1962 *Present :* **H. N. G. Fernando, J., and L. B. de Silva, J.**

K. S. S. JAILABDEEN, Appellant, *and* A. R. DANINA UMMA, Respondent

S. C. 2/1962—Quazi Court, Colombo South, No. 626

Quazi—Appointment by Minister—Unconstitutionality of such appointment—Quazi holds judicial office—Power of enforcement is not an essential requisite of judicial power—Power of Legislature to create new tribunals—Right of appeal conferred by statute—Right of appellant to question validity of the appointment of the persons constituting the tribunal—Muslim Marriage and Divorce Act (Cap. 115), ss. 12 (1), 14, 47, 48, 60, 62, 64, 65, 67—Bribery Act, s. 41—Constitution Order in Council, 1946, ss. 55, 88.

The office of Quazi is a judicial office, and the proper authority to make appointments to such an office is 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. Accordingly, 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 has no legal validity.

The establishment, by the Constitution Order in Council, of the Judicial Service Commission, with exclusive power to appoint to judicial office, does not, however, limit in any way the power of Parliament to establish by legislation new judicial tribunals with jurisdiction (whether exclusive or not) over particular charges or causes. *Piyadasa v. Bribery Commissioner* (1962) 64 N. L. R. 385, discussed.

A tribunal can have judicial power even though it may lack the power to enforce its decisions.

The right of appeal from an order of the Board of Quazis, which is a right expressly conferred by statute (the Muslim Marriage and Divorce Act), cannot debar the appellant from questioning the legal validity of the persons constituting the tribunal. *Don Anthony v. Bribery Commissioner* (1962) 64 N. L. R. 93, discussed.

APPEAL, under section 62 of the Muslim Marriage and Divorce Act, from an order of the Board of Quazis.

C. Ranganathan, with *M. T. M. Sivardeen*, for the Respondent-Appellant.

H. W. Jayawardene, Q.C., with *M. S. M. Nazeem* and *E. St. N. D. Tillekeratne*, for the Applicant-Respondent.

Cur. adv. vult.

December 17, 1962. H. N. G. FERNANDO, J.—

The Appellant is a person against whom an order was made by a Quazi under section 47 of the Muslim Marriage and Divorce Act (Cap. 115) for the payment of maintenance to his wife and children, and who unsuccessfully appealed to the Board of Quazis under section 60 of the Act. From the order of the Board of Quazis he has, with the leave of this Court, preferred this appeal to the Supreme Court under section 62.

An important question of law was raised by counsel for the Appellant in the form of an argument on the same lines as that apparently presented in the very recent case of *Piyadasa v. Bribery Commissioner* [1], namely that it was unconstitutional to confer on a Quazi, being a person holding a judicial office, the power to make orders binding on parties to proceedings taken before him. The form of both these arguments was similar to, although more extensive than, that put forward in the earlier case of *Senadhira v. Bribery Commissioner* [2], namely that it was unconstitutional to empower a Bribery Tribunal to pass sentences on an accused person whom it has found guilty. While agreeing with the reasoning of my brothers Tambiah and Sri Skanda Rajah in the recent decision, I think with respect that the conclusion reached on that reasoning should have received a different formulation, and I trust that the statement of my opinion will serve to clarify the issue rather than to confuse it. What was actually decided was that " the Bribery Tribunal has no jurisdiction to try and find the accused guilty of the offence of bribery (per Tambiah, J.,) and that " the Bribery Tribunal is an unconstitutional body " (per Sri Skanda Rajah, J.).

In my opinion, the establishment by the Constitution of the Judicial Service Commission, with exclusive power to appoint to judicial office, must not be construed as limiting in any way the power of Parliament by legislation to establish new " judicial officers ", that is to say, new tribunals vested with judicial power. There is nothing illegal, in the sense of conflict with the Constitution, in a statute which establishes a new judicial tribunal with jurisdiction (whether exclusive or not) over particular charges or causes. Indeed the legislature might well consider it necessary in the public interest to constitute such tribunals, and one can think of many reasons for the adoption of such a course, such as the need to secure quick disposal of matters considered to be deserving of special priority, or to appoint to such tribunals persons having special knowledge or experience concerning the matters to be adjudged. Taking then the Bribery Act itself, there would be no justification for a Court or a litigant to cavil at any of its provisions except such a provision as may be in conflict with the Constitution. The provision which does so is that (section 41) which, as amended in 1958, enables the Governor-General to appoint a panel from which the members of a Bribery Tribunal may be constituted. Those provisions of the Bribery Act which confer powers of adjudication and punishment on a Bribery Tribunal are in my opinion

[1] *(1962) 64 N. L. R. 385.* [2] *(1961) 63 N. L. R. 313.*

perfectly valid. There is no provision in the Constitution restricting the *establishment* of judicial offices and it follows that a Bribery Tribunal *to which persons are duly appointed in accordance with the proper law* can legally exercise all the powers which the Act confers upon such a tribunal. But since a tribunal having such powers is a " judicial office ", all that I find unconstitutional in the Bribery Act is the power given to the Governor-General to appoint the panel from which members of such a tribunal have to be constituted. The objection thus goes not to legal validity of the tribunal itself, or to the exercise of judicial power by it, but rather to the right and authority of the persons constituting the tribunal to exercise the powers conferred by the Act. The conviction and sentence in *Piyadasa's* case were bad in my opinion only on the ground that the persons who constituted the particular tribunal were appointed to the panel by the Governor-General and not by the Judicial Service Commission, which is exclusively vested, by section 55 of the Constitution, with the power to appoint to judicial office. Had section 41 of the Bribery Act merely provided for the constitution of a panel, and made no mention of the appointing authority, the section would not have been in any way repugnant to the Constitution, despite the conferment of judicial power on the tribunals. For the purposes of the present appeal, therefore, the proper formulation of the question of law to be decided—a formulation which counsel for the Appellant readily endorsed and adopted —is whether the office of a Quazi is a judicial office within the meaning of the Constitution, and whether the particular Quazi who adjudicated in this case, having been appointed by the Minister as Quazi under section 67 read with section 14 of the Act and not by the Judicial Service Commission, he could lawfully exercise the judicial power conferred on a Quazi by the Act.

Eminent counsel who appeared for the Respondent had to concede during his argument that the office of a Quazi is a judicial office, and that accordingly an appointment to such an office made by any person other than the Judicial Service Commission has no legal validity. But since the question is one of considerable importance, it is well that reasons should be stated to support the correctness of this proposition.

The first Ordinance which set up special tribunals to deal with questions of the marriages and divorces of Muslims, with applications for maintenance of Muslim wives and their children, and with other connected matters, was Ordinance No. 27 of 1929 (Cap. 99 of the 1938 Edition). Section 4 of that Ordinance enabled the *Governor* to appoint any suitable male Muslim to be a Kathi and Section 5 enabled him to appoint a Board of Kathis. Section 15 of the Ordinance, read with the rules in the 3rd Schedule, gave a Kathi jurisdiction to entertain an application by a Muslim wife for a divorce, and section 21 gave a further jurisdiction to a Kathi to adjudicate upon claims for the payment of *Mahr* as well as for the maintenance of wives and children. From an order of a Kathi in such a case an appeal lay to the Board of Kathis, and thereafter, with leave, to the Supreme Court.

With the enactment of the new Constitution in 1946, Article 88 enabled the Governor

> ". . . . to make such provision as appears to him necessary or expedient, in consequence of the provisions of this Order, for modifying, adding to or adapting the provisions of any written law which refer in whatever terms to the Governor, ... a Minister, ... or a public officer, or otherwise for bringing the provisions of any written law into accord with the provisions of this Order or for giving effect thereto."

In purported pursuance of this power, the Governor by Proclamation under Article 88 substituted *the Minister* for himself in those provisions of sections 4 and 5 of the Ordinance of 1929 which dealt with the appointment of Kathis and the Board of Kathis. Relying upon the order dated 3. 10. 62 made by three Judges in the Trial-at-Bar No. 1 of 1962 [1], counsel argued that the validity of the Governor's act in amending those sections, and in consequence the validity of the Minister's power to make the appointment, cannot be questioned. I understand from my brother de Silva (who was a member of the Court) that there was in that case no submission that the Proclamation under Section 88 of the Constitution contravened any provision of the Constitution itself when it substituted the Minister of Justice for the Governor in the relevant enactment, namely Section 440A of the Criminal Procedure Code. But in the present case, it is necessary to state my opinion that the power given by Section 88 did not enable the Governor to modify an enactment in such a manner that the enactment as so modified would conflict with any of the express provisions which are enacted in the Constitution itself. Reference to one possible situation would sufficiently explain my reasons. Let me take the case of the appointment of a District Judge or Magistrate. The officers being unquestionably judicial officers, the power of appointment, equally unquestionably, belonged solely, under the Constitution, to the Judicial Service Commission. But at the time of the enactment of the Constitution there was express provision in section 56 of the Courts Ordinance for the appointment of District Judges and Magistrates by the Governor. In fact the action very properly taken with regard to that section in the Proclamation under Article 88 was to delete the section from the Courts Ordinance, and thus to eliminate any possible conflict with section 55 of the Constitution. But what if, instead of deleting it, the Governor had either left section 56 untouched, or else substituted therein a provision empowering a *Minister* to appoint District Judges and Magistrates ? I cannot conceive that either of these courses could have been held to be valid, for either course would quite obviously have purported to authorise appointments otherwise than by the Judicial Service Commission. Whether amended or not by the Governor, it seems to me that any provision of the pre-existing law which conflicted with an express fundamental provision of the Constitution must give way to the

[1] *(1962) 64 N. L. R. 313.*

latter provision. The power of the Governor was to make adaptations or modifications necessary in consequence of the Order-in-Council so as to bring laws into accord with the Order-in-Council. That power cannot in my view be construed to include a power to make adaptations manifestly in conflict with the Constitution itself. I think therefore that if the office of Quazi is indeed a Judicial office within the meaning of the Constitution, the Proclamation must be held to have been invalid in so far as it had the effect of empowering a Minister to make appointments to that office.

The present Act, though passed in 1954, merely re-enacted the provisions of the former Ordinance (as amended by the Governor), in the matter of the power to appoint to the office which in the Act was redesignated " Quazi ". But even if that were not so, and if the Legislature must be regarded as having deliberately conferred the power of appointment on the Minister, such conferment would again be invalid if the office must be held to be a judicial office.

It will be seen that the purpose and effect of the 1929 Ordinance as continued by the 1954 Act was to take away from the ordinary Courts a jurisdiction previously enjoyed by those Courts, and to confer that jurisdiction on Quazis. Indeed there is express provision in section 48 of the Act that the jurisdiction exercisable by a Quazi under section 47 shall be exclusive and that any matter falling within that jurisdiction shall not be tried by any other Court. What is said to be the jurisdiction exercised by the Quazi in the present case is the jurisdiction to order a husband to pay maintenance for his wife and children. Prior to the enactment of the special legislation in 1929, that jurisdiction was enjoyed by the Magistrates Courts, and in exercising it a Magistrate was clearly exercising judicial power, for he had to administer the Common Law under which a person had the liability to maintain a wife and children ; upon claims being made for maintenance the Magistrate had to decide upon the validity of alleged marriages and upon questions of paternity ; and to make enforceable orders ; these are all matters involving the exercise of judicial power. Can it be said that the power conferred by section 47 (1) (i) on a Quazi, to make a declaration of nullity of marriage, is not a judicial power or that the power conferred by the Third Schedule to the Act read with section 28, to grant divorces, is not a judicial power? Having regard to these considerations, there is no merit in the argument that when the Legislature set up these separate tribunals to adjudicate upon claims for divorce or nullity and claims for maintenance of Muslim wives and children, it was merely assigning those claims for determination by administrative bodies.

One matter needs some clarification at this stage. Sections 12 (1) and 14 of the Act (Cap.115) authorise the Minister to appoint, respectively, a Quazi and a special Quazi. Each of these provisions contemplates two different acts, firstly the establishment of an office, and secondly an appointment to the office. In other words, two decisions have to be made by the Minister in each case, firstly whether to establish the office,

and secondly whom to appoint to it. It was clearly *intra vires* for the Act to entrust the performance of the first of these acts to a Minister, for that is a purely executive act, just as the act of setting up a new Magistrate's Court or a new Rural Court. It is only with respect to the second act, namely the act of appointment to the office, that the question arises whether the act of appointment is valid as being one not performed by the Judicial Service Commission.

An argument upon which counsel for the Respondent relied at one stage was that a Quazi had no power to enforce his own order, and that for this reason his is not a judicial office. Some support for this contention can be found in the judgment of Sansoni, J., in *Senadhira v. Bribery Commissioner* [1] where, in citing from the Australian judgment in the case of *Waterside Workers Federation of Australia v Alexander (J. W.) Ltd.*[2], he italicised the words "enforcement" and "enforce". It would appear from the judgment of Sansoni, J., that he may have regarded this power of enforcement as being an essential requisite of the judicial power. But there is a subsequent judgment of the High Court of Australia (*Queen v. Davison*)[3] in which the essentiality of the power of enforcement was fully considered, and I would with respect adopt the following observations from that judgment :

> "It may be said of each of these various elements that it is entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English Law. In the administration of assets or of trusts the Court of Chancery made many orders involving no *lis inter partes*, no adjudication of rights and sometimes self-executing. Orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court are all conceived as forming part of the exercise of judicial power as understood in the tradition of English Law. Recently Courts have been called upon to administer enemy property. In England declarations of legitimacy may be made. To wind up companies may involve many orders that have none of the elements upon which these definitions insist. Yet all these things have long fallen to the courts of justice. To grant probate of a will or letters of administration is a judicial function and could not be excluded from the judicial power of a country governed by English Law. Again the enforcement of a judgment or judicial decree by the court itself cannot be a necessary attribute of a court exercising judicial power. The power to award execution might not belong to a tribunal, and yet its determinations might clearly amount to an exercise of the judicial power. Indeed it may be said that an order of court of petty sessions for the payment of money is an example. For warrants for the execution of such an order are granted by a justice of the peace as an independent administrative act." (At page 368).

[1] *(1961) 63 N. L. R. at page 319.* [2] *(1918) 25 C. L. R. 434.*
[3] *(1954) 90 C. L. R. 353.*

In this connection it is interesting to find that the Privy Council in a case from Ceylon (*Aitken Spence & Co. v. Fernando* [1]) held in 1903 that proceedings before an arbitrator upon reference by a District Court under the Civil Procedure Code are judicial proceedings, although such an arbitrator has clearly no power to enforce his award. I have had the advantage in this connection of consulting the references and citations contained in the judgment of my brother Tambiah in *Piyadasa v. Bribery Commissioner*, and I agree with his opinion that the definition of judicial power given by Griffiths, C.J., in *Huddart, Parker & Co. v. Moorhead* [2], which was subsequently approved in the Privy Council by Viscount Simonds, is most acceptable, and that a tribunal can have judicial power even though it may lack the power to enforce its decisions. In any event a Quazi appointed under the Act now under consideration does have a power to enforce his orders; there is provision in sections 64 and 65 of the Act for a Quazi to certify to a Magistrate's Court the amount due under his order, the certificate having the automatic effect that the Magistrate will issue process for the recovery of the sum due in the same manner as a fine.

For the reasons above stated, I would hold that the office of a Quazi is a judicial office and that under the Constitution the proper authority to make appointments to such an office is the Judicial Service Commission as provided by the Constitution, and not the Minister as provided by the Act.

The reasons which have led me to the opinion just stated are equally applicable to the Board of Quazis from whom this appeal is taken. This body, which has jurisdiction on appeals from orders of Quazis, is equally a judicial body. Its members not having been appointed by the Judicial Service Commission, they have no authority to exercise the judicial powers conferred by the Act.

Counsel for the Respondent also argued that since the right of appeal from an order of the Board of Quazis is a right conferred by the Act itself, it is not open to an appellant to question the legality of the tribunal from which he appeals. I should refer in this connection to *Don Anthony v. Bribery Commissioner* [3] where both the Court (of which I was a member), and counsel, assumed that a questioning of the power of a Bribery Tribunal to adjudicate upon a charge of bribery involved a questioning of the validity of the entire Act under which the tribunals were established. It appears to me now that it was through a misconception that the matter came to be regarded in that way. I have explained at the commencement of this judgment my reasons for the opinion that the proper challenge in a case under the Bribery Act is not to be directed against the legal validity of the tribunal itself but rather against the validity of the appointment of the persons who in the particular case functioned as members of the tribunal. Although therefore counsel for the Appellant in *Don Anthony's* case thought that he was challenging the

[1] *(1903) A. C. 200.* [2] *(1909) 8 C. L. R. 330 at 357.*
[3] *(1962) 64 N. L. R. 93.*

validity of the entire legislation, or rather that he had to make such a wholesale challenge, he could well have been content to challenge merely the constitution of the particular tribunal which tried the case, on the quite narrow ground that the persons functioning as the "judges" on that tribunal had not been duly appointed to the judicial office.

With reference to *Don Anthony's* case, I think I should also state that the decision of the Privy Council in the Indian case *King-Emperor v. Benoari Lal Sarma* [1] was perhaps too easily regarded as being applicable. In the Indian case, there was truly a challenge of the entire legislation, the object of which was to constitute certain special courts. The attack against the tribunal was *that it was illegal to establish it ;* if it was not a valid court, then its judge was "in the same position as a private person who took it upon himself to conduct a trial of the appellants and to sentence them to imprisonment without any authority at all", a situation in which the proper remedy would be "the remedy of release by process in the nature of habeas corpus." (Per Viscount Simon, L. C.). But in relation to a Bribery Tribunal composed of persons appointed by the Governor-General it is not the legal validity of the Tribunal which has to be attacked, but rather the validity of the appointments of the persons composing it. I would for the reasons just stated over-rule the objection that the present appellant is not entitled in this appeal to raise the question of law previously discussed. Moreover, the legislation which was impugned in the latter case expressly excluded the right of appeal, and what was invoked by the Appellant was the revisionary power conferred on the High Court by the Criminal Procedure Code, and not a right of appeal. The opinion of the Privy Council, that such a revisionary power could not be invoked or exercised against a body which was not, in the Appellant's contention, a duly constituted court, may not, I now think, be relevant to a consideration of the Bribery Act or of the Muslim Marriage and Divorce Act, in each of which there is conferred an express right of appeal to this Court from the decisions of the respective tribunals.

I well realise the difficulty and inconvenience which can result from a decision of this Court that appointments by the Minister to the office of Quazi and to the Board of Quazis are invalid and *ultra vires* the Constitution ; but I feel compelled after anxious consideration to reach that decision.

The appeal is allowed, and the order appealed from is quashed. There will be no order as to costs.

L. B. DE SILVA, J.—I agree.

Appeal allowed.

[1] *(1945) A. C. 14.*