

1963

Present: Herat, J.

A. L. M. ISMAIL, Appellant, and A. A. MUTHU
MARLIYA, Respondent

S. C. 476/63—M. C. Kalutara, 7728

Maintenance—Muslim Marriage and Divorce Act (Cap. 115)—Claim for maintenance under Section 47—Exclusive jurisdiction conferred by Section 48 on Quazi—Invalidity of appointment of Quazi under Section 12 (1)—Constitution Order in Council, s. 55—Lack of jurisdiction of a Magistrate's Court to hear such claims under Maintenance Ordinance (Cap. 91).

A Magistrate's Court has no jurisdiction to hear under the Maintenance Ordinance (Cap. 91) a claim for maintenance which, by virtue of the provisions of section 48 of the Muslim Marriage and Divorce Act, falls under the exclusive jurisdiction of a validly appointed Quazi. In such a case, the fact that Section 12 (1) of the Muslim Marriage and Divorce Act is *ultra vires* as being in conflict with Section 55 of the Constitution Order in Council and, therefore, the persons appointed as Quazis by the Minister were not validly appointed is not material.

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

Izadeen Mohamed, with *M. T. M. Sivardeen*, for the Defendant-Appellant.

D. J. Tampoe, with *R. Manikkavasagar*, for the Applicant-Respondent.

Cur. adv. vult.

September 30, 1963. HERAT, J.—

The defendant-appellant is the person against whom the learned Magistrate made order for maintenance in this case in favour of the applicant-respondent under the Maintenance Ordinance (Chapter 91).

The parties are persons professing the Mohamedan faith and the short point taken on behalf of the defendant-appellant is that the said order is a nullity, because the learned Magistrate had no jurisdiction in view of the provisions of Section 48 of the Muslim Marriage and Divorce Act No. 13 of 1951.

Section 48 of the said Act is as follows:—

“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.”

Section 47 (1) of the said Act provides as follows:—

“The powers of the Quazi under this Act shall include the power to inquire into and adjudicate upon—

- (a)
- (b) any claim for maintenance by or on behalf of a wife;
- (c) any claim for maintenance by or on behalf of a child (whether legitimate or illegitimate).

By Section 12 (1) of the said Act it is provided as follows :—

“ The Minister may appoint any male Muslim of good character and position and of suitable attainments to be a Quazi. ”

This Court in *Jailabdeen v. Danina Umma*¹ has held that the provision contained in Section 12 (1) of the aforesaid Act is ultra vires and void as being in conflict with Section 55 of the Constitution Order-in-Council. In other words, Quazis appointed by the Minister, according to the decision of this Court, have not been validly appointed. As it is the decision of two judges I am bound by it when I sit as a single Judge.

The position in which Muslims now find themselves is that they cannot resort to the Court presided over by a Quazi in respect of claims for maintenance as appointment of Quazis by the Minister has been declared illegal by this Court. In the circumstances, in this case, they have resorted to the Magistrate's Court in order to proceed on with their claims for maintenance. Have these Magistrates' Courts jurisdiction to hear such claims in view of the provisions of Section 48 of the Muslim Marriage and Divorce Act No. 13 of 1951 ?

This Act No. 13 of 1951 is an Act validly passed by our Legislature except for the provisions contained in Section 12 (1) relating to the appointment of Quazis by the Minister. The Act validly creates and contemplates the office of Quazi and in my view our Legislature validly enacted by Section 47 (1) (b) and (c), that the Quazi had power to inquire into and adjudicate upon claims for maintenance. It is also my view that our Legislature has validly enacted the provisions of Section 48 of that Act when it declared that the jurisdiction exercisable by a Quazi in respect of maintenance cases shall be exclusive and that no other Court or Tribunal shall try or inquire into any matter falling within that exclusive jurisdiction. The validity of this provision clearly exists and cannot be challenged. The mere fact that the appointment of any particular Quazi is void does not invalidate the jurisdiction conferred by our Legislature upon the office of Quazi created by it and upon the valid creation of the exclusive jurisdiction given in certain matters. That question of exclusive jurisdiction has nothing to do with the invalidity of any particular appointment.

My opinion, therefore, is that the Magistrate's Court had no jurisdiction to hear and try this maintenance case and that the order made by the learned Magistrate as well as all the proceedings constitute a nullity. I therefore allow the appeal and set aside the order for maintenance and quash all the proceedings had in the Magistrate's Court on the ground that those proceedings are null and void as being in a Court without jurisdiction. The Defendant-Appellant is entitled to his costs of appeal.

Appeal allowed.

¹ (1962) 64 N. L. B. 419.