

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Seyyed Yaseen Mowlana Seyyed Hussain
Moulana,
No. 8/4, 4/1,
Harmers Place,
Off Harmers Avenue,
Wellawatte, Colombo 6.
Respondent-Petitioner-Appellant

CA CASE NO: CA/LA/05/2017

BOARD OF QUAZIS CASE NO: 22/2017/R/CMB

QUAZI COURT OF COLOMBO SOUTH CASE NUMBERS:

6057/WM, 6058/CM, 6059/CM, 6060/CM

Vs.

Fathima Sharmila,
No. 64/19,
Pepiliyana Cross Road,
Nedimala, Dehiwela.
Applicant-Respondent-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Yoosuff Nasar for the Appellant.

N.M. Sheheid for the Respondent.

Argued on: 31.05.2018

Written Submissions: No Submissions were filed by the Appellant.

By the Respondent on 06.07.2018.

Decided on: 04.09.2018

Samayawardhena, J.

The respondent-petitioner-appellant (appellant) filed this application under section 62(1) of the Muslim Marriage and Divorce Act, No. 13 of 1951, as amended (the Act), seeking leave to appeal against the order of the Board of Quazis dated 13.05.2017 whereby the revision application of the appellant dated 27.04.2017 to quash the maintenance orders made against him by the Quazi Court of Colombo South dated 31.01.2015 was dismissed even without notice being issued on the applicant-respondent-respondent (respondent). By the said maintenance orders, the appellant was ordered to pay maintenance to the respondent and the three children.

Counsel for both parties agreed the leave matter and the main appeal to be taken up together, and made brief oral submissions on 31.05.2018. Then counsel for both parties were directed to file comprehensive written submissions on or before 29.06.2018 with a copy to the Attorney-at-Law of the opposite party, and submissions in reply if any on or before 20.07.2018, and fixed the matter for the Judgment. However only counsel for the respondent has filed written submissions and no written submissions have been filed on behalf of the appellant.

Counsel for the respondent takes up a preliminary objection to the maintainability of this application. Section 62(1) of the Act, which confers jurisdiction to the Court of Appeal in respect of orders made by the Board of Quazis, reads as follows: "*Any party aggrieved by any order of the Board of Quazis on any appeal under section 60 may, with leave of the Court of Appeal first had and obtained, appeal to that Court from such order.*" Section 60 refers to appeals to the Board of Quazis from orders of Quazis. Counsel

argues that an order dismissing the revision application filed before the Board of Quazis under section 44 of the Act is not an order of the Board of Quazis "*on any appeal under section 60*" and therefore application for leave to appeal against such order of the Board of Quazis under section 62(1) of the Act is misconceived in law. Counsel does not cite any authorities to buttress this argument as if this argument is presented for the first time before this Court.

However, I find that this is not the first time that argument has been taken before the Court of Appeal. To mention two contradictory Judgments, in *Ameera Jabir v. Yasmin Jabir nee Nazick*¹ this argument has been accepted, but in *Rizniya v. Naushad*² it has been rejected.

If section 62(1) is inapplicable, it is interesting to note that counsel for the respondent does not state the applicable section of the Act under which the aggrieved party can come before the Court of Appeal against an order of the Board of Quazis made in a revision application.

There is no dispute that sections 43 and 44 of the Act deal with the revisionary powers of the Board of Quazis. Section 44(3) thereof reads as follows: "*Every order made by the Board of Quazis under this section shall have the same effect as an order made on appeal from an order made by a Quazi.*" Hence it is clear that an order made by the Board of Quazis on a revision application shall have the same effect as an order made on appeal from an order made by a Quazi, and therefore is circumscribed by section 62(1), which, if I may repeat, states, "*Any party aggrieved by any order of the Board*

¹ [1991] 1 Sri LR 282

² [2002] 2 Sri LR 343

of Quazis on any appeal under section 60 may, with leave of the Court of Appeal first had and obtained, appeal to that Court from such order". Hence I overrule the preliminary objection.

The main ground upon which the revision application has been dismissed by the Board of Quazis *in limine* is the long delay in filing the application—a delay of two years and three months from the orders of the Quazi Court. The Board of Quazis states that "*no explanation to this delay has been given by the petitioner.*" Admittedly, if the delay can be explained, that shall not be a ground for dismissal of the application *in limine*. (*Bisomenike vs. Cyril de Alwis*³, *Gnanapanditham & another vs. Balanayagam and another*⁴, *Camil v. Podimenike*⁵, *UDA v. Wejayaluxmi*⁶)

According to P16—a Report from the Quazi of Colombo South in relation to proceedings of Fasah Divorce filed by the respondent—the respondent wife is admittedly living in adultery, and the three children have been left by the respondent in Malaysia against the wishes of the petitioner. The appellant does not at least have access to the children. It is to those four, wife and three children, the Quazi has ordered the appellant to pay maintenance.

The petitioner had been unhappy with the way the inquiry into the maintenance was conducted by the Quazi. The maintenance orders have been made on 31.01.2015.

Soon after the maintenance orders were made on 31.01.2015, according to the impugned order of the Board of Quazis, the petitioner has complained against the Quazi alleging *inter alia* bias

³ [1982] 1 Sri LR 368 at 379

⁴ [1998] 1 Sri LR 391

⁵ [2012] 1 Sri LR 190

⁶ [2006] 3 Sri LR 62

to the Board of Quazis on 05.02.2015 and to the Judicial Service Commission on 10.02.2015. The Secretary to the Board of Quazis by letter dated 16.02.2015 has informed the petitioner to make a formal complaint following the proper procedure, and the Secretary to the Judicial Service Commission by an undated letter in April 2015 (P6) has appointed Quazi in Colombo North to hear and determine these maintenance applications. When the Judicial Service Commission appoints a new Quazi in April 2015 to hear and determine the maintenance applications, the appellant had been satisfied that his grievances would be addressed by the new Quazi.

However the appellant has been arrested by the police and produced before the Magistrate's Court on 27.03.2017 upon failure to pay maintenance in terms of the order of the Quazi dated 31.01.2015. It is thereafter, the petitioner has filed the revision application before the Board of Quazis. It is my considered view that the delay is explainable and therefore it should not have been a ground for refusal of the application. The Board of Quazis has gone wrong on that point.

The Magistrate's Court proceedings have commenced upon receipt of the Certificates of Enforcement sent by the Quazi Court. It is the position of counsel for the respondent that the letter of the Judicial Service Commission in April 2015 appointing another Quazi was received by the Quazi who made the maintenance orders on 09.05.2015 and the Certificates of Enforcement were sent to the Magistrate's Court on 06.05.2015.

When an official letter is received by any Court or any institution, it is the practice to place the date stamp on the said letter to signify the date of receipt of that letter. However I find no such

date stamp placed on the letter sent by the Judicial Service Commission in April 2015 to establish that it was received by the former Quazi on 09.05.2015.

According to the Magistrate's Court proceedings (P14), the 1st Journal Entry is dated 21.12.2015 and there is no indication whatsoever that the Magistrate's Court received the Certificates of Enforcement on or around 06.05.2015.

The sheet of Journal Entries prepared separately by the Quazi does not seem to me to be a contemporaneous record maintained by the Quazi Court as it is done in any other Court.

In any event, when the Judicial Service Commission has taken the matter out of the former Quazi and appointed another Quazi in April 2015 to hear and determine the matter, the former Quazi cannot deal with that matter anymore. Therefore, the former Quazi has no authority to send the Certificates of Enforcement to the Magistrate's Court in May 2015. The new appointment is effective not from the date of the receipt of the letter but from the date of the letter. The Board of Quazis has not considered this fundamental matter in its order.

For the aforesaid reasons, I set aside the order of the Board of Quazis dated 13.05.2017 and the order of the former Quazi dated 31.01.2015 and direct the new Quazi appointed by the Judicial Service Commission by the letter in April 2015 to hold a fresh inquiry into the maintenance applications filed by the respondent and make a suitable order according to law. The Certificates of Enforcement sent to the Magistrate's Court shall be recalled.

Appeal allowed. No costs.

Judge of the Court of Appeal