

20. After elaborate argument on the above legal questions the Additional District Judge of Colombo delivered his Order on the 2nd August, 1948, rejecting the arguments for the Appellant and holding for the reasons he gave that the marriage of Zubeida was valid. 40

21. On appeal by the Appellant to the Supreme Court this Order of the Additional District Judge of Colombo was upheld by the Supreme Court on the 28th September, 1950, and a decree of the Supreme Court of the same date was entered accordingly.

pp. 70-74.

p. 74.

22. Between the hearing in the District Court and the hearing in the Supreme Court a settlement was arrived at of the issue as regards the curatorship of the property of Zubeida, the parties agreeing that Rasheed bin Hassan, Zubeida's alleged husband, should hold this office. The agreement was, however, without prejudice to the rights of either party with regard to the validity of the marriage which obviously is of much wider import.

p. 69, ll. 10-14.

23. The Appellant applied for leave to appeal to His Majesty in Council from the said judgment and decree of the Supreme Court of Ceylon and this was granted conditionally on the 12th October, 1950, and by final decree dated the 24th October, 1950.

pp. 76-77;

pp. 79-80.

24. The Appellant humbly submits that this appeal ought to be allowed and the judgment and decree of the Supreme Court of Ceylon dated the 28th September, 1950, and the Order of the District Court of Colombo dated the 2nd August, 1948, set aside, and in lieu thereof a decree should be entered declaring the said marriage invalid for the following among other

#### REASONS.

1. BECAUSE Zubeida, as a child of parents of the Shafi Sect, was bound by Shafi law.
2. BECAUSE nobody other than Zubeida could effect a change in her personal ancestral law.
3. BECAUSE no change of her personal ancestral law by Zubeida effected before she attained an age to understand what she was doing was of any legal effect.
- 30 4. BECAUSE, Zubeida being bound by Shafi law, any marriage purported to be contracted by her was invalid if effected without the consent of her father as Wali.
5. BECAUSE, even if Zubeida had effectively changed to the Hanafi Sect, the law applicable to her in Ceylon still required the consent of her father as Wali to make a marriage valid.
6. BECAUSE, even if Zubeida had effectively changed to the Hanafi Sect, no choice by her of a Wali could be made until she reached the age of twenty-one years.
- 40 7. BECAUSE, the Order of the District Court and the judgment and decree of the Supreme Court were wrong and ought to be reversed.

D. N. PRITT.

STEPHEN CHAPMAN.

In the Privy Council.

**ON APPEAL**

FROM THE SUPREME COURT OF CEYLON.

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**BETWEEN :**

**A. H. M. ABDUL CADER**

(Petitioner) *Appellant*

— AND —

**1. A. R. A. RAZIK**

**2. AMEENA UMMA** Wife of **A. R. A. RAZIK**

**3. ALAVEE MAZAHIMA** Wife of **M. S. M. SHAFEEK**

**4. HAMEEDA SITHY ZUBEIDA**

(Respondents) *Respondents.*

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**CASE FOR THE APPELLANT.**

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