1977 *Present:* **Pathirana, J., Malcolm Perera, J. and Vythialingam, J.**

UMMUL MARZOONA, Appellant

and

A. W. A. SAMAD, Respondent

S. C. Application No. 159/77—Board of Quazis No. 1821

Maintenance—Muslim father's duty to maintain his son—When does such duty cease—Exclusive jurisdiction of the Quazi—Muslim Marriage and Divorce Act (Cap. 115), section 48—Maintenance Ordinance as amended (Cap. 91)—Age of Majority Ordinance (Cap. 66), section 3.

Held: (1) That under the principles of Muslim Law as laid down for the Shaffi Sect to which the majority of the Muslims of this country belong, a Muslim father is obliged to maintain his son until he reaches puberty or the age of 15 years. However, thereafter his liability ceases unless the son is disabled by disease or infirmity. The fact that the son is engaged in studies is such a disability as is envisaged by this rule and therefore the father's duty to maintain continues during this period until his son completes his studies, as during that period the son is unable to work and therefore unable to maintain himself.

(2) That the Muslim Marriage and Divorce Act (Cap. 115) section 48, vests exclusive jurisdiction in the Quazi in respect of marriage and divorce and matters connected thereto such as maintenance. In regard to persons who are or were legally married and profess the Muslim faith such matters will have to be decided by the Quazi in accordance with the Muslim Law of the sect to which the parties belong. Neither the provisions of the Maintenance Ordinance nor those of the Age of Majority Ordinance consequently apply to a case such as this.

Cases referred to:

Abdul Cader vs. Razick, 52 N. L. R. 156.
Assanar vs. Hamid, 50 N. L. R. 102.
Ismail vs. Muthu Maraliya, 65 N. L. R. 431.
Jiffry vs. Nona Bintham, 62 N. L. R. 255.
Abdul Cader vs. Razik, 54 N. L. R. 201.
A. L. M. Haniffa vs. A. A. Razack, 60 N. L. R. 287.
Wappu Marikkar vs. Ummaniumma, 14 N. L. R. 225.
Asharafalli Cassamalli vs. Mahammadu Rajaballi, (1945) 48 *Bom. L. R. 462.*

APPEAL from an order made by the Board of Quazis.

M. S. M. Nazeem, with *J. Mohideen,* for the appellant.

M. F. Miskin, for the respondent.

Cur. adv. vult.

October 24, 1977. VYTHIALINGAM, J.

The appellant in this case sued the respondent in the Quazi Court of Colombo for maintenance in respect of her son. Parties were married but the respondent divorced the appellant by pronouncing Talak in 1961 and is now married again. The Quazi ordered the respondent to pay maintenance for the son, the quantum being enhanced from time to time until June, 1976 when the respondent agreed to pay Rs. 160 per mensem as maintenance. On 6.7.1976 the appellant moved for an enforcement of the order, but the respondent resisted on the ground that the boy had reached the age of 15 years and that under the Muslim law he was not obliged to pay maintenance after that age.

Admittedly the boy, having been born on 1st August, 1959 is over the age of 15 years but is still a student in the Advanced Level Class at Zahira College, Colombo. After inquiry the Quazi held that the respondent was liable to pay maintenance till the boy completes his studies. The respondent appealed to the Board of Quazis on the ground that under the Muslim Law applicable the liability of the father to maintain his son ceased after he attains puberty or the age of 15 years and the Board allowed the appeal and quashed the order made by the Quazi. This appeal is against that finding.

Under the general Maintenance Ordinance (Cap. 91) the order for maintenance in respect of a child legitimate or illegitimate would cease to be operative on the child reaching the age of 16 years unless the Magistrate directs that it should continue until the child reaches the age of 18 years (section 7). This limit has now been raised to 21 years by Act No. 19 of 1972. The Age of Majority Ordinance (Cap. 66) also fixes the age of attaining majority at 21 years. However it is provided in section 3 of the Ordinance that nothing contained in the Ordinance should extend to or be construed to prevent any person under the age of 21 years from attaining his majority at an earlier period by operation of law.

I do not think that both these Ordinances apply to the question as to the age at which the liability of a Muslim father to maintain his son ceases. The latter because the Ordinance has regard to the attainment of legal majority for general purposes and has

no application to the attainment of majority by operation of law to questions such as capacity to contract or to marry, for purposes of custody or maintenance—*Abdul Cader vs. Razick,* 52 N.L.R. 156 ; also *Assanar vs. Hamid,* 50 N.L.R. 102. The former because in respect of marriage and divorce and matters connected thereto such as maintenance in regard to persons who profess the Muslim faith, the Muslim Marriage and Divorce Act by section 48 rests exclusive jurisdiction in the Quazi who has to decide those matters in accordance with the Muslim Law of the sect to which the parties belong—section 98 (2) and the Maintenance Ordinance does not apply to Muslims who are or were legally married—*Ismail vs. Muthu Maraliya,* 65 N.L.R. 431, and *Jiffry vs. Nona Binthan,* 62 N.L.R. 255.

The question before us has therefore to be resolved in accordance with the principles of the Muslim Law which are applicable. The followers of Islam are divided in the main into two divisions, the Sunnis and the Shias. Each of them is again divided into a number of schools having its own books of authority. The vast majority of the Muslims in India and Sri Lanka belong to the Sunni School of which there are four main sub-divisions, taking their rise from the four great doctors (1) Abu Hanifa, (2) Malik Ibn Anas, (3) Shafi, and (4) Ahamed Ibn Hanbal.

Although there are Muslims in Ceylon who belong to the Hanafi sect—see *Adbul Cader vs. Razick,* 54 N.L.R. 201, and *A. L. M. Haniffa vs. A. A. Razack,* 60 N.L.R. 287, yet " It appears that the Moors in Ceylon belong to the Shaffi sect of Sunnis " per Wood Renton, J. in *Wappu Marikkar vs. Ummaniumma,* 14 N.L.R. 225 at 226. In the absence of any evidence to the contrary, in the instant case it may be presumed that the parties belong to the Shaffi sect and accordingly the principles applicable under that school of law would apply. This is the basis also on which the Board of Quazis proceeded in making their determination.

It is not disputed that under the Shaffi school of law a father is obliged to maintain his son until he reaches puberty or the age of 15 years. But after that his liability ceases unless the son is disabled by disease or infirmity. It is argued that being engaged in studies is not such a disability as is contemplated in the rule. But this ignores completely the very basis on which

the rule is founded, namely that maintenance is payable during that period because the son is unable to work and thereby maintain himself.

So much so that Wilson states the rule thus "A man must maintain his minor son if and so far as the latter has no sufficient property of his own and is unable to maintain himself by his own labour; but he may set the boy to work under his own supervision or hire him out to strangers and may recoup himself out of the produce of his labour or out of his wages, as the case may be, for whatever has been expended on his maintenance; provided that the work be not beyond his strength nor suitable by reason of his rank or destined profession"—Anglo Mohamedan Law, p. 204, para. 142. That is, he may be put to work even before he has reached puberty or the age of 15 years, if he is able to do so. But of course he goes on to state that "A man is not obliged to maintain his adult son unless disabled by infirmity or disease." *Ibid,* p. 205, para. 143.

In regard to work of a degrading character Amir Ali says that if the work is "unsuitable or improper for their rank in life, they would be placed on the same footing as children labouring under some infirmity." Mohamedan Law, 5th Ed., Vol. 11, p. 428. The word "infirmity" is therefore not used in the sense of some physical or mental infirmity. Indeed he states that "The obligation of maintaining male children lasts until they arrive at puberty. After this, a father is not bound to maintain his male children unless they are incapacitated from work through some disease or physical infirmity or are *engaged in study*". The emphasis is mine. So that infirmity in this sense would include incapacity to work because the son is engaged in legitimate studies.

The Quazi based his decision on the authority of this passage but the Board of Quazis were of the view that the proposition suggested by Amir Ali did not appear to be consistent with the position set out by the Shafi law. They stated that they had occasion to hold earlier that on reaching the age of puberty or 15 years of age the father's liability to maintain a son ceases (vide B.Q. case No. 1761) following the decision reported in Volumn IV of the Muslim Marriage and Divorce Law Reports, p. 117. I have examined the decision in both cases and find that

apart from laying down the general principle set out above they do not consider the question as to whether the father's liability ceases on the son reaching 15 years of age even though he is incapacitated from working and thereby providing for himself because he is engaged in studies. No direct authority has been cited either way on this question.

But I do not think that in the passage quoted above Amir Ali was merely stating what the position was under the Hanafi law. Indeed in that very page 428 Amir Ali sets out earlier in regard to another matter what the Hanafi rule was and also the Shiah doctrine, and then goes on to state the position under the marginal note "General Doctrines". There are followers of the Shaffie School of law in the coast line in India, among the Koknis of Bombay and the Mopilahs or Mapillahs of Malabar: Fyzee—page 34. Surely if there was such a vital difference between what was stated and the rule under the Shaffi school he would have made pointed reference to it.

Indeed on this point there does not seem to be much difference in principle between the four Sunni Schools of law. Tyabji states of the great founders of the four schools "Each of them promulgated his own exposition of the law. At the same time not only was there no antagonism between them but each respected the ability and knowledge of his predecessors or contemporaries. There is therefore a kind of comity amongst the 4th Ed. page 2. In fact in regard to certain matters the Board followers of the four Sunnite Schools"—Tyabji on Muslim Law, of Quazis stated in an earlier case, Muslim Marriage and Divorce Law Reports Vol. IV at 52, "The general accepted treatises on Muslim law such as Amir Ali, Tyabji, Mulla, Wilson do not state that there is a difference in principle between the Hanafi School and the Shafi School". And again in another case (*ibid* at page 97) they said "Under Muslim law—there seems to be no difference in principle between the Hanafi and Shafi School—a father is under a duty to maintain his daughter until she is married—A. Fyzee, 2nd Ed. 183, Mulla 13th Ed. Section 370, Tyabji 3rd Ed. Section 318, Amir Ali Vol. II, 5th Ed. page 429". It is significant that in both cases they have referred to the authority of Amir Ali.

There is nothing startling or repugnant to the Muslim law in the proposition that a Muslim father should be obliged to continue to maintain his adult son if the son is incapacitated from working because he is engaged in studies. Thus Amir Ali points out (*ibid* at page 427) "In consequence of these precepts, the Musulman Civil law imposes on parents the duty of maintaining their children and of *educating them properly.* This obligation rests naturally upon the father ; the Hedaya declares in explicit terms that the maintenance of minor children, rests on their father, and no person can be his associate or partner in furnishing it (that is, share the responsibility with him) ".

In regard to adults, that is those who have attained puberty Tyabji states that " Necessitous sons are entitled to maintenance though they are adult ". Tyabji's Mohamedan law, 4th Ed. Article 322 at 276. He defines " necessitous " as meaning " a person who is both indigent and unable to earn his livelihood " : *ibid*—Aritiele 287 (5) at page 253. Quite obviously a person engaged in studies would be unable to earn his livelihood and would be a necessitous person. This is a statement of the general rule as applicable to all the sects, for throughout the world where there is a difference between the various schools of law he sets out the different rules. See for example, Article 299 which deals with the rate of maintenance payable to a wife.

Baillie who deals with the Hanifa code of jurisprudence states —Digest of Mohamedan Law at page 462 (3rd Impression) :— " Hulwaae has said that the sons of better orders whom it is not the practice of men to set to hire are to be treated as weak ; and so also students of learning when unable to earn anything ; and their right to maintenance from their father does not abate while engaged in legal studies." This is nothing more than an interpretation of what is meant by the words " disabled by disease or infirmity " or the words " necessitous adults " in the admitted Shaffi rule and " disability or infirmity " in this sense has a wider meaning than mere physical or mental disability or infirmity.

Originally Muslim Law consisted of a few simple rules suited for the simple society of that time. No educational qualifications were required to perform the simple and uncomplicated tasks of that age. But as Muslims spread to about 20 coun-

tries of Asia, Africa and Europe in which nearly 425 million people are governed by Muslim law the medieval texts of the traditional Muslim law were no longer adequate as authorities for the varying demands of political, economic and social forces and had to be supplemented and even superseded by statute and customary law. It became necessary to apply to the ever changing conditions, the never changing principles of the law.

The great Prophet of Islam himself approved of this for it is said that when he sent one of his companions as Governor of a province and also appointed him as distributor of justice he asked him :

"According to what shall thou judge" and he replied

"According to the scriptures of God.

And if thou findest nought therein ?

According to the tradition of the Messenger of God.

And if thou findest nought therein ?

Then I shall interpret with my reason".

Whereupon the Prophet said "Praise be to God who has favoured the Messenger of this Messenger with what his Messenger is willing to approve".

Thus Chagla, J. as he then was, pointed out in *Ashrafalli Cassanalli vs. Mohamedalli Rajaballi,* (1945) 48 Bom. L. R. 642 at 652 : "Now there is no doubt that those ancient Muslim texts must be considered with the utmost respect. But it must also be remembered at the same time that Muslim jurisprudence is not a static jurisprudence. It is a jurisprudenec which has grown and developed with the times and the quotaions from Muslim texts should be so applied as to suit modern circumstances and conditions".

Under the modern conditions even the simplest job requires some form of educational qualification. The requirement that a Muslim father should continue to support his adult son who is engaged in studies in order to qualify for employment is therefore in keeping and not in conflict, with the Shaffi School of Muslim law which requires that a Muslim father maintain

his adult son who is necessitous or is incapacitated or disabled by infirmity or disease. For an adult son who is engaged in studies is also necessitous or is incapacitated from earning his livelihood because of his studies.

I would therefore hold that the respondent in this case is liable to continue to maintain his son till he completes his studies. There is no question about his capacity to pay the amount as he himself has consented to pay the sum ordered. He is only disputing the liability to pay because of his understanding of the law on account of his researches into it. I would accordingly set aside the order made by the Board of Quazis and uphold the order made by the Quazi. The respondent will pay the costs of the appeal.

PATHIRANA, J.—I agree.

MALCOLM PERERA, J.—I agree.

Appeal allowed.