

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

Razeena Cassim
No. 86/7, Mahiyangana Road,
Badulla.

APPLICANT-APPELLANT

CALA No. 05/2011

Quazi Court
Monaragala-Badalkumbura
No. M 5504

Vs.

Ahamed Azmi
No. 49/1, Razik Fareed Mawatha,
Sir Razik Fareed Mawatha
Periyamulla, Negombo.

RESPONDENT-RESPONDENT

AND

Ahamed Azmi
No. 49/1, Razik Fareed Mawatha,
Sir Razik Fareed Mawatha
Periyamulla, Negombo.

**RESPONDENT-RESPONDENT-
PETITIONER**

Vs.

Razeena Cassim
No. 86/7, Mahiyangana Road,
Badulla.

**APPLICANT-APPELLANT-
RESPONDENT**

BEFORE: Anil Gooneratne J.

COUNSEL: A.H.G. Ameen and D.K.S. Kodagoda
For the Respondent-Respondent-Petitioner

F. Thahir and A.L.N. Mohamed
For the Applicant-Appellant-Respondent

ARGUED ON: 21.02.2012

DECIDED ON: 16.3.2012

GOONERATNE J.

This is a leave to appeal application filed by the Respondent-Respondent-Petitioner (hereinafter referred to as the Petitioner) against his wife the Respondent who were married to each other on or about 4.4.1990, (vide Marriage Certificate marked P1) and by this application the Petitioner

inter alia seeks to set aside the maintenance order of the Quazi Court of Monaragala in Case No. M/5504 and contained in order P8 and the order made by Board of Quazis on 22.10.2011 marked P13 (prayer (b) & (c) of the petition). The main argument that was advanced on behalf of the Petitioner in his oral submissions which was supported by written submissions, was that:

- (a) under the Islamic Law a wife would not be entitled to maintenance if the wife refuse to live with the husband, and in the petition filed in this court the other ground is
- (b) Constructive desertion by the Respondent in refusing to live with the husband

It would be necessary to consider the order at P8 & P13 to decide whether to grant or refuse leave. It was the position of the learned Counsel for Respondent that the Petitioner had not contested maintenance before the Quazi Court which made order as in P8 on the basis urged in (a) above (if the wife refuse to live with husband). Further learned Counsel also contended that before the Quazi the Petitioner had agreed to pay a sum of Rs. 3000/-, and also argued that the Petitioner failed to appeal to the Board of Quazis from the order made by P8. It was the Respondent who appealed to the Board of Quazis from the order of the Quazi Court ordering maintenance in a sum of Rs. 10,000/-. It is recorded in the order at P8 that the Petitioner agreed to settle for Rs. 3000/-.

In the order at P8 and its proceedings the evidence recorded therein of the Petitioner it is stated inter alia that he had again married in Negombo and the 2nd wife has a child of 14 years. It is also recorded that the Petitioner could pay Rs. 3000/- per mansum. It is also stated that the moneys invested with the Golden Key cannot be recovered and that he is unemployed. The Respondent in her statement inter alia state that her return to Sri Lanka she lived with the Petitioner for about 2 years happily and thereafter over an argument Petitioner left the house after an heated argument having assaulted her. She tried to trace the Petitioner but was not successful. In that statement various expenses of her are mentioned and she claims Rs. 15,000/- per month, as maintenance.

The Board of Quazis proceeding and order at P13, gives a full description in a chronological order of all events and all steps taken before Quazi and the Board of Quazis. Therefore this court need not again reproduce those facts and what this court should be mindful of is only the question of maintenance and whether as a matter of law the so called refusal of the Respondent to live with the Petitioner.

This court was invited to consider the following authorities by learned counsel on either side and I have noted the following:

- A. Syed Ameer Ali in his book *Mohammadam Law* 1965 at page 377 states that when the woman abandons the conjugal domicile without any valid reasons he is not entitled to maintenance.
- B. Minhaj et Talibin 1992 at page 385 referring to the Imam Shafi, the Imam of the Sunnis who are majority in Sri Lanka and the Muslim Marriage and Divorce Act applicable to Sunnis in Sri Lanka, states that Imam Shafi during his stay in Egypt adopted the doctrine that a wife's maintenance is obligatory only if she puts herself at her husband's disposition and not in virtue of the contract of marriage. The husband has a presumption in favour of his assertions for any proceedings as to the putting of the wife at his disposition. Consequently a husband owed his wife no maintenance so long as she refuses to come to him, but owes it from the moment he hears she is willing to part herself at his disposition.
- C. In *Abdul Hai vs. Mariam Natchia* MMDL Report Vol. IV page 34 It was held that, Under Muslim Law a husband is not obliged to maintain his wife where she unjustifiably refuses to live with him.
- D. In *Razeem vs. Bafaquiyah* reported in MMDL Report Vol. IV page 41. It was stated, "The question whether the wife is entitled to maintenance because, as alleged by the husband, she refused to live with him in his house at Stafford Place, has not been considered by the Kathi As far as the evidence goes the wife has made the bare statement that he had not maintain her for eleven months and that he did not come to her during that period. The husband on the other hand says that he left her because she refused to come and live in his house.

- E. In Pathumuthu vs. Abdul Cader, reported in MMDL Report Vol. V page 59, "The Appellant was the 1st wife of Respondent who brought a second wife from India. It was admitted that the second wife is not a concubine. Both wives lived together at Darley Road, Maradana, for some time. The 1st wife left the house as she "would not put up with the other wife" both wives resided under the same roof but the appellant was provided with a separate room for her use. Held that the husband had discharged his obligations in providing the appellant with a separate dwelling but the room or apartment was not exclusively for her own use. The appellant was satisfied with the newly reconstructed apartment for her own exclusive use but she refused to go back to her husband unless and until he made the payment of certain sums of monies. Held she was not entitled to maintenance after her refusal before the Board. She was awarded maintenance up to the date of the order of the Board. Case 23 NLR 277 was followed and Minhaj 316 and Mohammadan Law (1917) by Ameer Ali was cited.
- F. In Halaldeen vs. Irrefathul Zohara Reported in MMDL Report Vol. VI, page 81, the Quazi decided the means of the husband to decide the quantum of maintenance to be awarded to the wife when there was refusal on the part of the wife refusing to live with the husband. The order of the Quazi was quashed in this case on the basis of refusal to live with the husband.

In all the above circumstances and facts placed before this court, it is apparent that the Respondent wife never attempted to abandon the conjugal domicile without valid reason and or refused to live with the Petitioner. This court observes that having considered the case history of the husband who had been on many occasions unfaithful and untruthful to his wife the

Respondent in this application is justified in refusing to live with the Petitioner in Negombo. A bare statement inviting the wife to live with him in Negombo would not suffice. The Petitioner, appears to this court, to be in the habit of associating many woman either legally or otherwise, should in no uncertain terms satisfy the Respondent wife that she would be provided independent accommodation in the Negombo house, especially when another wife is living with him in Negombo. It is the burden of the Petitioner to provide material to the relevant authorities and his Respondent wife, that independent and uninterfering accommodation with easy access would be provided by the Petitioner in the Negombo residence. In the absence of such material and or information made available to court I do not consider that the Petitioner could rely on the legal principle that the wife would not be entitled for maintenance since she has refused to live with him. Nor can this court accept the position that there is constructive malicious desertion on the part of the Respondent wife.

The Respondent no doubt had to undergo very humiliating experiences in view of the conduct of the Petitioner at various stages of her life. Respondent cannot be deprived of her legal entitlement for maintenance. I am not satisfied with the legal position put forward by the

Petitioner, in the circumstances of this case. In all the circumstances, this court is of the view that there is no merit in this application. Hence leave to appeal is refused with cost.

Application refused.

JUDGE OF THE COURT OF APPEAL