1972 *Present :* **Deheragoda, J.**

ABDUL WAHID, Appellant, *and* SITHY NALEERA, Respondent

S. C. 256/71—M. C. Kalmunai, No. Q. 918/D. 369

Muslim Marriage and Divorce Act—Sections 12–14, 46–48, 64, 66, 67—Act No. 1 of 1965—Act No. 32 of 1969—Application for appointment of a Special Quazi—Inability to have it heard on account of failure of Legislature to provide for a valid appointing body—Resulting effect on an order of maintenance made by the ordinary Quazi.

An *ex parte* order of maintenance entered by a Quazi against the appellant was made absolute on 9th November 1967 under the Muslim Marriage and Divorce Act, although the appellant had applied for the appointment of a Special Quazi in terms of section 67 of that Act on the ground that a fair and impartial trial was not possible before the Quazi. But an appointment of a Special Quazi could not have been validly made under section 67 until it was amended on 9th December by Act No. 32 of 1969. The resulting position was that prior to the amending Act, the Legislature had provided a remedy without providing the means of pursuing that remedy.

The present appeal was from an order of enforcement made by the Magistrate on 11th December 1970 under section 66 of the Muslim Marriage and Divorce Act upon an application made to him by the Quazi under section 64 for the recovery of sums due upon the order of maintenance of 9th November 1967.

Held, that, inasmuch as the appellant's application for the appointment of a Special Quazi was not heard through no fault of his own but because of the failure of the Legislature to provide the means of enforcement of a right which it had given him, the order appealed from should be set aside in revision and that the case should be sent back to the Quazi to enable the appellant to show cause why an application for an enforcement order should not be made to the Magistrate under section 64 of the Muslim Marriage and Divorce Act.

Held further, that section 46 of the Muslim Marriage and Divorce Act permits a Quazi to reserve for consideration of the Board of Quazis a question of Muslim law only and not a question relating to the interpretation of the Act.

APPEAL from an order of the Magistrate's Court, Kalmunai.

M. S. M. Nazeem, for the defendant-appellant.

A. R. Munsoor, for the applicant-respondent.

Cur. adv. vult.

July 5, 1972. DEHERAGODA, J.—

This is an appeal from an order made by the learned Magistrate of Kalmunai under section 66 of the Muslim Marriage and Divorce Act (Cap. 115) for the issue of a warrant directing the appellant to pay a sum of Rs. 3,000 as a fine and in default to undergo six months' simple imprisonment for failure to comply with the order of the Quazi to pay maintenance said to be due to the respondent and her children.

The history of this case as gathered from the petition of appeal is as follows :—On 21.7.67 the appellant applied for the appointment of a special Quazi in terms of section 67 of the Act on the ground that a fair and impartial trial was not possible before the learned Quazi, Dumbara, on account of—

(*a*) the close relationship of the Quazi, Dumbara, and the respondent,

(*b*) the learned Quazi taking more than a personal interest in the case, and

(*c*) the likelihood of a real bias.

On 5.8.67 this application had been taken up *ex parte* by the Quazi and order *nisi* had been made against the appellant. On 24.8.67 the Quazi had been informed that an application had already been made to the Judicial Service Commission for the appointment of a special Quazi under section 67 of the Act to hear the appellant's case. The appellant had requested the Quazi to stay further action in view of this application. On 20.9.67 the Judicial Service Commission had informed the appellant that it was beyond their powers to make such an appointment, apparently for the reason that, as section 67 stood at that time, the power to act under that section still remained in the District Registrar. Section 67 (1) of the Muslim Marriage and Divorce Act (Cap. 115) as it stood on 20. 9. 67 ran as follows :—

" Where it appears to the District Registrar, on the application of any party to or of any person interested in any proceedings instituted or to be instituted under this Act before a Quazi, that a fair and impartial inquiry cannot be had before such Quazi, the District Registrar may order that proceedings be instituted before and heard by a special Quazi to be appointed for the purpose under section 14

and, in the event of any such order being made, any proceedings taken in respect of the matter to which the application relates before the first-mentioned Quazi shall be of no effect."

In the case of *Jailabdeen v. Danina Umma*[1], in a judgment delivered on 17th December 1962 (*Vide* 64 N.L.R. 419), H. N. G. Fernando J., with L. B. de Silva J. agreeing, held that the office of a Quazi was a judicial office, and the proper authority to make appointments to such an office was the Judicial Service Commission as provided by section 55 of the Constitution Order in Council, and not the Minister as provided by sections 12 (1) and 14 of the Muslim Marriage and Divorce Act. The Judgment accordingly held that an order for maintenance made under section 47 of the Muslim Marriage and Divorce Act by a person or persons who were appointed to such office by the Minister and not by the Judicial Service Commission had no legal validity. In the case of *Ismail v. Muthu Marliya*[2], in a judgment delivered on 13th September 1963 (*Vide* 65 N.L.R. 431), Herat J. held that a Magistrate's Court had no jurisdiction to hear under the Maintenance Ordinance a claim for maintenance which, by virtue of the provisions of section 48 of the Muslim Marriage and Divorce Act, fell under the exclusive jurisdiction of a validly appointed Quazi.

It is not claimed that an application has been made to the District Registrar under section 67 (1), but even if such an application had been made there would have been considerable doubt in the light of the above decisions whether the function conferred on the District Registrar by that section of deciding whether a fair and impartial inquiry cannot be had before the Quazi was *ultra vires* the Constitution. If, therefore, an application had been made to the District Registrar, it is not likely to have met with success.

The resulting position was that the special Quazi to be appointed for the purposes of section 67 of the Act could not be appointed by the Minister under section 14 or by the District Registrar under section 67. By Act No. 1 of 1965, which received assent on 7th July 1965, the power of appointment of Quazis under sections 12, 13 and 14 was conferred on the Judicial Service Commission bringing the law into line with the earlier judicial decisions. But unfortunately section 67 of the Act remained unamended until Act No. 32 of 1969 which received assent only on the 9th of December 1969. In 1967 therefore neither the Judicial Service Commission nor the District Registrar could have made an order under section 67. The Legislature had provided a remedy without providing the means of pursuing that remedy. In this situation the Quazi fixed the matter for inquiry on the ground that no steps had been taken by the appellant to have the case heard before a special Quazi. On 9.11.67 the appellant through his counsel showed cause why order absolute should not be made and the Quazi, according to the appellant, "wrongfully, improperly and illegally" refused to record such cause and made order absolute.

[1] *(1962) 64 N. L. R. 419.* [2] *(1963) 65 N. L. R 43.*

Rule 4 of the rules in the Fourth Schedule to the Muslim Marriage and Divorce Act applicable to maintenance proceedings relates to the making of an order *nisi* conditioned to take effect in the event of the respondent not showing cause against it on a day specified for that purpose in the order. Rule 6 runs as follows :—

> " Where the respondent appears and shows cause to the satisfaction of the Quazi why the order *nisi* should not be made absolute, the Quazi shall set aside the order *nisi* and shall proceed with the inquiry as though no default had been made by the respondent in appearing in compliance with the notice issued under rule 2."

Learned counsel for the appellant points to Rule 10 which says that no appeal shall lie against any order absolute made by a Quazi in pursuance of the rules in this Schedule. Provision is however made in that rule for the Quazi to set aside the order absolute and proceed with the inquiry as though there had been no default in appearance only in a case where the respondent was unable to appear due to illness, accident, misfortune or other unavoidable cause or by not having received notice of the proceedings. None of these considerations will apply to the case of the appellant.

When the appellant appealed to the Board of Quazis against the order absolute, the Board, in my view, quite rightly dismissed the appeal on the ground that there was no right of appeal from an order absolute. On 27.11.67 the respondent had filed a Fasah Divorce Case No. 393 in the Quazi Court of Dumbara. In the meantime the Quazi had applied to the Magistrate at Kalmunai for the enforcement of the order under section 64 of the Act. The appellant thereupon informed the Magistrate of his desire to re-open proceedings as provided for in the proviso to section 66 of the Act, on the ground that the order of the Quazi had been made *ex parte*. Thereafter the appellant made an application to the Quazi, Dumbara, to re-open proceedings. The Quazi had sought the advice of the Board of Quazis on the question of re-opening proceedings, and the President of the Board of Quazis had ruled that " since the Board has rejected the appeal for the reasons stated therein section 66 of the Act would not apply at this stage." Accordingly on 15.8.70 the Quazi refused to re-open proceedings and the appellant appealed to the Board of Quazis from this order. On 26.11.70 the Board of Quazis had rejected the appeal without a hearing and stated as follows :—

> " As the petition relates to case No. 369 Dumbara, where the Board has made an order on 5.4.70 rejecting the petition of appeal, the Board cannot at this stage entertain the petition of appeal from an order of the Quazi refusing to re-open the proceedings which, in our opinion is an attempt to nullify the order made on 5.4.70."

On 4.12.70 the appellant appealed to this Court against the order of the Board of Quazis dated 26.11.70. These are the circumstances in which the enforcement order of 11.12.70 of the learned Magistrate has been made and against which this appeal has been taken.

Learned counsel for the appellant argues that the application of the Quazi under section 64 dated 6.10.69 to the Magistrate's Court can be made only after an inquiry under section 47. He contends that in any event the Quazi has to notice the appellant and hold an inquiry into any objections he may wish to make before making an application under section 64, and cites in support the case of *Thahir v. Shafi*[1] reported in 72 N. L. R. 19.

In reply learned counsel for the respondent brings to my notice that the respondent's application for maintenance was filed as far back as 1967 and decided in her favour in 1969 and up to date she has not obtained any relief. He states that the main complaint is that the Quazi has decided to hold the inquiry notwithstanding an application that it should be heard by a special Quazi. He also argues that the Quazi is entitled to consult the Board of Quazis on any question of law in terms of section 46 of the Act. I do not agree that that section confers power on a Quazi to reserve any question of law relating to the interpretation of the Act for consideration by the Board of Quazis. That section only enables a Quazi to obtain the advice of the Board of Quazis on any question of Muslim Law which arises in any proceedings before him.

This seems to be a case in which the appellant has done everything he could to obtain relief under section 67 of the Act to which he is entitled for the purpose of obtaining a fair and impartial inquiry, but without success, not due to any fault of his own but due to the failure of the Legislature to provide the means of enforcement of a right which it had given him.

There is some doubt as to whether the appellant has a right of appeal, but it is my view that, having regard to the penal consequences of the enforcement order, it is in the interest of justice that I should exercise the powers of revision vested in this Court and set aside the order of the learned Magistrate dated 11.12.1970 and the application of the Quazi under section 64 of the Act dated 6.10.1969.

I accordingly set aside that order and that application upon which that order is based and direct that the case be sent back to the Quazi to enable the appellant to show cause why an application for an enforcement order should not be made to the Magistrate under section 64 of the Act.

The parties should bear their own costs of this appeal.

Case sent back for further proceedings.

[1] *(1968) 72 N. L. R. 19.*