

1962

Present : Sinnetamby, J.

R. S. M. ISMAIL, Appellant, and S. LATIFF, Respondent

*S. C. 618/61—M. C. Colombo, 31133/AMC**Maintenance—Illegitimate children—Muslim parties—Jurisdiction of Quazi—Muslim Marriage and Divorce Act, No. 13 of 1951, ss. 2, 47, 48.*

A Quazi has no jurisdiction to entertain an application for maintenance in respect of illegitimate children of Muslim parties who were at no time married. Section 47 of the Muslim Marriage and Divorce Act, No. 13 of 1951, is controlled and limited by the provisions of section 2.

Jiffry v. Nona Binthan (1960) 62 N.L.R. 255, followed.

APPEAL from a judgment of the Magistrate's Court, Colombo.

C. Ranganathan, with *M. T. M. Sivardeen*, for the defendant-appellant.

H. W. Jayewardene, Q.C., with *H. Mohideen* and *K. Palakidnan*, for the applicant-respondent.

Cur. adv. vult.

April 3, 1962. SINNETAMBY, J.—

This is an application for maintenance instituted by the applicant-respondent against the defendant-appellant in the Magistrate's Court of Colombo. The parties to the application are both Muslims and the applicant sought to recover maintenance in respect of two children who are illegitimate. She was at no time married to the defendant nor did she allege the existence of any marriage between them. The defendant denied paternity of the two children but after inquiry the learned Magistrate held that the defendant was the father of the children and ordered him to pay Rs. 25 as maintenance for each of them. Against this finding, the defendant appealed.

The only matter argued before me related to the question of jurisdiction. Before the Magistrate, a preliminary objection was taken to his jurisdiction to try the case on the ground that the Quazi had exclusive jurisdiction in terms of sections 47 and 48 of the Muslim Marriage and Divorce Act, No. 13 of 1951. Section 48 provides as follows:—

“The jurisdiction exercisable by a Quazi under section 47 shall be exclusive and any matter falling within that jurisdiction shall not be tried or inquired into by any other court or tribunal.”

Section 47 provides that:—

“the powers of a Quazi shall include the power to inquire and adjudicate upon any claim for maintenance by or on behalf of a child (whether legitimate or illegitimate).”

Prima facie, this would suggest that all claims for maintenance in respect of illegitimate children are also triable exclusively by a Quazi. The matter was considered by my brother T. S. Fernando, J. in *Jiffry v. Nona Binthan*¹. In that case my brother took the view that the Quazi had no jurisdiction to hear and determine an application for maintenance in respect of children whose mother had at no time been married to the putative father. In construing section 47 he took the view that it was controlled and limited by the provisions of section 2 of the Act which specifically states that

“the Act shall apply only to marriages and divorces and other matters connected therewith, of those inhabitants of Ceylon who are Muslims.”

The first requirement, therefore, is that the matter which the Quazi is empowered to try is one which is connected with a marriage or a divorce. No difficulty arises in respect of maintenance claimed by a wife on her behalf or in respect of a legitimate child for such a claim may be considered to be connected with marriage, but where an illegitimate child is concerned, the matter creates some difficulty. It is

¹ (1960) 62 N. L. R. 255.

a cardinal principle of construction that provisions contained in different parts of the same Act which appear to be irreconcilable should be construed, if possible, in such a way as to reconcile each with the other.

At first sight, the Muslim Marriage and Divorce Act would appear in section 47 to contain provisions, empowering a Quazi to entertain applications for maintenance of illegitimate children, which are inconsistent with section 2 of the Act, limiting his powers to matters connected with Marriages and Divorces. Under the Roman-Dutch law, illegitimate children are confined generally to those children whose parents are unmarried; but under the Muslim law, unlike as in the Roman-Dutch law, there exist categories of children who are deemed to be illegitimate even though their parents are married. Justice T. S. Fernando instanced two such cases but in the course of argument reference was made to several instances where under the Muslim law, though the parents get married, the children remain illegitimate. These are referred to both in Ameer Ali in his book on Mohamedan Law and Russel and Suhrawardy in their book entitled "Mohamedan Law of Marriage". Not only are children of marriages where the parents are within prohibited decrees illegitimate but children born prior to marriage of parents who are free to get married would despite subsequent marriage remain illegitimate. Ameer Ali also refers to a child conceived out of wedlock but born after marriage as being illegitimate (page 236 and 238, 4th edition) but any acknowledgment by a father that such a child or a child born even before wedlock is his would make the child legitimate (Ameer Ali at page 214, 4th edition). It will thus be seen that even in cases where Muslim parties are married they can have children who are illegitimate and as Justice Fernando points out, section 47 when it refers to illegitimate children must necessarily be construed to refer to such children. The Marriage and Divorce (Muslim) Act is described in the Act itself as intended "to make provision with respect to the marriage and divorce of Muslims in Ceylon and in particular with respect to the registration of such marriages and divorces". The main object, therefore, of that Act is to provide for marriages and divorces and, as section 2 states, other incidental "matters connected therewith". If, therefore, in connection with a marriage or a divorce any question of maintenance or custody of children is involved, it could legitimately be regarded as something which would fall within the jurisdiction of the Quazi, but when the question involved is something quite independent of a marriage or a divorce, it would be correct, I think, to say that the Quazi has no jurisdiction merely because the parties are Muslims. It is in this way possible to reconcile section 2 of the Act with section 47 by limiting the expression "illegitimate children" to those children of spouses who are in Muslim law deemed to be so, despite the marriage of their parents.

It is not uncommon for courts having jurisdiction in regard to matrimonial matters when dealing with them to make orders in regard to the maintenance and custody of children born of that marriage. Provisions of that nature for instance are to be found in the Civil Procedure Code.

In regard to non-Muslims these provisions are limited to legitimate children ; but in the case of Muslims, as children born of the parties to the marriage may in some circumstances be regarded as illegitimate children, one can understand the provisions in respect of maintenance and custody of such children being made in matrimonial proceedings. It seems to me, therefore, that section 47 must be limited to cases where the application for maintenance is confined to illegitimate children whose parents were or are married : an applicant may make an application for maintenance alleging that the defendant was married to her and this may be denied by the defendant, but, nevertheless, the Quazi will have jurisdiction to investigate the matter and, if the marriage has been established, to order maintenance even for those children of that marriage who in Muslim law are regarded as illegitimate. If, however, the marriage is not established, then he will have no jurisdiction whatever to order any maintenance.

For these reasons, I agree with the view expressed by my brother T. S. Fernando in *Jiffry v. Nona Binthan* (supra) and I would accordingly dismiss the appeal with costs.

Appeal dismissed.
