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

Tuan Muthaliph Tuan Nazar

No. 60, Wijeyarajadana

Mirigama.

PETITIONER

C.A. 531/2008

Quazi for the Memon Community

No. 812/T

Vs.

1. A. A. M. Illyas

Quazi for the Memon Community

No. 3, 2nd Floor, Milagiriya Avenue,

Colombo 4.

Substituted by:

Vally Mohamed Haji Ahamed

No. 20-2/21, Rudra Mawatha,

Colombo 6.

SUBSTITUTED-1ST RESPONDNET

2. M. Fathima Minna

No. 29/F, Jiffry Moulana Mawatha,

Kalutara.

2ND RESPONDENT

BEFORE: **Anil Gooneratne J.**

COUNSEL: Farook Thahir with N. M. Riyaz for Petitioner

Bashir Ahamed with L. Jeykumar and Safana Begum for the 1st Substituted-Respondent

J. Mansoor for 2nd Respondent

ARGUED ON: 30.10.2012

DECIDED ON: **13.06.2013**

GOONERATNE J.

The Petitioner to this Writ application seeks to quash the order marked, P2 of 10.5.2008 relating to payment of 'Mathah' or compensation to the 2nd Respondent in a Divorce proceedings under the Muslim Marriage and Divorce Act. By sub paragraph (b) of the prayer to the Petition a Writ of Certiorari is

sought to set aside that part of the order relating to payment of Rs. 200,000/- as Mathah or Compensation to the 2nd Respondent. This court had on 22.7.2008 issued an interim order in terms of sub paragraph 'C' of the prayer to the Petition, which had been extended from time to time and on 26.2.2009, order was made to extend the interim stay order until the final determinations of this application.

The facts very briefly as gathered from the affidavit of the Petitioner which are not disputed are that the Petitioner was married to the 2nd Respondent on 5th April 1995 (vide P1). By the above marriage a female child was born on 12.6.1986. Petitioner filed a case to divorce the 2nd Respondent on or about November 2005 in the Quazi Court of Kalutara. (application 812/T) whilst the application was pending the 2nd Respondent filed application No. 7268/CM on December 2005 claiming maintenance for the daughter. Petitioner then filed an application with the Board of Quazi seeking an appointment of a Special Quazi to inquire into the said applications. The Board of Quazi recommended to the Judicial Services Commission to transfer the above two applications before a special Quazi and accordingly the 1st Respondent was appointed to hear and determine the above applications.

The material placed before this court suggests that the application for divorce and maintenance had been taken up before the 1st Respondent. Position of the 1st Respondent in the written submissions filed in this court and his pleadings indicate that the 1st Respondent after inquiry (petitioner refer to it as a protracted inquiry) on 10.5.2008 granted the divorce and ordered maintenance for the child in a sum of Rs. 10,000/- per month. In the same order the 1st Respondent also ordered that the Petitioner pay a sum of Rs. 200,000/- to the 2nd Respondent as 'Mathah' or compensation for divorcing the 2nd Respondent. It is the award of 'Mathah' that is being seriously contested and argued before this court, in this writ application. i.e 'Mathah' is not recognized or incorporated in the Muslim Marriage and Divorce Act.

In the petition filed by the Petitioner, more particularly in paragraphs 8 – 13 the Petitioner seeks to represent that he has appealed to the Board of Quazis from the order of the 1st Respondent dated 10.5.2008, which is pending. On Petitioner's visit to the office of the 1st Respondent he became aware that both inquiries had been conducted together, though on two separate applications. The payment for 'Mathah' in a sum of Rs. 200,000/- was payable to the 2nd Respondent within 6 months. Petitioner also adds that (in paragraph 13)

the 1st Respondent had acted upon a letter sent by the 2nd Respondent of 10.4.2008 in awarding 'Mathah' and said letter was not shown to the Petitioner or he had notice of same, during the course of proceedings before the 1st Respondent. This court notes that the Petitioner has failed to annex the proceedings before the 1st Respondent, to the petition filed in this court. In the absence of such proceedings Petitioners assertions could not be verified. On the other hand failure to do so would amount to non-compliance with rules of the Appellate Courts procedure.

The legal position as adverted to this court by the learned counsel for the Petitioner inter alia is as follows:

(a) 'Mathah' or compensation is not recognized or incorporated in the Muslim Marriage and Divorce Act.

(b) 1st Respondent had no authority or jurisdiction to entertain or hear an application on payment of 'Mathah'

(c) Award of Rs. 200,000/- made by the 1st Respondent is liable to be quashed by way of Writ of Certiorari, and such award is illegal.

In the petition it is pleaded that the Petitioner does not seek any relief from the 2nd respondent his divorced wife (paragraph 17) but this court observes that the 2nd respondent would be a necessary party and merely because the Petitioner pleads so, it is the 2nd Respondent who would be directly involved and affected by an order of this court. The 1st and 2nd Respondents were both represented by learned counsel in this court and made submissions before this court, and the learned counsel for 2nd Respondent strenuously argued that a writ does not lie in the circumstances of this case. 1st and 2nd Respondents have also filed written submissions.

The order of the 1st Respondent is marked P2. Having examined the said order, (proceedings submitted at a late stage) I would before considering the case of each party, refer to certain points only which tend to demonstrate difficulties encountered by the 1st Respondent in conducting the inquiry and the reason if any to grant 'Mathah".

(a) 1st Respondent attempted reconciliation of parties on 11.8.2007 & 8.12.2007 but was not successful.

(b) Appellant Petitioner had been avoiding answering questions posed by the 1st Respondent as regards child's maintenance i.e income particulars. On one occasion refused to answer questions.

(c) It is recorded by the 1st Respondent that (pg.3 of pg.2) "he was behaving very badly and thereafter I decided to make an order on the available documents and evidence. ... " He was not conducting himself properly and refused to sign the proceedings of 1.3.2008, 10.3.2008 & 22.3.2008. I got the impression that he was doing this with ulterior motives".

(d) Refused to give maintenance for the wife 2nd Respondent since he refused to live with Petitioner. However the order indicates that the Appellant had not permitted the 1st Respondent question the Petitioner on the justification of not living with the Petitioner by the wife.

(e) Having considered the suffering undergone by the 2nd Respondent and that the Petitioner is a free man and giving his mind to Surah Al-Baqarah which clearly states that man should provide for the wife at the time of divorce mathah in a sum of Rs. 200,000/- payable within 6 months.

This court observes that (a) to (d) above clearly indicates some aspects of the conduct of the Petitioner. In the absence of placing the proceedings initially before this court, on one hand there is a clear breach of non-compliance with the rules of court, and court is also placed at a disadvantages of being unable to check and verify the important matters necessary to be checked and verified. Prerogative writs are mainly discretionary remedies of court and court is entitled to reject applications for writs on certain grounds that would disentitle a party

for a proper remedy by way of a Writ of Certiorari/Mandamus. Though the focus on this application is on the award of 'Mathah' the writ jurisdiction of court vests the court with powers to reject the application on certain recognized grounds by law.

It is noted that at the inquiry before the 1st petitioner source of income had been inquired into and at the conclusion of the inquiry the special Quazi allowed the application of the petitioner on 22.03.2008 to pronounce 'Talak' divorce. Consequent to the ' Talak' divorce, 2nd respondent made an application 'Mathah' on 10.04.2008. On 02.05.2008 Quasi made order P2 calling upon the petitioner to pay Rs. 200,000/- as Mathah to the 2nd respondent, Wife of the petitioner and that the petitioner pay Rs. 100,00/- per month as maintenance to the daughter. Petitioner only appealed to the Board of Review against the award of Rs. 10,000/= of maintenance for the daughter. This writ application only concerns the award of 'Mathah' for which the petitioner did not appeal to the Board of Review ,re-payments 'Mathah'.

The 1st and 2nd respondents counsel argue that Mathah is payable under Muslim Law (Shariah) to a wife divorced by her husband pronouncing 'Talak' and it is a

mater connected with divorce. Emphasis is on Section 2 of Act No. 13 of 1951, and act applies only to marriages divorces, and other matters connected therewith of the Muslim inhabitants of Sri Lanka. There is also reference to sec 98 (2)..... in all matters relating to any Muslim marriage or divorce, the status and the material rights and obligations of parties shall be determined according to Muslim law governing the sect to which parities belong. It is not restricted or limited to the provisions of the Act. As such payment of ' Mathah' is governed by the Muslim (Shasiah) law governing the sect to which parities belong. It is the position of the 1st and 2nd respondents that both sect 2 read with 98(2) of the Act would apply to matters connected with divorce such as ' Mathah' governing the sect to which parties belong.

I find various interpretations given by either party on available statutory provisions. Petitioner refer to section 98(1) to demonstrate that the Quazi has no jurisdiction to award ' Mathah'. It is argued that sec 98(1) is a saving clause included in a repealing statute in order to protect the rights and persons who may have acquired rights on previous existing laws. But none of the previous laws had anything to do with ' Mathah'. In another way 1st and 2nd respondents urge that sec. 98(1) provides for avoidance of doubt. Repeal of Sec. 64 to 101 and first

Para of Sec. 102 of previous laws does not affect the Muslim law of marriage and divorce and rights of Muslims.

On the development of the Muslim Law and where Courts have applied the Muslim Law governing the sect on which parties belong are cited by the above respondents. In **Mirza Vs Ansar 75 NLR 295.**Sec. 98(2) , reads with section 28 and Rule 12 of the 3rd schedule, of the Muslim Marriage and Divorce Ac t makes it mandatory that in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect. to which the parties belong. Accordingly, where the parties belong to the Shafi sect, the wife is not entitled to obtain a Khula divorce from a court unilaterally without the consent and participation of the husband.

A khula divorce is one which is granted without any necessary requisite of fault on the part of the husband and is in this respect basically different from the fasah divorce. One of the circumstances in which a Khula divorce initiated by the wife is granted is where the wife has an incurable aversion to the husband which renders life together : within the limits of God" impossible. The expression ' within the

limits of God" is generally understood to mean co-habitation with due performance of conjugal obligations.

Per Weeramantry, J.- " A review therefore of the original sources, the commentaries of the great Islamic writers, the views of modern commentators and the dicta contained in the case law of this country would appear to point to the participation in the Khula divorce of the husband himself. This Court would be reluctant in the face of this body of authority to extend the law as hitherto understood in this country to enable a wife unilaterally to obtain this form of divorce from the public authorities."

Samarawickrame, J had to say this " I agree with the order made by Weeramantry, J and the reasons set out in his judgment. An extension of the law as hitherto understood in this country to enable a wife unilaterally to obtain a khula divorce is not without some support from Muslim Law authorities and sources but, in my view, it must await a widespread acceptance by the Muslim community of the need for it. At present even the Board of Quazis do not appear to consider favourably such an extension of the law. It is not for this Court, " to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." (Judge learned Hand in Spector

Motor Service, Inc, v Walsh 1944). Having regard to the rapid pace at which traditional notions are shed in these days, it may not be correct to regard the possibility of an extension of the law as distant.

I find various arguments put forward by the respondents to convey the position that powers of Quazi are not limited to Sec. 47 of the Act and that the Quasi has the power to inquire into granting an application for Maththa. The above views are supported by some decisions pronounced by the Board of Quazis. It would be interesting to note the following orders delivered by the Board of Quazis.

Vide **Fawsiya Vs Mohideen BQ 3969** decided on 6th August 2005 reported in volume 3 of the Board of Quazis Law Reports (BQLR) at page 70 where it was held that Mathah is permitted by substantive Muslim Law and the Act does not prohibit Mathah, therefore Mathahs is payable to a divorced wife, where Talak divorce is pronounced by the husband. The said order of the Board of Quazis was not challenged. Vide also Fasmila Vs Azam BQ 2692 decided on 26th April 2008, Vide also Haleema Vs Rizly BQ 3862 decided on 24th of April 2004 reported in Volume 2 BQLR at page 45, all the aforesaid orders granting Mathah to a divorced wife were not challenged.

In the case of **Refaideen Vs Siddique** CA Writ Application No. 1705/2005 minutes of 9th September, 2008 where the petitioner came to the Court of Appeal by way of Writ application form the order of Quazi. Where His Lordships Justice S. Sriskandarajah, held that, when an alternative remedy is available, Writ application cannot be sought and dismissed the application of the Petitioner.

In the case of **Mohamed Sadikeen Vs Sirajul Muneera BQ 113/10** decided on the 13th of October, 2012 a divisional bench judgment was delivered by the Board of Quazis. Four Honourable members of the Board of quazis out of 5, delivered judgment in favour of granting Mathah. Board held that the Quazi is not precluded from hearing and determination of an application for Mathah. The majority judgment observed that though the Act makes no mention whatsoever of Mathah, it is interesting to note in this regard that the Act does not make any mention of the Khul form of divorce though it is now settled law that an application for Khul divorce could be made under section 28(2) of the Act.

The journal entry of 02.042013, it is recorded that learned counsel for the 2nd respondent has undertaken to produce the proceedings held before the 1st

respondent which the petitioner has failed or omitted to forward. However this Court was invited by 2nd respondent in his written submissions to consider the position which disentitle the petitioner for relief for non compliance with rules of Court. Several authorities have been cited some of which proceed on the basis of failure to make a full disclosure to Court, when seeking discretionary remedy from Court. Vide Blanca Diamonds (Pvt) Ltd. Vs Wilfred Van Els 1997(1) SLR 360; Alphonso Appuhamy Vs Hettiarachchi 77 NLR 131; Land Vs A.G 1995 (2) SLR 88; Kiriwante Vs Navaratne 1990(1) SLR1.

The above respondents also stress on the ' conduct' aspects of the petitioner where on a perusal of the record indicates the indifference of the petitioner deliberately or otherwise to corporate with the 1st respondent quasi. There is an area of discretion left to this Court to refuse and reject writ application on certain acceptable grounds as unexplained delay, availability of alternative remedies, conduct of petitioner, bad motive et. But in legal proceedings of this nature, Court will have to consider the above grounds and give it's mind as the Court is entitled to either reject or entertain the application which has to be decided on a case by case basis. However by looking at both sides of the case, there is a very fundamental basic aspect of the case to be considered very

carefully. Has the 1st respondent jurisdiction to award ' Mathah' in the manner urged and pleaded by the respondents ?

Notwithstanding the above, when attention of court is drawn to a very fundamental aspect of the law which lend support to arrive at a conclusion that the order made by an inferior tribunal is without a legal basis and as such a nullity, even grounds such as ' delay' etc, would recede to the background, since the authority or a Court of law cannot be permitted to pronounce any order on an empty/ vacume which does not affect the rights of a party. It is ' nothing on nothing'

I have fortified my views on the submissions expressed by learned counsel for the Petitioner. Let me refer to same from the point of view of the prevalent statute law which governs all Muslims who profess the Islam faith.

What I have learnt by perusing the submissions of either party is that ' Mathah' is an Arabic term of a post divorce settlement, enshrined in the Holy Quran the fundamental source of Islamic Law. Two views are expressed on above post divorce settlement.

a) It is a compensating gift given by the husband voluntarily to a divorced wife.

b) It is a mandatory payment.

Both (a) and (b) above has not been specifically incorporated by the legislature in the Muslim Marriage and Divorce Act No. 13 of 1951.

It is useful to consider the History of introduction of the Muslim Law into our statute book. As from the British, regime when Ceylon was a colony under the British, the Muslim inhabitants were governed by the Mohamedan Code of 1806. (In two parts one an inheritance and the other dealing with marriage) In the early 19th century the above Mohamedan Code was repealed and replaced by the Muslim Marriage and Divorce Ordinance No. 27 of 1929, which came into effect on or about 1937. It is states that the above ordinance of 1929 established the system of Courts of Quazis and the Board of Quazis to deal with appeals and review of orders of Quazis. Thereafter the 1929 Ordinance was repealed and replaced by the Muslim Marriage and Divorce Act No. 13 of 1951. (effective from 01.08.1954). All the above statutes never recognized and incorporated into same the concept of 'Mathah' which is recognized in the holy Quran. It is observed that for well over a century the statutes that governed Muslim Marriage and Divorces omitted to incorporate such a concept. According to learned counsel for the

petitioner it was not due to an oversight or an omission but deliberate to make it non applicable to Muslim Divorce Laws, of our country .

I have no hesitation in accepting the views of the petitioner, that the Muslim law of Marriage and Divorce does not contemplate the granting of 'Mathah' to a divorced wife. What is not specifically incorporated cannot be given or granted by implication or interpretation in the manner argued on behalf of the respondents to this application. If the legislature intended to introduce the concept of 'Mathah' it could have done so very easily over the years . But none of the above statutes thought it fit to include same.

Petitioner also diverts the attention of this Court to powers of the Quazi. In this regard refer to sec 47(1)(a) to(j) of the Act. Quazi has power to grant 'Iddah' maintenance which is a post divorce settlement. 'Mathah' is also a post divorce settlement but sec. 47 makes no reference to award of ' Mathah' (omitted to include same under 47)

The Maxim " expressio umius est exclusion alterius" applies and it means things expressly stated need to be given effect and what is not expressly mentioned is excluded. Bindras Interpretation of Statute 9th Ed. Pg. 1223.

As such powers of the Quazi cannot be presumed or imported into sec 47 of the Act. There are no decisions on this issue pronounced by the Superior Courts. But the Board of Quazis in a few cases have awarded ' Mathah'. Vide Fawbiya Vs Mohideen BQLR Vol. iii (2009) pg. 70. The simple answer given to ..... by the petitioner is that the Board of Quazis cannot arrogate to itself the function of the legislature under the guise of interpretation. Further sec. 2 of the Act also cannot be given an extended meaning. .... " Other matters connected therewith" to be read and understood to include only those matters within the parameters of the statute. Unless specific provision is made in the statute Quazi or the Board of Quazis have no jurisdiction to award ' Mathah'

Circular no. 299 dated 13.12.2005 issued by the Judicial Service Commission as pointed out by the petitioner has been issued without reference to the law under which such circular is to be issued. Vide Ellawela Medhanande Thero Vs District Secretary Ampara 2009 (1) SLR 54 at 59 .

This Court is of the view that the order sought to be impugned is a nullity. (P2 as regards award of 'Mathah' only) and the 1st respondent had no power and jurisdiction to make such an order in the absence of clear statutory provisions. When such a question of nullity arises the grounds on which writs are refused and rejected would not preclude obtaining and resorting to the writ jurisdiction of the Court of Appeal under article 140 of the Constitution. Any decision which is ultra vires and void could be set aside by a writ of Certiorari although the petitioner has not exercised his right of appeal provided by the Act. However in the instant case there is no right of appeal as there is no mention of awarding a post divorce settlement order as 'Mathah' in the statute. It is 'manifestly illegal'. What is ' unlawful' or 'illegal' or 'bad in law' does not necessarily imply a nullity. However, sometimes an exercise of power is described as 'unlawful' or 'illegal' what is meant to be conveyed is that it is invalid and a nullity. The more serious the errors committed in the process of exercising power, the greater the chance that it will be treated as a nullity. Therefore where the illegality is treated as so serious as rendering the exercise of power invalid, the exercise of power is described as ' manifestly illegal', as in the case in hand .

In all the above facts, circumstances and having considered all the material placed before this Court both oral and documentary, by learned counsel who appeared before me, whilst thanking all of them for assisting this Court, I am very much inclined and convinced of the position of the Petitioner. The intention of the legislature as regards awarding a post divorce settlement as 'Mathah' does not favour the respondents.

In the absence of specific provisions in that regard this Court is of the view that the Petitioner is entitled to relief. As such I allow this application in terms of sub para (b) of the prayer to the petition.

Application allowed as above.

Judge of the Court of Appeal

Kpm/-