1960 *Present:* **T. S. Fernando, J.**

M. T. M. JIFFRY, Petitioner, *and* NONA BINTHAN, Respondent

S. C. 263—Application in Revision in M. C. Colombo, 30980/A

Maintenance—Illegitimate children—Muslim parents—Jurisdiction of Quazi—Muslim Marriage and Divorce Act, No. 13 of 1951, ss. 2, 47 (1), 48—Maintenance Ordinance (Cap. 76).

A Quazi has no jurisdiction to hear and determine an application for maintenance in respect of children whose mother has at no time been married to the alleged father. Section 47 (1) (c) of the Muslim Marriage and Divorce Act, No. 13 of 1951, relating to "any claim for maintenance by or on behalf of a child (whether legitimate or illegitimate)" must be construed in a way which does not detract from the force of the governing section 2 which provides that the Act "shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Ceylon who are Muslims".

APPLICATION to revise an order of the Magistrate's Court, Colombo.

M. S. M. Nazeem, with *M. T. M. Sivardeen*, for the defendant-petitioner.

Malcolm Perera, for the applicant-respondent.

Cur. adv. vult.

September 1, 1960. T. S. FERNANDO, J.—

On the 29th January 1960 the applicant-respondent made an application in the Magistrate's Court in terms of the Maintenance Ordinance (Cap. 76) claiming an order against the defendant-petitioner for maintenance in respect of her two illegitimate children aged 18 and 7 months respectively. She alleged that the defendant is the father of these two children. It is common ground that the applicant and the defendant are Muslims and that the applicant has at no time been married to the defendant.

The defendant took objection to the Magistrate entertaining the application on the ground that the Quazi appointed by the Minister for the area in question had exclusive jurisdiction to inquire into and adjudicate upon any claim for maintenance by or on behalf of a child of Muslim parents. On his behalf reliance was placed on sections 47 (1) and 48 of the Muslim Marriage and Divorce Act, No. 13 of 1951. The learned Magistrate, relying upon a statement contained in the judgment of Fernando J. in *Abdul Gaffoor v. Joan Cuttilan* [1], that the Kathi Court and the Magistrate's Court have concurrent jurisdiction to hear and determine applications for maintenance, decided that he had jurisdiction to adjudicate on the application. The proceedings before me are designed to canvass the correctness of the Magistrate's decision in regard to jurisdiction.

[1] *(1956) 61 N. L. R. at 89.*

The relevant part of section 47 (1) and the entirety of section 48 of Act No. 13 of 1951 are reproduced below :—

> 47 (1).—" The powers of the Quazi under this Act shall include the power to inquire into and adjudicate upon . . . . (c) any claim for maintenance by or on behalf of a child (whether legitimate or illegitimate) ; "
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> 48. " Subject to any special provision in that behalf contained in this Act, 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 whatsoever."

It was argued on behalf of the defendant that the reference in *Abdul Gaffoor v. Joan Cuttilan* (*supra*) to the Quazi's Court and the Magistrate's Court having concurrent jurisdiction to adjudicate on maintenance applications has been made *per incuriam* and that the attention of the learned judge who decided the case may not have been drawn to section 48 of the Act. The learned judge makes no reference in the judgment to either section, but it is clear that he was dealing with proceedings for maintenance between parties who had been married and divorced, and in respect of those proceedings the Quazi's Court obviously had jurisdiction which was the jurisdiction upheld in appeal. It appears to me that section 48 had the effect of making that jurisdiction exclusive and not concurrent with that of the Magistrate's Court, but having regard to the order actually made on appeal the reference in the judgment to concurrent jurisdiction played no part in the ultimate decision.

Mr. Malcolm Perera, for the applicant, contended that the Quazi's Court had no jurisdiction at all to hear the present applicant's application as section 2 of the Muslim Marriage and Divorce Act, No. 13 of 1951, which section governs the whole of the Act, declares that " This Act shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Ceylon who are Muslims ". As the applicant and the defendant are not married it was not open, he argued, to invoke the jurisdiction of the Quazi under section 47 which must be limited to matters connected with marriage or divorce between the parties. He pointed out that in *Abdul Gaffoor's case* (*supra*) the maintenance of the ex-wife and the child was a matter connected with the divorce and the Quazi's Court rightly had jurisdiction to adjudicate upon the matter of maintenance.

It is correct, as has been pointed out on behalf of the defendant, that section 47 confers on a Quazi power to adjudicate upon a claim for maintenance by or on behalf of an illegitimate child as well, but this power must be construed in a way which does not detract from the force of the governing section 2 which I have quoted above. It may be mentioned that by section 1 (2) of the Muslim Marriage and Divorce Regulation Ordinance (Cap. 99) which also had made provision for a Kathi to adjudicate upon claims for maintenance by or on behalf of a child (whether legitimate or illegitimate), and which was repealed by Act No. 13 of 1951, that Ordinance was declared applicable " only to subjects of His Majesty professing

Islam ", while the corresponding section of the existing Act reads, as I have shown already, that the Act " shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Ceylon who are Muslims ". The change is not without significance, and whatever might have been the position if section 2 of the Act had been couched in the same terms as section 1 (2) of the Ordinance, it is impossible to deny that the change in phraseology has had the effect of restricting the applicability of the Act. A marriage between persons who are Muslims does not have the effect of legitimating children born to them before marriage.—(See Ameer Ali on Mahommedan Law, 5th ed., at pages 199 and 201 :—" The Mussulman Law does not recognise the doctrine of *legitimatio per subsequens matrimonium* "). The legislature may well have thought of that case in enacting section 47 (1) (*c*) in the terms it did. Mr. Perera added another case as having possibly been in the contemplation of the legislature, viz., the case of children procreated as a result of a void marriage. These are but two instances which indicate that there are certain classes of illegitimate children whose claims for maintenance are exclusively within the jurisdiction of the Quazi for they can be said to be matters connected with marriage within the meaning of section 2. Then, again, what is the position in respect of maintenance for an illegitimate child born to a non-Muslim woman by a Muslim father ? If section 47 (1) (*c*) of the Act is to be interpreted literally, without reference to section 2, even such a child may have to submit to the exclusive jurisdiction of a Quazi's Court. I do not think that was ever the intention of the legislature.

Applications for maintenance in the case of children like those of the present applicant who has at no time been married to their alleged father are not, in my opinion, within the special Act (Act No. 13 of 1951), but fall to be prosecuted under the general statute (the Maintenance Ordinance).

As the Magistrate's Court has held that it has jurisdiction, I would dismiss this application and order that the record be returned for the proceedings now to be continued in that Court. The petitioner must pay the costs of this application which I fix at Rs. 52/50.

Application dismissed.