MANZIL
v.
MIHILAR & OTHERS

COURT OF APPEAL
J. A. N. DE SILVA, J. (P/CA),
AMARATUNGE, J.
CA NO. 1258/99
QUAZI COURT KEGALLE NO. 2945
BOARD OF QUAZIS NO. 3494
MAY 04, 2001

Writ of Certiorari – Muslim Marriage & Divorce Act s. 37, s. 43, s. 44 (1), s. 47 and s. 62 (5) – Divorce – Kaikuli – Alternate remedy – Order a nullity – Does writ lie?

The petitioner seeks to quash by a writ of *Certiorari* the order delivered by the Board of Quazi and the order delivered by the Quazi Court, Kegalle.

The petitioner sought a divorce and the respondent sought the recovery of the Kaikuli from the Quazi.

The petitioner was ordered to pay back the Kaikuli in instalments. On appeal to the Board of Quazi, the petitioner was ordered to pay balance Kaikuli within 03 months.

The petitioner thereafter made an application for a writ of *Certiorari* to set aside the said order.

The respondent contended that the remedy is misconceived as there is an alternative remedy under s. 62 (1) and Rule 4 of the 5th schedule of the Muslim Marriage and Divorce Act or under s. 43 of the same Act.

Held:

(1) The Quazi has failed to conduct a proper inquiry in terms of s. 47 and Rules set out in the 4th schedule, and thereby acted in breach of the statute as well as the rules of natural justice.

(2) The Quazi has also violated s. 37 of the Act. The petitioner has never participated in the Kaikuli case. It is difficult to understand how several signatures appear at the bottom of the proceedings recorded on that day if the petitioner was the only person who was present.

The order is a nullity. Therefore, a writ lies.

APPLICATION for writ in the nature of *Certiorari / Mandamus.*

M. S. M. Saheed for petitioner.

Shibly Aziz, PC with *Farook Thahir* for applicant-petitioner-respondent.

Cur. adv. vult.

June 21, 2001

J. A. N. DE SILVA, J. (P/CA)

The petitioner had come before this Court by an application dated 1
23. 12. 1999 praying for a mandate in the nature of a writ of *certiorari* to quash the orders delivered by Board of Quazis on 15. 09. 1990 and the order delivered by Quazis of Kegalle on 21. 12. 1997.

The petitioner is a Medical Practitioner by profession and attached to a Government Hospital. The petitioner and the respondent-respondent are Muslims by faith and governed by the Muslim Law for the purpose of marriage, divorce and other ancillary matters.

The marriage between the petitioner and the respondent-respondent was registered under the Muslim Marriage and Divorce Act on 10
10. 08. 1997 and the ceremony took place on 25. 09. 1997 at Bandaranaike Memorial International Hall (BMICH). At the time of registration a sum of Rs. 750,000 is alleged to have been given to the petitioner as "Kaikuli" by the father of the respondent Dr. Mihilar in consideration of the said marriage. Parties lived together for a short period and three weeks after the marriage, a dispute arose between the petitioner and the respondent-respondent which eventually resulted in the break up of their matrimonial relationship.

There were two cases filed before the Quazi for the Judicial District of Kegalle. One was filed by the petitioner bearing No. 547/T for the grant of divorce. The other was filed by the respondent bearing No. 2945 for the recovery of Kaikuli. This application appears to have been filed by the respondent on or about 8th of November, 1997, and according to proceedings on that date the Quazi has issued notice on the petitioner to appear on 20. 11. 1997 for inquiry. The Quazi states in the proceedings that he held an inquiry on 20. 11. 1997 into the claim of Kaikuli and both the petitioner and respondent were present on that day. The respondent (the petitioner in this application) moved for a date and the Quazi allowed the said application and the inquiry was postponed for 21. 12. 1997.

On 21. 12. 1997 the petitioner had been represented by his mother and brothers and the respondent by her father. According to the order of the Quazi the petitioner's brother had admitted that the petitioner had taken the Kaikuli in a sum of Rs. 750,000 and had paid back a sum of Rs. 150,000 on that day. In terms of the order of the Quazi the balance sum of Rs. 600,000 was to be paid as follows:

(*a*) The petitioner to pay a sum of Rs. 250,000 from March, 1998, in istalments of Rs. 10,000 per month and Rs. 40,000 to be paid on or before 31st December,1999, aggregating to Rs. 250,000.

(*b*) Rs. 200,000 to be paid before the end of the year 2000 but the mode of payment is not mentioned.

(*c*) The balance sum of Rs. 150,000 need not be paid if the above payments are duly made but in the event of default the petitioner shall pay the balance sum of Rs. 150,000 aggregating to Rs. 750,000.

The respondent-respondent appealed to the Board of Quazis against the said order, *inter alia,* stating that –

(1) the learned Quazi has ordered instalment payments without ascertaining the income of the petitioner (then respondent) and without reference to the capacity of the respondent to pay the full sum of Rs. 750,000.

(2) the order of Quazis reducing a sum of Rs. 150,000 is arbitrary and unreasonable and made without jurisdiction.

The parties filed written submissions before the Board of Quazis. The Board of Quazis made order on 15. 09. 1999 directing the petitioner to pay the balance sum of Rs. 600,000 within three months from the date thereof. As stated earlier the present application to this Court is to quash this order as well as the original order of the Quazis of Kegalle.

The learned Counsel for the respondent raised objection to this application on the basis that the remedy sought by way of writ of *certiorari* is misconceived as an alternative adequate and effective remedy was available to the petitioner. Attention was drawn to section 62 (1) and rule No. 4 of the 5th schedule to the Muslim Marriage and Divorce Act which reads thus : "any party aggrieved by any order of the Board of Quazis may within 30 days from the date on which notice of the order was given as aforesaid apply by petition to Court of Appeal for leave to appeai against such order and shall give to the other party to the appeal notice of such application".

The learned Counsel for the respondent-respondent submitted that the petitioner has not made use of the remedies available to him by the governing Act, namely Muslim Marriage and Divorce Act and therefore a discretionary remedy by way of writ is not available to him.

It was also the position of the learned Counsel for the respondent that the petitioner could have under sections 43 and 44 of the Musilm

Marriage and Divorce Act made an application to the Board of Quazis from the original order of the Quazi of Kegalle but he has not done that.

Section 43 reads as follows :

"The Board of Quazis may call for and examine the record of any proceedings before a Quazi under the Act in respect of any matter whether such matter being trial or inquiry into or is pending trial for the purpose of satisfying itself as to the legality or propriety of any order passed there in or as to the regularity of the proceedings."

Section 44 (1) states :

"The Board of Quazis may in respect of any proceedings before a Quazi the record of which has been called for in its discretion exercise any of the power conferred upon it for the purposes of its appellate jurisdiction."

It was the submission of the learned Counsel for the respondent-respondent that the petitioner has not utilized any of the provisions mentioned above and, therefore, is not entitled to invoke the jurisdiction of this Court to obtain a writ.

It is significant to note that the petitioner has raised a more fundamental question which goes to the jurisdiction of the Quazi to make the original order. Petitioner states that in respect of the second application, viz the "kaikuli" application he did not receive notice in terms of the Act and that he was not given a hearing at all. Therefore, the order is a nullity due to failure on the part of the Quazi to follow the correct procedure and for acting in breach of the rules of natural justice.

It appears that the petitioner has filed the application for "talak" / divorce on 08. 11. 1997 and the respondent has been noticed to appear by the Quazi on 20. 11. 1997. On this day that is 20. 11. 1997 it appears that the petitioner and the respondent were present and both of them have placed their signature on the record.

The petitioner states that the Quazi in the course of the purported inquiry into his divorce questioned him as to whether he obtained a sum of Rs. 750,000 as dowry from the respondent. The petitioner has specifically denied that he ever received any cash (dowry) from the father of the respondent-respondent and he would take an oath to the effect that he had not received any money as dowry (*vide* Proceedings marked "X" and the translation marked "Y").

In paragraph 27 of the petition to this Court the petitioner states that in the proceedings marked "M" it appears that the petitioner was present on 20. 11. 1997 and moved for a date to discuss about "kaikuli" claimed by respondent. The petitioner specifically denies the proceedings of the said date and states that he was present before the Quazi on that date in respect of his application for "talak" (547/T) and his signature was obtained at the bottom of the proceedings of the said date in that case. The petitioner specifically states that he was neither summoned to appear in the kaikuli case nor the said case was taken up for inquiry on 20. 11. 1997. The petitioner pointed out that the proceedings relating to "kaikuli" held on 27. 11. 1997 does not bear his signature at the bottom of the proceedings where as several others have signed the proceedings on that date. Through the proceedings the Quazi tries to give the impression that both cases, namely 547/T and No. 2945 (kaikuli case) were taken up together. However, the signature of the petitioner does not appear in the kaikuli case No. 2945 whereas the signature of his brother and some others appear thereof. This fact clearly establishes that the petitioner has never participated in the kaikuli case before the Quazi. It is difficult to understand how several other signatures appear at the bottom of

the proceedings recorded on that day if the petitioner was the only person who was present.

According to the 4th schedule to the Marraige and Divorce Act where the rules are set out to follow at the inquiries under section 47 rule 8 is to the following effect, "every order made by a Quazi in any inquiry held under the rules in the Schedule shall be entered in the record of the proceedings in the case and shall be signed by the Quazi and claimant, applicant or complainant by the respondent if he is present".

It is significant to observe that the respondent (former wife) filed her objections to this application on 25. 04. 2000. She has not denied the averments set out in paragraph 27 of the petition she is silent on this matter. If the inquiry on kaikuli was taken up before them she could have referred to that and contradicted the petitioner when he stated that he never asked for a postponement of the inquiry relating to kaikuli.

Petitioner also complained that he never received notice of the kaikuli application. It terms of the rules set out in the 4th schedule it is the duty of the Quazi to issue notice in writing to the party against whom the application is made. It appears that Quazi has acted in violation of this rule.

It is clear from the proceedings that Quazi has conducted the purported inquiry in the presence of Dr. Mihilar and the mother and the brother of the petitioner. Nowhere in the proceedings the mother or the brother has claimed that they represented the petitioner.

The mother of the petitioner in her affidavit has set out the circumstances under which she went to Quazi's house at Mawanella. According to her the Quazi telephoned her and inquired about the

dowry. She had said that she was given Rs. 400,000 by Dr. Mihilar in respect of the marriage and out of that Rs. 250,000 was spent on the marriage itself, for the jewellery for the bride, function for the home-coming, travelling, etc. She has also said that she is left with Rs. 150,000 and is willing to return that. Thereafter, she had been asked to come to the house of the Quazi at Mawanella on 21. 12. 1997. She had gone there with her second son who had returned from Middle East.

I totally believe her in respect of this evidence. A village Muslim woman from Aluthgama Dharga Town would not travel to Mawanella carrying Rs. 150,000 with her if she was not asked to come with the money. If she went to attend an inquiry there was no necessity for her to carry the money with her. She says that when she was at Quazi's house Quazi telephoned Dr. Mihilar and got him down to the house. It is also relevant to note that Quazi has called them to his home and not to his "office".

The Quazi had been made a party to this application. There were allegations levelled against him that he is related to Dr. Mihilar and he had been acting unfairly due to that reason. Court has directed to issue notice on him and the notices have been duly served and they have not been returned to the Registry of this Court. He had not bothered to say anything to the allegations levelled against which includes maintaning improper proceedings relating to the kaikuli application. It appears that he has even violated section 37 of the Act. Section 37 states that : "where it is proved to the satisfaction of Quazi that the woman claiming or intended to claim mahar or kaikuli, is through sickness, infirmity or other reasonable cause unable to appear in person, the Quazi may permit any fit proper person authorized in that behalf by the claimant and approved by the Quazi to institute proceedings or to appear on behalf of the claimant.

It appears that without adhering to the provisions of this section the father of the respondent-respondent has played a prominent and a dominant role in the kaikuli proceedings.

In all the circumstances of this case I hold that the Quazi has failed to conduct a proper inquiry in terms of section 47 and rules 200
set out in the 4th schedule and thereby acted in breach of the Statute as well as the rules of natural justice. Therefore, the order he gave is a nullity.

In view of the above findings I set aside the order of the Quazi dated 21. 12. 1997. As nothing can flow from nullity I set aside the order of the Board of Quazis dated 15. 09. 1999. I direct that a different Quazi should take appropriate steps in terms of the law and inquire into the application of the respondent. I think justice and fair play demands this course of action as natural justice is fair play in action. I make no order with regard to costs. 210

AMARATUNGE, J. – I agree.

Application dismissed.