
IRSHATH**Vs.****ASMIYA**

COURT OF APPEAL
SAMAYAWARDHENA, J.
CAJLA/03/2018
BQ/A/60/15/KAL QC/ADDALAICHENAI/8543/FASAH

Muslim Marriage and Divorce Act, section 28(1), Rule 7 and 11 of the Third Schedule—Fasah divorce—Compliance with the Rules salutary but not mandatory—Impossibility of reconciliation—Irretrievable breakdown of marriage

The parties married under the Muslim Marriage and Divorce Act. The respondent wife made an application against the appellant husband before the Quazi seeking a Fasah divorce under section 28(1) of the said Act inter alia on the grounds of failure to fulfil conjugal obligations, harassment, ill-treatment etc. as “faults”. The Fasah divorce granted by the Quazi in favour of the respondent was affirmed by the Board of Quazis. The appellant appealed to the Court of Appeal on two grounds: (a) according to Rule 7 of the Third Schedule to the Muslim Marriage and Divorce Act although three Muslim assessors shall be empanelled by the Quazi to assist him in the hearing of the application, the Quazi empanelled only two; and (b) notwithstanding that according to Rule 11 the evidence of at least two witnesses shall be led by the wife, no evidence of any witness was led before the divorce was granted.

Held:

1. In terms of section 28(1) of the Muslim Marriage and Divorce Act where a wife desires to effect a divorce from her husband, without his consent, on the ground of ill-treatment or on account of any act or omission on his part which amounts to a “fault” under the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed.
2. Two assessors have assisted the Quazi in hearing the application. The insistence on leading evidence of two witnesses is salutary. Strict adherence to the Rules in the Third Schedule to the Act is not mandatory. *Deen v. Rauff* [1997] 2 Sri LR 253 followed.

3. What matters is not the number of witnesses called, but whose version-husband or wife-is more probable or acceptable than the other. Evidence shall be weighted not counted.

4. The attempts made by the Quazi and assessors for reconciliation of the marriage were unsuccessful. The marriage is irretrievably broken down and there is no flint of hope for a reunion. With due regard to the sanctity of marriage, there is hardly any reason why the marriage tie, in the said circumstances, should continue.

Cases referred to:

1. Deen v. Rauff [1997] 2 Sri LR 253 at 257- 258

APPEAL from an order of Board of Quazis.

Safana Gui Begum for the Appellant.

Yoosuff Nasar for the Respondent.

cur. adv. vult.

July 11, 2019

SAMAYAWARDHENA, J.

The husband (appellant) filed this appeal with leave obtained from the Judgment of the Board of Quazis dated 17. 03. 2018 whereby the Fasah divorce granted by the Quazi Court in favour of the wife (respondent) was affirmed.

The parties married under the Muslim Marriage and Divorce Act on 21. 06. 2012. The appellant went to Qatar on 24. 10. 2012 and returned on 17. 05. 2014. The respondent on or about 26. 05. 2015 made the application in the Quazi Court seeking a Fasah divorce under section 28(1) of the said Act inter alia on the grounds of failure to fulfil conjugal obligations, harassment, ill-treatment etc. as “faults”. There are no children from this wedlock.

The position taken up by the appellant before the learned Quazi was that the respondent had applied for Fasah divorce due to compulsion on the part of her parents and not of her own volition. He says he committed no fault. Nor does he say that the respondent committed any fault. He wanted a reconciliation to be brought about between them and to continue with matrimonial life.

It is apparent from the proceedings before the Quazi Court and the Judgment of the Board of Quazis that the learned Quazi has taken every possible step to bring about a settlement but all his attempts have ended in vain.

The respondent has consistently and categorically taken up the stern position that she is unable to live with the appellant. She has both verbally and in writing repeatedly informed the learned Quazi that she would not change her mind.

The Board of Quazis in its Judgment has set out in detail the attempts made by the learned Quazi for reconciliation and how those attempts were unsuccessful.

When the case has been taken up before the Quazi Court on 05. 09. 2015, the learned Quazi has informed before both parties that if there was no reconciliation within one month from that date, Fasah divorce would be granted on the next date.

On the next date, which was 03. 10. 2015, the appellant had been absent on the ground of illness, but no application for a postponement has been made.

Hence the learned Quazi, taking all the circumstances into account, has granted the Fasah divorce.

It is true that neither party has led oral evidence but relied upon the affidavits tendered by them with written statements in addition to what has been stated before the learned Quazi. The learned Quazi has accepted the respondent's version.

The learned counsel for the appellant challenges the order of the Quazi Court which granted the Fasah divorce and the Judgment of the Board of Quazis which affirmed it, on two grounds. Both of them relate to the violation of the Rules in the Third Schedule to the Muslim Marriage and Divorce Act-to be specific, Rule Nos. 7 and 11.

Section 28(1) of the Muslim Marriage and Divorce Act reads as follows:

Where a wife desires to effect a divorce from her husband, without his consent, on the ground of ill-treatment or on account of any act or omission on his part which amounts to a "fault" under the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed.

Rule 7 of the Third Schedule reads as follows:

The Quazi shall then proceed, in manner prescribed by regulation made under the Act, to empanel three Muslim assessors (hereinafter in this Schedule referred to as “Muslim assessors”?) to assist him in the hearing of the application:

Provided that in the following cases, and in those cases only, it shall not be necessary for the Quazi to empanel Muslim assessors, namely-

(a) Where the Quazi dealing with an application is a special Quazi appointed under section 14 of the Act; or

(b) Where the area in which an application is to be heard is an area in respect of which, owing to the sparseness of the Muslim population or for any other reason, the Minister has by notification in the gazette given directions that application for divorce may be heard without the assistance of Muslim assessors.

Rule 11 is to the following effect:

The Quazi shall maintain a record of the proceedings in the case and shall enter therein the statements made on oath or affirmation by the wife or her witnesses and by the husband (if he is present) and his witnesses. Of the wife’s witnesses the number examined shall not be less than two in any case. The record of every such statement shall be read over by the Quazi to the person who made it and, after any necessary corrections have been made therein, shall be signed by such person. Where such person refuses to sign such statement, the fact of such refusal shall be recorded by the Quazi.

It is the contention of the learned counsel for the appellant that, in terms of Rule 7, although three Muslim Assessors shall be empanelled by the Quazi to assist him in the hearing of the application, the Quazi, in this instance, empanelled only two, which is a violation of the mandatory requirement of the law.

Learned counsel for the appellant also says that, in terms of Rule 11, notwithstanding evidence of at least two witnesses shall be led by the wife, no evidence of any witness was led before the Fasah divorce was granted in transgression of the said Rule.

Accordingly, the learned counsel strenuously submits that the violation of those two mandatory procedural requirements vitiates the grant of the divorce and therefore it shall be set aside.

The predominant question to be decided in this appeal is whether the strict adherence to the Rules of the Third Schedule in the Act to the extreme very letter is mandatory. The Board of Quazis has taken the view that it is not mandatory. That seems to be the better view.

It is important to understand that divorce under the Muslim Marriage and Divorce Act is different from divorce under the Marriage Registration Ordinance. The procedure, standard of proof etc. are stricter in the latter than in the former. When a marriage is contracted under the Marriage Registration Ordinance, divorce can only be granted by a District Judge (who is a trained judicial officer having vast judicial experience) on limited specific grounds. But under the Muslim Marriage and Divorce Act, no such strict specific grounds have been laid down and divorce is granted by a Quazi, who is a layman.

When similar objections were taken on appeal upon Fasah divorce being granted in *Deen v. Rauff*,¹ Justice Ismail did not think that the failure to hold the inquiry in conformity with the Rules vitiated the Quazi's decision. In that case, as seen from page 257 of the Judgment, "*Learned counsel for the appellant-petitioner [has] referred in particular to the failure of the Quazi to empanel the assessors in the manner prescribed by the regulations, the failure to administer the oaths to them before they commenced their functions, the failure of the witnesses to give evidence on oath or affirmation and the failure to obtain the opinions of the assessors on the points arising for adjudication.*" Justice Ismail at page 258 held that "The learned Quazi has clearly erred in failing to hold the inquiry in conformity with the rules as prescribed in the Third Schedule to the Act", but did not think it fit to set aside the order of the Board of Quazis which affirmed the order of the Quazi by which Fasah divorce was granted on the basis that there was sufficient evidence to grant Fasah divorce in favour of the wife.

In the instant case, admittedly, two assessors have assisted the Quazi in hearing the application. As seen from the proceedings of the Quazi Court dated 05. 09. 2015, the two assessors-each from one party-have informed the Quazi of the impossibility of reconciliation. The two assessors have signed the case record.

The insistence on leading evidence of two witnesses is salutary, but may not be mandatory. What matters is not the number of witnesses called, but whose version-husband or wife-is more probable or acceptable than the other. Evidence shall be weighted not counted.

In this case, as I stated earlier, the only plea of the appellant before the Quazi was for reconciliation in order to continue with matrimonial life. This plea is no longer valid, according to the appellant's own showing, because, soon after the Fasah divorce was granted, pending appeal, the respondent has contracted another marriage. The appellant has filed a private plaint in the Magistrate's Court against the respondent for bigamy, which is a criminal charge attracting a jail sentence. In that backdrop it is abundantly clear that reconciliation is an impossibility. The marriage is irretrievably broken down. There is no flint of hope for a reunion. With due regard to the sanctity of marriage, there is hardly any reason why the marriage tie, in the said circumstances, should continue.

In the unique facts and circumstances of this case, there is no compelling need to interfere with the Judgment of the Board of Quazis.

I dismiss the appeal but without costs.

Appeal dismissed.

Judgment by: Mahinda Samayawardhena, J.

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