1971 *Present :* **Samerawickrame, J., and Weeramantry, J.**

M. H. M. ANSAR, Appellant, *and* FATHIMA MIRZA, Respondent

S. C. 1/70—Quazi Court, 755/836/10

Muslim law—Fasah divorce—Availability to wife on grounds of ill-treatment and desertion by husband—Meaning of expression " legal cruelty " same in Muslim law as in Roman-Dutch or English law—Proof of actual violence not necessary—Appointment of a special Quazi to hear a particular case—Validity—Muslim Marriage and Divorce Act (Cap. 115), ss. 12 (1) (2), 13, 14, 67.

The respondent-appellant and his wife, the applicant-respondent, were Muslims. Four months after their marriage, the husband left the matrimonial home on 16th January 1962. In the present proceedings, which commenced before a special Quazi and were continued, in appeal, before the Board of Quazis and the Supreme Court, it was established (1) that the husband's departure from the matrimonial house was without reasonable cause, and (2) that the course of conduct indulged in by the husband was such as made married life altogether insupportable. Although there was no actual violence, life together was fraught with danger to the health of the wife and tended to reduce her to a state of nervous prostration.

The special Quazi before whom the proceedings commenced was appointed by the Judicial Service Commission under section 14 of the Muslim Marriage and Divorce Act to hear this particular case only. No objection was taken by the parties or by the regular Quazi as to the validity of the special Quazi's appointment and his jurisdiction to hear the case. The objection was raised by the husband for the first time at the hearing of the appeal before the Board of Quazis.

Held, (i) that the appointment of the special Quazi was validly made and that he had jurisdiction to hear and determine the action. Section 14 of the Muslim Marriage and Divorce Act empowers the appointment of a special Quazi not only to deal with a class of cases but even with one particular case.

(ii) that the wife was entitled to a decree for divorce on the grounds of ill-treatment and desertion without cause. These are grounds which in Muslim law would entitle a wife to a fasah divorce, i.e., a divorce based upon the fault of the husband. By the rules of Muslim law no less than of Roman-Dutch or English law the husband's continued course of conduct amounted to cruelty in law. Actual violence is not required to constitute "legal cruelty".

APPEAL from an order of the Board of Quazis.

C. Ranganathan, Q.C., with *M. T. M. Sivardeen* and *K. Kanagaratnam*, for the respondent-appellant.

H. W. Jayewardene, Q.C., with *M. S. M. Nazeem*, *M. Hussein* and *Ben Eliyatamby*, for the applicant-respondent.

Cur. adv. vult.

November 10, 1971. SAMERAWICKRAME, J.—

Learned counsel for the respondent-appellant submitted that the Special Quazi who heard this case had not been validly appointed and had no jurisdiction to hear and determine it. No objection on this ground was taken before the Special Quazi when he commenced proceedings. The objection was raised for the first time at the hearing of the appeal before the Board of Quazis.

The Special Quazi was appointed by the Judicial Service Commission under section 14 of the Muslim Marriage and Divorce Act. Section 12 (1) provides for the appointment of Quazis and subsection (2) provides :—

"Save as otherwise provided in section 13 or section 14, more than one person shall not be appointed to be a Quazi for the same area ; and the area for which each Quazi is appointed shall be so fixed or delimited as to avoid any intersection with or overlapping of any other such area."

Section 13 provides for the appointment of a temporary Quazi where the Quazi appointed for the area is temporarily absent or incapacitated. Section 14 provides for the appointment of a special Quazi and reads :—

" (1) Whenever there is a special necessity for the appointment of a Quazi otherwise than under section 12 or section 13, it shall be lawful for the Judicial Service Commission to appoint any male Muslim of good character and position and of suitable attainments to be a special Quazi.

(2) A special Quazi may be appointed under this section either for the whole of Ceylon or for any area thereof.

(3) In appointing a special Quazi, the Judicial Service Commission may specify the conditions or restrictions subject to which such Quazi shall perform his duties and functions under this Act; and such Quazi shall not act otherwise than in accordance with such conditions or restrictions."

Learned counsel for the respondent-appellant submitted that s. 14 did not empower the Judicial Service Commission to make an *ad hoc* appointment in respect of a particular case. The words of the provisions are wide and enables an appointment to be made, " whenever there is a special necessity for the appointment of a Quazi otherwise than under section 12 or 13 ". Section 67 expressly provides for proceedings in respect of particular proceedings to be instituted before and heard by a special Quazi to be appointed under s. 14. In my view, s. 14 empowers the appointment of a special Quazi not only to deal with a class of cases but even with one particular case.

It was also submitted that where the facts were such as would make s. 67 applicable, it was obligatory that recourse be had to the procedure provided for therein. Section 67 reads :—

" (1) 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."

The object of this provision appears to be to give a right to a party to place before the District Registrar the grounds why a fair and impartial inquiry cannot be had before the regular Quazi and to obtain an order which will take away his jurisdiction and nullify any proceedings already had before him. An appointment of a special Quazi apart from an order of the District Registrar under s. 67 would only empower the special Quazi to hear the case but would not take away the jurisdiction of the

regular Quazi to do so and he might, if he chose to do so, continue to hear the case. But where the parties and the regular Quazi are agreed that it is not possible for the latter to hear the case or are for any reason content that the special Quazi should do so, no difficulty would arise. A typical instance would be where the regular Quazi has reason not to hear the case and will be embarrassed if he has to do so.

In this matter the applicant-respondent made her application to the Quazi of Colombo South who at the date she made the application was Mr. Farooq Dorai. The respondent-appellant had an objection to Mr. Farooq Dorai hearing the application. Mr. Farooq Dorai however resigned and Mr. Mohideen Cader succeeded him. Mr. Mohideen Cader was related to the parties who were first cousins. He was also a step-brother of Shuaib Cader who was a brother-in-law of the respondent-appellant and lived in the same house. Shuaib Cader was also a witness for the respondent-appellant.

The particular ground on which the appointment of the special Quazi was made by the Judicial Service Commission has not been established. In a letter to the special Quazi the Secretary of the Judicial Service Commission has stated that the appointment was made on the application of the parties. There is no material to show that the respondent-appellant made any request or representation to the Commission and, if he did make any, to what effect. The applicant-respondent appears to have taken steps to bring to the notice of the Commission the fact that the necessity for the appointment of a special Quazi had arisen. Mr. Mohideen Cader has also, in the journal entry dated 19.6.66 stated that friends and relatives of one party had approached him on various points. It is likely having regard to this circumstance that Mr. Mohideen Cader himself had communicated the need to the Commission though there is no material on the record to show that he did so. The gentleman appointed as special Quazi was the regular Quazi for Colombo North and was in every respect competent. The parties appear to have been content to have the case decided by him and no point in respect of the validity of his appointment was raised until the stage of the appeal before the Board of Quazis.

I hold that the appointment of the special Quazi was validly made and that he had jurisdiction to hear and determine the action. In view of my finding it is unnecessary to consider the further submissions made by learned counsel for the applicant-respondent based on estoppel or waiver and the doctrine of the de facto judge.

A further point was made on behalf of the appellant that the decision was vitiated by irregularity. It was submitted that there had been a breach of Rule 55 of the Muslim Marriage and Divorce Regulations 1953 which stated that in no case may a Quazi express or indicate to the assessors his own opinion of any question of fact. The special Quazi delivered his order in respect of the application for a khula divorce in the presence of the assessors and thereafter proceeded to obtain their

views in regard to a fasah divorce. In his judgment in respect of the khula divorce he did refer to certain evidence. I am of the view that there was no contravention of regulation 55 and that even if there was a contravention, the irregularity was not substantial and in no way vitiated the decision.

I agree with the finding arrived at by Weeramantry J., that upon a consideration of all the circumstances the conduct of the appellant was such as to make married life insupportable and amounted to cruelty. The applicant-respondent was therefore entitled to a fasah divorce. I accordingly agree with the order made by Weeramantry J., confirming the judgment of the Board awarding the wife a fasah divorce and dismissing the appeal with costs.

WEERAMANTRY, J.—

The proceedings from which this appeal is taken commenced with an application to the Quazi Court by the wife, who is the respondent in the appeal, for a divorce on the ground of (1) ill-treatment, (2) desertion without cause, (3) failure to maintain, and (4) failure to perform marital obligations without cause.

The trial took place before a Special Quazi and the respondent proceeded only upon the first two bases namely ill-treatment and desertion. These are grounds which in Muslim law would entitle a wife to a fasah divorce, that is a divorce based upon the fault of the husband.

The learned Special Quazi, despite every effort at a reconciliation, as was his duty under the Muslim law, was unable to bring the parties together. At more than one stage the respondent, when asked whether she was prepared to be reconciled to her husband, stated consistently that her position was that a reconciliation was out of the question, and that she would under no circumstances resume life with the appellant for whom, in consequence of his conduct, she had conceived an intense dislike.

On the first day of the proceedings before the Special Quazi the wife stated however that she was also seeking a khula divorce, that is, a divorce in respect of which it is not essential to prove fault, but wherein the allegation is that the parties are unable to live together as husband and wife " within the limits of God ". The wife's contention was that she was entitled to such a divorce by decree of the Court and that a decree could be so granted despite the opposition of the husband ; and independently of his consent.

The learned Special Quazi held with the wife on the question of ill-treatment, and held also that he had left the matrimonial home without good cause on 16th January 1962. However he held that his failure to return up to 22nd January 1962, when he was informed that his wife

desired a divorce, did not constitute desertion in law. He awarded the wife a fasah divorce on the ground of cruelty and also indicated that she was entitled in law to a khula divorce as well.

Upon the appeal of the husband to the Board of Quazis the Board not only upheld the Special Quazi's findings on cruelty but also held that the appellant was guilty of desertion in law. The Board further, while upholding the Special Quazi's findings in relation to a fasah divorce, reversed his findings in regard to the availability of a khula divorce.

It is against this background that two appeals have come before this Court, the first by the husband against the decision awarding a fasah divorce to the wife and the second by the wife against the decision that she is not entitled in law to a khula divorce. The present judgment deals with the first of these appeals.

There has been an argument before us on the question of the validity of the appointment of the Special Quazi and the questions of law involved in that argument are dealt with in the judgment of my brother Samerawickrame. I agree with his finding that the appointment of the Special Quazi was validly made and it is upon that basis that the present judgment proceeds. I would content myself with observing that the parties submitted to the jurisdiction of this Special Quazi and in the present case it is my view, subject to any rights they may have by way of appeal, that they are bound by the order of the learned Special Quazi.

Passing now to the facts, it should be noted at the outset that the parties to this marriage are first cousins, in that the husband's mother is the sister of Dr. Sulaiman, the wife's father. The parties were married on 14th September 1961 and lived as husband and wife until the appellant's departure from the matrimonial home on the morning of 16th January 1962.

The matrimonial home of the parties during the four months they lived together was the house occupied by the parents of the respondent, Dr. and Mrs. Sulaiman. It was in evidence that among members of the Muslim community it is customary after marriage for the young couple to take up residence in the home of the wife's parents until the birth of the first child and there was therefore nothing unusual in the arrangement that the new couple were to live initially with the bride's parents. Moreover that was the accepted and agreed matrimonial home of the parties in which the appellant, without any expression of reluctance, took up residence after marriage.

It may be observed also that the house occupied by Dr. and Mrs. Sulaiman in fact belonged to the bride, as it had been gifted to her by her father some time prior to the marriage. It would appear that the father, Dr. Sulaiman, used to pay to his daughter a sum of Rs. 600 per month as rent for these premises. He had also transferred to her a property in Main Street bringing a rental of Rs. 800 per month and it was his practice to bring this rent totalling Rs. 1,400 into the room

occupied by the couple and hand it over to the husband, saying it was his wife's rental for the month. This rental has been one of the principal causes of displeasure between the parties as it was the wife's contention that her husband desired to have control of this money.

The witnesses called for the respondent at the hearing before the Special Quazi were her father Dr. Sulaiman and Mr. A. H. M. Ismail, an advocate of the Supreme Court who formerly held judicial office and is a respected member of the Muslim community. She also gave evidence on her own behalf.

For the appellant, apart from his own evidence there was the evidence of his father, Mr. C. L. M. M. Saleem.

The wife's position was that on the very night of the wedding her husband told her that he had not wanted to marry her but had done so only to please his parents. She complained of unhappiness from the very commencement of her marriage and of her movements being restricted unreasonably. For example her husband used to object to her attending parties at the houses of her relatives and would practically keep her confined to her room. He abused and insulted her parents and on occasions when there were visitors she was not even allowed out of her room. The appellant used to go to work daily and return home around 7 p.m. having first visited his mother after work at 5.30 p.m. The respondent used to be taken for drives only to the house of the appellant's parents and it was only on one occasion after marriage that they went to Galle Face for a drive.

One incident in particular stands out for special mention. Dr. Sulaiman had in accordance with his usual practice bought tickets for the annual Medical dance in 1961. It is in evidence that Dr. Sulaiman books a table for this dance to which he takes the doctors who are employed by him at his nursing home, and on this occasion he had bought two tickets for the young couple and invited them to attend. The appellant, stating that he objected to any participation in functions of this sort, refused to attend after the tickets had been bought. Consequently, the respondent went there along with her father and at this table the only empty place was that of the appellant. So shortly after the marriage, when all the doctors employed under the respondent's father would no doubt have been anxious to meet the young couple, this was certainly an incident that must have caused much pain of mind to the respondent and to her parents.

The respondent's position was that all this harassment and ill-treatment were attributable to the complete domination of the appellant by his father and the desire of the appellant to gain control over her money. The rental paid by her father on 10th November 1961 had not been given to her by her husband and when she asked for it he had told her that she had no right to touch his cupboard. In consequence the respondent requested her father to pay the money due to her and this was done in the months of December and January.

The final episode in their life together occurred on the night of 15th January 1962, and was a sequel to an argument over money matters arising from the non-payment to him of the January rental. The respondent states that her husband had wanted her to wake her father at 2 a.m. and to bring him to his room to face the ordeal of being questioned about money matters. She refused to fetch him saying that her husband could speak to him in the morning without disturbing her all night. On the 16th morning the appellant left the house without a word to her and never returned. He never communicated with her personally, he sent her no letters and made no attempts to come home.

The wife has summarised the effect upon her of her husband's unreasonable and harsh conduct in the terms that he continually "bullied" her over money matters, abused her and her parents, wanted to control every act of hers, and eventually " reduced me to a state of nervousness and harassment ".

The wife's father, Dr. Sulaiman, confirmed her version of unhappiness from the commencement of married life and of the unreasonable attitude of the respondent on money matters. He describes how " she became daily more unhappy and her gay and jovial life had almost come to an end. I did not want to ask her any reasons, which were quite apparent looking at her face ".

This is indeed an eloquent description of the manner in which a happy young girl was transformed in the short space of a few weeks into one weighed down by harassment and restrictions to a state of sorrow and nervousness.

Dr. Sulaiman referred to the appellant's conduct in relation to the Medical Dance, his refusal to attend a motor rally at Ratmalana held on one of their estates although all the other members of the family customarily attend that rally and the couple had been given a month's notice of it, his refusal to come down to breakfast when a well-wisher had come all the way from Eravur to greet the young couple, and other incidents of this nature which, if proved, constitute clear indications of conduct most unreasonable on the part of a husband so shortly after marriage.

Dr. Sulaiman also recounted how the appellant did not come down to meals with the other members of the family but required his wife to carry his meals upstairs and that he required this to be done even when her ankle was sprained and she had to limp up the stairs.

All this evidence, if correct, shows that a situation was slowly building up in which life together was becoming intolerable to the wife.

Finally on 16th January 1962 the respondent left home earlier than usual. To Dr. Sulaiman's inquiry as to why he was leaving so early that morning he replied that he had to reach his work place in time to obtain parking space for his car as the Police was stopping the incoming traffic into the Fort in consequence of the arrival of a State visitor.

The respondent did not return that night and the household stayed up till 11 p.m. awaiting his arrival. Dr. Sulaiman himself waited for him till 1 a.m. but he did not return. The following morning he and his wife consequently decided to visit the appellant's home to make inquiries, but his daughter insisted that before he proceeded he must hear her. Her version was that on the 15th night her husband had harassed her asking her to give him his money and to submit accounts in respect of the moneys she spent. He also wanted her to wake her father at a late hour of the night and ask him to come to his son-in-law's room. She was very annoyed at this conduct and pleaded with her father not to set out to fetch her husband as he had left of his own accord. If he in fact wanted to return she said he would come on his own. In consequence of the respondent's request Dr. Sulaiman did not go over to the residence of the appellant's father.

The evidence of Dr. Sulaiman regarding his daughter's complaints to him and in particular her prompt complaint on the 17th morning regarding the happenings of the 15th night, lend strong support to her own version of these matters.

The appellant's version briefly was that, the marriage being one between first cousins, financial questions did not loom large in it and that in fact there was no question of any monetary matters or dowry ever being discussed. He stated that during his stay at No. 63, Green Path, he caused household provisions and a bag of rice to be supplied monthly and also a sum of Rs. 200 to be paid to the respondent for her expenses. He continued to pay this sum monthly even after he left.

His position was that during his absence his wife used to go out shopping and to sundry places both with and without her mother and that he never raised objections to this. He accompanied his wife almost daily on a drive to Galle Face and also took her to the cinema and attended functions with her and visited relations. He denied the allegation that he kept her confined in the house. He stated further that her relations paid almost daily visits to No. 63, Green Path, so that his wife had ample opportunities of keeping in contact with them, whereas his own relations lived some distance away.

His position was that his mother-in-law, who occupied the bedroom adjoining that of the young couple, used to interfere with their married life and he actually complained that in consequence of inquisitiveness on her part to observe their conduct, their privacy was also interfered with.

In regard to attending ballroom dances, his position was that such attendance did not accord with his religious principles and that despite his wishes in the matter his wife attended the Medical Dance to please her parents. His view was that ballroom dancing goes on to the early hours of the morning and interferes with married life.

His contention was that from the commencement it was the intention of dissatisfied relations to wreck the marriage, and among the persons so ill-disposed were his maternal uncle, Mr. U. L. M. Mohideen Hadjiar, Mr. Advocate A. H. M. Ismail and others. He denied that there was any dispute between himself and his wife on any money matters and affirmed that the causes of quarrels were only his wife's desire to attend dances, and liquor parties.

Seeing that interference with their married life by his mother-in-law was not conducive to harmony he suggested to his wife that they live separately, and this request was frequently made, but his wife did not accede to his wish and he finally left on 16th January 1962 when his wife told him that his mother-in-law was trying to organise another dance after a relation's birthday party. He therefore left No. 63, Green Path, and went to his father's house leaving behind all his belongings. An important part of his case was that in spite of his parting he continued to write letters to his wife and sent remittances for her maintenance. He personally posted these letters and kept carbon copies after the first two letters. He produced all these carbon copies marked R90 to 137, that is for the period February 1962 to August 1966. These letters were all returned unopened and were opened in Court.

It was also his position that on several occasions he attempted to speak to his wife on the telephone and that his mother also telephoned his father-in-law on several occasions. Dr. Sulaiman promised to meet his mother but failed to do so.

He categorically denied that he ever wanted to control her money or income or that he abused her or her parents or prevented her from mixing with members of either his or her family.

As between the respective versions of the parties both the Special Quazi and the Board of Quazis appear to have had little difficulty in rejecting the version of the appellant and in preferring that of the respondent. On all material points regarding the incidents referred to they have accepted the evidence of the respondent and of her father Dr. Sulaiman. With this view of the facts I am in complete agreement.

In regard to the complaint that his wife was fond of attending dances and liquor parties, it is rather difficult to understand the reference to liquor when there was not the slightest suggestion that she or any of the members of her party indulged in liquor; and in fact throughout the cross-examination of the wife the suggestion was not made to her that she was fond of attending liquor parties. One finds it difficult to understand whether the alleged objection of the appellant was to the fact that dancing was indulged in or that liquor was consumed at these parties. If he had in fact a serious objection to his wife attending parties on the ground that at any of those she or members of the party had consumed liquor, one would expect that that position would have been clearly stated by him and put to her at the stage at which she was giving evidence. It seems to us that the question of liquor has merely been

dragged in to make her attendance at the Medical Dance appear in an offensive light, when in fact her attendance in the company of her father and all her father's staff at a function which has come to be looked upon as a well-known get-together of the Medical profession, seems to be quite inoffensive and innocuous and one to which no objection could reasonably be taken.

That would be the view we would be inclined to take ordinarily but we are strengthened in this view by the findings of the Board of Quazis who being themselves leading members of the Muslim community have expressed the view that they see nothing objectionable in attendance at such a dance as customs change and it becomes necessary to adapt oneself to the changing customs of the time. In any event there has not been the slightest suggestion savouring of impropriety of any description whatsoever in the attendance of the wife at the Medical Dance. Indeed when specifically questioned as to whether his wife takes liquor when she goes to parties the appellant answered in the negative. We see no substantiation of any sort of the appellant's contention that attending such a function is against the teaching of Islam.

The general unreasonable attitude of the appellant can indeed be gauged from the manner of his cross-examination of the respondent. For example, in regard to the Medical Dance he asked the question :—" So you go to such parties where there are various communities present."

There is quite clearly in this question the implication that he disapproved of his wife even attending such social gatherings where other communities are present and if this was his general attitude it seems quite manifest that his attitude towards the movements of his wife was an altogether unreasonable one.

Before concluding this discussion of the questions of fact involved, I would only wish to deal with the rather curious conduct of the plaintiff in regard to the correspondence he addressed to his wife after he left her.

I would refer firstly to the letter R88 of 17th January 1962, wherein he states that he had left the previous day because it was not possible for him to be in that house with the plaintiff's mother interfering at many times in their personal affairs. He goes on to state that he begs of her to live separately from the parents of both parties, if they are to be happily married. The letter requests the wife to contact the writer over the telephone and to make arrangements to come and live with him separately. This letter begins with the statement that he had tried many times to contact his wife on the phone but had been told that she was not in.

The receipt of letter R88 is denied. The next we have in the series of letters is R89 of 20th January 1962 referring to the letter of 17th January, and stating that it was not possible to go on like this. This letter requested the recipient to write a short note indicating that she was

willing to come, in which event the writer would call and take her away. It also speaks of sending her a cheque for her monthly expenses in a few days' time.

R90 is dated 22nd February 1962 and states that " as promised in my previous letter " he is sending her a sum of Rs. 1,000 being the usual monthly allowance of Rs. 200 and a further sum of Rs. 800 for festival expenses.

R91 of March 1962 forwards a cheque for Rs. 200 and begins a stereotyped series of letters which followed month after month stating that the cheque for Rs. 200 was being enclosed and that the writer was still hoping that " our parents and elders will look into our matter and bring about a settlement to enable us to resume our normal relationship ". These letters are all addressed " My dear Mirza " and end " with kind regards, yours affectionately ".

These are scarcely the letters one would expect from a husband who still retained, as he claimed he did, an affection for his wife. They savour rather of routine business correspondence and seem totally devoid of the affection one would expect even in the strained circumstances that now prevailed. This abnormal correspondence was continued month after month and each one of these letters was returned unopened by the wife.

It is to be remarked also that carbon copies have apparently been preserved of these letters, thus pointing again to the conclusion that they were written more or less in the manner of business correspondence.

There is moreover a strong suspicion that the appellant has been dishonest in the matter of this correspondence for there are cogent reasons for a belief that there has been a tampering with the date of the letter R90 (also marked R5) in order to build up a case for the appellant.

The letter R90 of 22nd February 1962 (also marked R5) is a letter enclosing a cheque for Rs. 1,000, and much significance attached to the question whether this letter was sent by the appellant subsequent to a meeting with Mr. Ismail. The significance of the date lay in the fact that Mr. Ismail had according to his evidence and according to the entries in his diary of 22nd and 23rd February 1962 informed the appellant that the respondent was determined to seek a divorce. Consequently if R90 was written prior to the meetings with Mr. Ismail it would have been a letter written without knowledge of the determination of the respondent to seek a divorce. If on the other hand it had been written after the meetings with Mr. Ismail it was written with knowledge of her determination but in pursuance of a pretence that he was not so aware.

In R90 as if innocent of all knowledge that matters had reached this stage, the appellant regrets that he had received no replies or telephone calls to his earlier letters. He proceeds to state that he is sending her

money for festival expenses and monthly expenses as though the knowledge that divorce was contemplated by her was furthest from his mind.

In these circumstances the suggestion was made that R90 was not in fact written on 22nd February (a date which would ante-date the meetings with Mr. Ismail) but on 24th February and that the appellant had deliberately ante-dated it to the 22nd of February, so as to make it appear that it was written before the meetings with Mr. Ismail.

There is much support for this suggestion from more than one circumstance. The letter appears to have been posted on the 24th and the appellant was questioned as to why the letter written on 22nd February should have been posted on the 24th. The explanation he gave, namely that the 22nd may have been a Saturday, was found on verification to be incorrect, for it was a Thursday and the 23rd a Friday.

Furthermore, as the learned Quazi observes, a close scrutiny of the counterfoil of the enclosed cheque (which is a cheque drawn by the father for Rs. 1,000) shows that it was originally dated the 24th, and that, in the figure representing the date, the 2nd digit has been altered from 4 to 2. This again would seem to suggest that the letter and the cheque were made out on the 24th.

When the appellant's attention was drawn to this discrepancy in dates he went through the relevant postal article receipt and eventually admitted that the letter was sent on the 24th.

This brings me to important aspects of this case concerning the diary entries of Mr. Ismail which reflect the interviews he had in this connection with the representatives of both parties. The suggestion was rashly made by the appellant that these diary entries were fabricated.

I shall deal first with the entries relevant to the date of the letter R90.

The diary entries in question are those relating to February 22nd and February 23rd, and if these entries are correct it is easy to see that the appellant's attempt to make out that R90 was sent on the 22nd of February and not on the 24th is a dishonest attempt to conceal the fact that he clearly knew by the time he wrote this letter that his wife had made up her mind to seek a divorce.

A4, Mr. Ismail's diary entry on February 22nd reads as follows :—

"C. L. M. M. Saleem and Ansar came to our place with a type-written letter at about 7.30 p.m. embodying the draft prepared last Sunday the 18th instant. I told them not to send the letter as matters have changed since I last spoke to them. I told them I have no time to discuss this in detail ; but that I would meet them and Sithy Aysha at their home tomorrow at 2.30 p.m. However I told them the gist of the decision arrived at Dr. Sulaiman's place yesterday namely that Mirza desires a Divorce as the Marriage had failed and that she cannot have a happy and compatible married life with Ansar in future."

A5, the entry for February 23rd makes it even clearer that the respondent's state of mind had been communicated by Mr. Ismail to the appellant's representatives. It reads as follows :—

"I discussed Ansar's marriage matter with his parents Mr. & Mrs C. L. M. Saleem and Shuaib Cader at their residence at Pendennis Avenue from 2 p.m. till 5 p.m. I told them that Mirza desires to have a Divorce from her husband Ansar as she cannot lead a happy life with him. Ansar's reply was that he cannot grant a Divorce as there is no valid reason for such a course. He wants the elders to intervene and settle matters amicably and allow both him and his wife to live happily after settling the money matters satisfactorily. I told them that it is not possible to settle this matter as the wife's mind is finally made up and that she considers the marriage ill-suited and incompatible as her experience of four months' married life with Ansar from September 1961 till 15th January, 1962. I asked them to consider the request of the wife, take time over it, and decide without causing bitterness and hardening of feelings."

It became abundantly clear then that the letter R90 was sent out with knowledge of the respondent's state of mind and so as, by its date, to counter possible evidence that by that date the respondent had made it clear to Mr. Ismail that a reconciliation was out of the question.

The anxiety of the appellant to discredit Mr. Ismail's diary entries thus becomes easy to understand.

On a consideration of these matters we feel that the learned Quazi was perfectly correct in rejecting the letters R88 and R89 and in holding them to have been ante-dated. It is significant that in none of the letters that have been produced except for R88 and R89 is there any indication by the appellant of an intention to live with her in a separate house.

Upon the learned Quazi's findings it would follow that the appellant has not only been cruel to the respondent and unreasonable in the matter of his desertion but also that he has been prepared to go the length of bolstering up his case by letters which, as the learned Quazi observes, do not reflect the true state of affairs between the parties.

Upon a review of the totality of the evidence in this case there seems then to be clear proof of a course of conduct so altogether unreasonable that married life became impossible. There is clear proof also of desertion by the appellant without cause.

The numerous incidents indicating irresponsibility and unreasonableness amply substantiate the findings arrived at both by the learned Special Quazi and by the Board of Quazis. For instance the readiness with which the appellant was prepared to cast aspersions on Mr. Ismail, bespeaks an irresponsibility of outlook which is of a piece with the irresponsibility displayed by the appellant throughout his short married life.

It is important to note that the diaries of Mr. Ismail emerged only at a stage when the appellant was putting it to Mr. Ismail that neither the appellant nor his representatives had ever sought Mr. Ismail's advice on any occasion regarding this matter. It was at that stage that Mr. Ismail while re-affirming that his advice had been sought on more than one occasion said that he could prove the matter definitely by the diary which he had kept. These diary entries such as A1, A2 and A3 indicate long discussions at Mr. Ismail's house on 11th February, 12th February and 18th February and attempts to seek his assistance in drafting a letter to be sent to the respondent. Some of these discussions according to the diary have lasted for hours.

Even if the diary entries had not been there to support Mr. Ismail, Mr. Ismail's evidence is evidence which would unhesitatingly command the acceptance of a court unless strong reasons existed for its rejection. None which are worthy of any consideration have been suggested.

When Mr. Ismail stated in his evidence quite categorically that he had been so consulted the attempt to contradict him flatly was one which by itself was serious enough. When Mr. Ismail produced in support of his statements diary entries which completely confirmed his version, it seems exceedingly rash for the appellant to have suggested that a person of Mr. Ismail's position and background had gone to the length of fabricating a series of diary entries in order to pay off an ancient grudge. Such a suggestion is not one which a person with any sense of responsibility would lightly make. Mr. Ismail has contradicted this allegation on oath and there is nothing before us of the strong and compelling nature a court would require before it even entertains the suggestion that the entries in the diary are other than perfectly genuine ones.

Again in the cross-examination of Dr. Sulaiman, the appellant, in order to establish a minor point regarding the illness of a relation, summoned Dr. Sulaiman to produce all the books of the Grandpass Maternity Home. The respondent quite rightly objected that the books of the Nursing Home had nothing to do with the case and that this was merely an attempt to harass her and prolong the case. Dr. Sulaiman pointed out that the Nursing Home was a very big organisation employing over fifteen doctors and stated that he objected to the appellant having a look at his books. The learned Quazi upheld these objections, and refused the appellant's application, observing that the fact that a patient had been treated in that hospital had no bearing upon the facts in issue. I refer to this as another instance indicative of the general attitude of irresponsibility of the appellant in the conduct of his case. It seemed quite clear that the application was one made not with a view to assisting the court but with a view to embarrassing the respondent.

This is of a piece also with the reckless allegation that his mother-in-law from her adjoining room would constantly peep into their bedroom and disturb their privacy.

Statements of this nature show that the appellant, to gain his ends and show his wife and her relations in an unfavourable light, is prepared to make allegations with little regard to reality or plausibility.

This sort of conduct and this attitude of mind were not in any way conducive to matrimonial harmony. For these and other reasons the learned Special Quazi has observed that after a careful consideration of the evidence of the appellant he is compelled to reject it as untrue. These findings of the learned Special Quazi have not only been accepted by the Board of Quazis, but the latter have expressly stated that they are of the view that the learned Quazi came to the correct conclusion when he stated that the appellant's conduct amounts to cruelty.

We would associate ourselves with the condemnation of the appellant's conduct by the learned Special Quazi and the Board of Quazis and hold his conduct to be so altogether harsh and unreasonable, as to constitute cruelty. As pointed out by the Board, questions of credibility are heavily involved in this case and no adequate reason has been adduced for any interference with the findings of the Special Quazi. Co-ordinate findings of fact by the Special Quazi and the Board of Quazis this Court would require the strongest circumstances to disturb. None such have been made out by the respondent and in our view no reason whatever exists for any such interference by us.

We agree also with the findings of both courts below that the appellant's departure from the matrimonial house on 16th January 1962 was without cause and we agree with the findings of the Board that in the circumstances of this case his conduct amounts to desertion in law.

It is not necessary for the purpose of the present judgment to enter upon an elaborate discussion of what constitutes " cruelty " under the Muslim law. It seems sufficiently clear that actual violence is not required in order to constitute " legal cruelty " whether under English law or under Muslim law. In *Buzrul Rahim's case*[1] the Privy Council observed that " the Muhammadan law on the question of what is legal cruelty between man and wife would probably not differ materially from our own."

As Sir Rowland Wilson observes[2]: " Since Lord Stowell's time it has been made clear in England that a course of unkind treatment may be cruelty in the legal sense though keeping clear of actual violence if it tends to endanger the wife's health...." and proceeds to observe that so far as Muhammadan law is concerned actual violence is now not necessary but that " legal cruelty " will be sufficient.

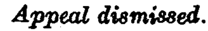
I have no doubt upon a consideration of all the circumstances in the present case that the course of conduct indulged in by the appellant was such as made married life altogether insupportable. Life together was fraught with danger to the health of the respondent, and tended to

[1] *11 Moore Indian Appeals 551.* [2] *6th ed., p. 155.*

reduce her to a state of nervous prostration. Such a continued course of conduct by the rules of Muslim law no less than of Roman-Dutch or English amounts to cruelty in law.

There is no question but that a fasah divorce would be available to a wife in the circumstances I have set out.

I would accordingly confirm the judgment of the Board awarding the wife a fasah divorce and dismiss this appeal with costs.



Appeal dismissed.