1961 *Present :* **T. S. Fernando, J., and Sinnetamby, J.**

A. ALIYARLEBBAI, Appellant, *and* K. PATHUMMAH, Respondent

S. C. 1—Quazi Court of Karavaku, 3620

Maintenance—Illegitimate child—Muslim parties—Plea of res judicata*—Applicability—Scope of obligation of Quazi to examine at least two witnesses—Maintenance Ordinance (Cap. 76), s. 6—Muslim Marriage and Divorce Act, No. 13 of 1951, ss. 28 (2), 47 (6), Schedule 3, Rule 11, Schedule 4, Rule 7.*

Where an application for the maintenance of an illegitimate child is dismissed by a Quazi after the evidence of the parties is recorded, the dismissal of the application, whether upon insufficiency of evidence or upon refusal of an application for postponement, bars a second application for the same relief.

In an inquiry held under section 47 (6) of the Muslim Marriage and Divorce Act No. 13 of 1951, Rule 7 of the Fourth Schedule of the Act must be interpreted to mean that the Quazi's obligation to examine at least two witnesses arises only if there are two or more witnesses in attendance at the inquiry.

APPEAL from an order of the Board of Quazis.

Izadeen Mohamed, with *M. T. M. Sivardeen*, for the defendant-appellant.

E. R. S. R. Coomaraswamy, with *Hanan Ismail*, for the applicant-respondent.

Cur. adv. vult.

July 7, 1961. T. S. FERNANDO, J.—

This appeal canvasses the correctness of an order made by the Board of Quazis holding that the dismissal by a Quazi of an application for maintenance after taking the evidence of the parties does not bar the applicant from maintaining fresh proceedings for the same relief.

To appreciate the point involved, it is necessary to set out the history of the applications made by the applicant, the respondent to this appeal, for maintenance in respect of her illegitimate child. It does not appear that, under the law applicable to proceedings for maintenance among Muslims, there is any provision similar to that contained in section 6 of the Maintenance Ordinance (Cap. 76) to bar applications for maintenance not instituted within 12 months from the birth of the child.

The applicant first applied to the Quazi court on 8th December 1953. The child was then stated to be about 3 years old. This application was numbered 5842. After the case had been mentioned in court on two occasions and before summons could be served on the defendant, the appellant on this appeal, the application was on 12th January 1954 dismissed on the applicant being absent on the calling date.

After a lapse of nearly three years, i.e. on 24th December 1956, the applicant instituted proceedings a second time—application numbered 1827—and, after the case had been set down for inquiry on several occasions, on 11th May 1957 it was marked " ready for inquiry today". The inquiry was commenced, presumably later that day, and the applicant's evidence was recorded on affirmation in the course of which she stated that the appellant is the father of her illegitimate child. She was tendered for cross-examination, but no questions were put to her by the appellant. The Quazi then recorded the evidence of the appellant, also on affirmation, in the course of which he denied that he was the father of the child. He was in turn tendered for cross-examination by the applicant, but no questions were put to him by the applicant. In the course of the applicant's evidence she did say she had " no witnesses at this moment to prove the case ; hence I am not going for inquiry ". The appellant also stated when his turn came to give evidence that he was not ready for inquiry as " my witnesses are at the moment not procurable ". After the evidence of the applicant

and the appellant had been recorded the Quazi dismissed the application for maintenance. He has also made the following entry of record :— " Application disallowed ". This entry probably means in the context that an application for a postponement was refused by him.

The applicant next instituted proceedings once again, that is, for the third time—on 12th August 1959. This third application was numbered 3620, and the appellant raised before the Quazi during the proceedings the plea of *res judicata,* but the judge ruled that the order in application No. 1827 was no bar to the later application No. 3620 being maintained, and went on to decide the question of paternity and, holding against the appellant, ordered him to pay by way of maintenance a sum of Rs. 15 a month as from the 12th August 1959.

An appeal preferred by the appellant to the Board of Quazis was dismissed, the Board holding that application No. 1827 came to be dismissed without the court proceeding to inquiry. The Board sought to distinguish the proceedings in application No. 1827 from the course which the case of *Punchi v. Tikiri Banda* [1] followed by taking the view that in application No. 1827 there was no decision on the merits and that there was no withdrawal of the case as happened in *Punchi's case.* I regret I am unable to agree that the distinction so sought to be made by the Board is a valid one. When the Quazi disallowed the application presumably made for a postponement and thereafter proceeded to tender the applicant for cross-examination and to record the evidence of the appellant, it is difficult to take any view other than that an inquiry was held. Moreover, to reproduce the words used by the Quazi himself, the application was *dismissed,* not that the inquiry was put off. There was, in my opinion, an adjudication on the application to the effect that the applicant had not satisfied the Quazi on the main issue of paternity. In *Rankiri v. Kiri Hattena* [2] it has been held that, in proceedings under the Maintenance Ordinance against a putative father for maintenance, the dismissal of a previous application, whether upon insufficiency of evidence or upon any other defect is a decision upon the merits, and that such decision bars a second application. This case was followed in *Jainambo v. Izzadeen* [3] where the Court was considering a case between Muslim parties on an appeal from a decision of the Board of Kathis. For the reasons indicated above I am of the opinion that the view taken by the Quazi and the Board of Quazis in the case now before us is contrary to authority, and that the plea of *res judicata* raised by the appellant should have been upheld. It follows that this appeal should be allowed and the application No. 3620 dismissed.

It is necessary before disposal of this appeal to advert to an argument advanced by learned counsel for the applicant in an effort to resist the plea of *res judicata.* He referred us to Rule 7 of the Rules for inquiries under section 47 of the Muslim Marriages and Divorce Act,

[1] *(1951) 54 N. L. R. 210.*
[2] *(1891) 1 Ceylon Law Reports 86.*
[3] *(1938) 10 Ceylon Law Weekly 138.*

No. 13 of 1951, contained in the Fourth Schedule to that Act and to Rule 11 in the Third Schedule of the same Act and contended that the plea cannot succeed because the Quazi has not examined the minimum number of witnesses specified in the said Rule 11. Section 47 (6) of the Act enacts that every inquiry under that section shall be held as nearly as possible in accordance with the rules in the Fourth Schedule, and section 28 (2) which brings the Third Schedule into operation itself declares that the procedure laid down in that Schedule shall be followed so far as the nature of the relief claimed in each case renders it possible or necessary to follow that procedure. Rule 7 of the Fourth Schedule which is the Rule invoked in the applicant's aid by her counsel itself only provides that the provisions of Rule 11 in the Third Schedule as to the record of proceedings shall apply *so far as may be* in the case of inquiries held under the rules in the Fourth Schedule. If therefore an applicant does not bring or cause to be brought before the Quazi the minimum number of witnesses, it is difficult to see how the Quazi can examine at least that number of witnesses. The rule must be interpreted to mean that the Quazi is obliged to examine at least two witnesses where there are two or more in attendance at the inquiry. In view of the nature of the relevant provisions, we are of opinion that that part of Rule 11 which relates to the minimum number of witnesses does not embody an imperative provision of the law. There has not therefore been, in my opinion, any legal defect in the procedure followed by the Quazi in application No. 1827 ; nor can I see how even a defect in the conduct of the proceedings by the Quazi can affect the validity of his adjudication which has not been reversed by an appeal preferred as provided by law.

There will be no costs of this appeal.

SINNETAMBY, J.—I agree.

Appeal allowed.