

1946

Present : Soertz A.C.J.

NANSOORA, Appellant, and JARIA, Respondent.

337—Kathi Court, Kalutara, 298/261.

Muslim law—Divorce—Fasah divorce—Does previous divorce by husband operate as bar?—Muslim Marriage and Divorce Registration Ordinance (Cap. 99).

A Muslim wife against whom Talak had been pronounced by her husband obtained subsequently a Fasah divorce in respect of the same marriage. The husband appealed and the Board of Kathis, without dealing with the grounds on which the Fasah divorce was granted, dismissed the appeal solely on the ground that the Kathi had no jurisdiction to entertain the application for Fasah divorce in view of the previous divorce by the husband.

Held, that the Board of Kathis should have dealt with the grounds on which the Fasah divorce was granted by the Kathi.

Quaere, whether a Kathi has no jurisdiction to entertain or inquire into an application for Fasah divorce when the applicant has already been divorced by her husband.

¹ *Major v. Fernando* (1917) 4 C. W. R. 221.

² *Loku Menika v. Charles Sinno* (1918) 5 C. W. R. 281.

³ *Fonseka v. Jayawickrama* (1892) 2 C. L. Rep. 134.

³ *S. A. L. R.* (1923) A. D. 317.

A PPEAL against an order of the Board of Kathis.

L. A. Rajapakse, K.C. (with him *S. A. Marikar*), for the husband, appellant.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for the wife, respondent.

Cur. adv. vult.

August 22, 1946. SOERTSZ A.C.J.—

This is an appeal with the leave of this Court granted on February 24, 1946. The appellant is the husband of the respondent. The parties were married in March, 1935, but did not live happily ever after. According to the description of the wife herself of their relations, a short time after marriage, they lived "a cat and dog life." The inevitable result followed. The wife sued for a divorce on three grounds: non-maintenance, cruelty, and desertion, and on June 24, 1945, she obtained what is known as a Fasah divorce. That order was preceded by a very full inquiry. This order of the Kathi in association with his Assessors found that "the respondent had treated the applicant cruelly, had failed to maintain her, and also deserted her." But, not content with that order based on the grounds on which the application for a Fasah divorce were based, the Kathi went on to hold that the Talak pronounced on June 13, 1939, by the husband had become irrevocable and "so they granted a Fasah divorce so that there may be no room for any further questions or complications regarding the marriage."

The husband appealed to the Board of Kathis and that learned body of men attracted by the questions of law involved in the finding that the one Talak pronounced by the husband on June 13, 1939, had become irrevocable in the course of events that followed, considered that question alone and by their order of October 27, 1945, held that "the learned Kathi had no jurisdiction to entertain or inquire into an application for Fasah divorce when on the dates material to these proceedings the applicant was not the lawful wife of the appellant. A divorce valid in Muslim Law has, however, taken place between the applicant and the appellant and this application for Fasah divorce should therefore be dismissed."

There is an unmistakable Gilbertian flavour about all this. A wife who, in reality, was no wife sues a man whom she, although with great dislike, regarded as her husband, only to be told that, in law, she and he were complete strangers to each other. But, for all the mental discomfort that such a situation causes, the law of the Board of Kathis may well be above reproach and it would have been necessary to consider it if the parties had been given an opportunity to lead evidence, by calling experts, for instance, to ascertain the Muslim law on this point prevailing in this country since the passing of the Muslim Marriage and Divorce Registration Ordinance of 1929. It would be necessary to consider how far the law as quoted from Indian authorities in the learned order of the Board of Kathis applies here. I am also of opinion that the Board

should have dealt with the main grounds on which the Fasah divorce was granted by the Kathi, namely, cruelty, desertion and non-maintenance.

I would, therefore, set aside the order appealed from and remit the case to the Board for consideration of and decision upon these matters.

Order set aside.
