
MOHAMED MUZNIY**Vs.****FATHIMA RIZNA**

COURT OF APPEAL
NAWAZ, J.
CALA 1/2014
BQ- 166/2010
QUAZIS UDUNUWARA 727/M

Muslim Marriage and Divorce Act, No. 13 of 1951, sections 47(1) (a) and (b), 60, 63(a) — Fourth and Fifth Schedules to the Act—Rule 1(b) of the Fifth Schedule—Maintenance order by Quazi—Appealable time—Discretion of the Board of Quazis to entertain appeals filed out of time—Lex non cogit ad impossibilia

The Quazi made the order of maintenance on 27. 04. 2010 and the order dated 10. 05. 2010 was posted to the appellant on 19. 05. 2010. The appellant preferred an appeal to the Board of Quazis on 08. 06. 2010. The Board of Quazis dismissed the appeal on the basis that the appeal was not filed within thirty days from the date the order was made, as stipulated in section 60(2) read with Rule 1 (b) of the Fifth Schedule to the Muslim Marriage and Divorce Act, No. 13 of 1951, as amended. The appellant appealed to the Court of Appeal.

Held:

1. In terms of Rule 1 (b) of the Fifth Schedule to the Act, although the appeal should have been filed within thirty days from the date on which the order was made, the proviso to this Rule says the Rule shall not affect the power vested in the Board to entertain an appeal filed out of time. The proviso is reflected in the statute in the form of section 63(a) which confers discretion on the Board of Quazis to entertain an appeal notwithstanding lapse of time.

2. On the facts and circumstances of this case, the maxim *lex non cogit ad impossibilia* applies. The Board of Quazis ought to have entertained the appeal.

Cases referred to:

1. *Harding v. Price* (1948] 1 KB 695
APPEAL from the Order of the Board of Quazis.

M. Yoosuff Nasar with Mohamed Rusmi and Nalin Pathirana for the Respondent-Appellant-Appellant.

Safana Gui Begum with M. M. P. Risda for the Applicant-Respondent-Respondent.

cur. adv. vult.

February 15, 2019

NAWAZ., J.

Having granted leave to appeal to the Appellant against the order of the Board of Quazis, this Court heard both counsel on this appeal and the issue in this case revolves around the interpretation of Rule 1(b) of the Fifth schedule to the Muslim Marriage and Divorce Act, No. 13 of 1951 as amended (the Act). The relevant Rule 1(b) reads as follows:

1. Where by any provision of this Act a right of appeal against any order made by a Quazi is conferred on any party, such appeal shall be preferred in writing to the Board of Quazis:

a) in the case of an order under subsection (2) or subsection (3) of Section 47, within 10 days from the date on which the order was made;

b) in the case of any other order, within thirty days from the date on which the order was made;

Provided that the preceding provisions of this rule shall not affect the power vested in the board by the Act to entertain an appeal which is out of time.

In fact, the proviso is reflected in the statute in the form of Section 63(a) which vests a discretion to entertain an appeal notwithstanding lapse of time.

This is an application made by the Respondent (wife) against the Appellant (husband) for maintenance in respect of the Respondent and the issue of the union-a female child. These applications are made under Sections 47(a) and (b) of the Act and the procedure to be followed is specified in the Fourth Schedule to the Act. The Applicant-Respondent-Respondent (hereinafter sometimes referred to as “the Respondent” or “the wife”) made this application before the Quazi, Udunuwara who conducted an inquiry into the claim on two days namely 12. 04. 2010 and 27. 04. 2010.

Since Respondent-Appellant-Appellant (hereinafter sometimes referred to as “the Appellant” or “the husband”) had been living in Italy and it is on record that he could not present himself before the Quazi. The Quazi examined the Respondent alone and I observe that the Appellant had notice of the proceedings since the Quazi read out the letter sent by the father of the Appellant in response to the notice served on him.

At the end of the inquiry, the Quazi made order on 27. 04. 2010 directing the husband to pay the wife Rs. 20, 000 per mensem and the child Rs. 15, 000 per mensem. The learned Quazi made the payment to be retrospective with effect from 01. 04. 2010. The learned Quazi recorded in the proceedings that his order must be sent to the Appellant in Italy and his father in Sri Lanka by registered post.

Though the Quazi made his order on 27. 04. 2010, he dated the order on 10. 05. 2010 and admittedly the order was posted only on 19. 05. 2010. It is then axiomatic that the order was received on a date after 19. 05. 2010.

Aggrieved by the order of the learned Quazi of Udunuwara made on 27. 04. 2010, the Appellant (husband) preferred his appeal to the Board of Quazis on 08. 06. 2010. A preliminary objection on behalf of the Respondent wife was raised before the Board of Quazis to the effect that the Appellant could not maintain the appeal, since it was out of time. The appeal must be rejected in limine-this was the preliminary objection raised in the written submissions of the Respondent dated 20. 11. 2010.

It is under section 60 under the Act that the Appellant preferred his appeal to the Board of Quazis from the order of the Quazi, Udunuwara. Section 60(2) of the Act states that all appeals under this section shall be heard and disposed of in accordance with the rules in the Fifth Schedule. Rule 1 of the Fifth Schedule to the Act has the effect that any appeal, other than those preferred against any order under subsection (2) or subsection (3) of Section 47 of the Act, shall be preferred “within thirty days from the date on which the order was made.”

Having recourse to Rule 1 (b) of the Fifth Schedule, the Respondent-wife contended before the Board of Quazis that the appeal preferred by the husband must be rejected in limine, as he had filed his appeal long after 30 days from the date of the order had lapsed. The Board of Quazis upheld this preliminary objection and rejected the appeal stating that all arguments regarding the merits of the grounds for appeal are rendered merely of academic importance in the light of the fact that this appeal

had been filed out of time and the Appellant had failed to satisfy the Board that any of the grounds set out in subsection (a) of Section 63 of the Muslim Marriage and Divorce Act in order for the Board to entertain this appeal despite it being filed out of time, existed-see the order of the Board of Quazis dated 14. 12. 2013.

It is this order of the Board of Quazis that has been challenged before this Court in appeal. It is crystal clear from the chronology of events that the appeal was filed in the Board of Quazis long after the lapse of the prescribed time limit namely 30 days from the date of the order of the Quazi. But one poses the question at this stage. This lapse of time is also traceable upon the perusal of the record to the haphazard way in which the Quazi has sought to serve his order. The Quazi passed his order for maintenance on 27. 04. 2010 but dated it only on 10. 05. 2010. Moreover he sought to communicate it by posting it only on 19. 05. 2010. Assuming without conceding that the Appellant, if at all he had been living in Sri Lanka around that time, received the order on 20. 05. 2010, he would have had just 7 days to prefer the appeal. Given the fact that the Appellant was in Italy and the impossibility of the order from Sri Lanka reaching him on time in order for him to reach out to an Attorney-at-Law to draft papers and file the appeal within the appealable period of time, it cannot be gainsaid it was well-nigh impossible. In fact the law cannot expect the performance of what is impossible-Lex Non Cogit Ad Impossibilia. Herbert Broom calls this a fundamental legal principle in Selection of Legal Maxims Classified and Illustrated.

The case of *Harding v. Price*¹ is illustrative of this principle. It is for this reason that Section 63 of the Act vests a discretion in the Board to entertain a belated appeal, notwithstanding such lapse of time, provided that the Board is satisfied that the appeal could not be filed in time owing to illness, accident, misfortune or other avoidable cause. The unavoidable cause can be manifest upon a perusal of the chronology of events in regard to the proceedings held before the Quazi.

I take the view that the Board of Quazis must have treated this appeal as an appeal filed notwithstanding lapse of time under Section 63 of the Act and heard and disposed of it on the merits. In the circumstances I set aside the order of the Board of Quazis dated 14. 12. 2013 and allow the appeal of Respondent-Appellant-Appellant.

The case is remitted to the Board of Quazis with a direction that the Board proceeds to hear this appeal on the merits and dispose of it as expeditiously as it should since the order made by the Quazi pertains to claims under Section 47 of the Act.

Appeal allowed.

Judgment by: A.H.M.D. Nawaz, J.

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