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

Saraff Ahmed Saleem,
No. 65, Kandy Road,
Madawala Bazzar
Presently of No. 23,
Clifton Road,
Slough, SLI, ISP,
United Kingdom.
By his Power of Attorney holder Saleem
Mohamed Ashraff Ali
Respondent-Petitioner-Petitioner

CASE NO: CA/LA/1/2015
BOARD OF QUAZIS NO: 182/2010

Vs.

Fathima Uruj Atheek,
No. 115/2A,
Peradeniya Road,
Kandy.
Applicant-Respondent-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Murshid Maharoof for the Petitioner.

Respondent is absent and unrepresented.

Decided on: 04.12.2018

Samayawardhena, J.

This is an appeal filed by the respondent-petitioner-petitioner (petitioner) with leave obtained against the order of the Board of Quazis dated 20.12.2014.

Although notice was served on the applicant-respondent-respondent (respondent) a number of occasions, both by way of registered post and through Fiscal, the respondent did not come to resist the appeal of the petitioner.

The Board of Quazis rejected the appeal of the petitioner without going into the merits of the matter on two grounds. They are in verbatim as follows:

> *(a) the petitioner has not averred that he has not previously invoked the jurisdiction of the Board.*
>
> *(b) the petitioner has not averred any exceptional circumstances for delay in filing this revision application.*

Regarding (a) above, it seems that the Board of Quazis has taken the view that the Court of Appeal and the Supreme Court Rules shall mandatorily be followed in the proceedings before the Board of Quazis. On that basis, following *Nicholas v. Macan Marker Ltd [1981] 2 Sri LR 1*, the Board has decided that the failure to set out in a separate averment in the petition that the petitioner has not previously invoked the jurisdiction of the Board of Quazis is fatal to the maintenance of the application. The Board of Quazis does not state on what basis the Board takes the view that the Court of Appeal and the Supreme Court Rules shall strictly be followed in the proceedings before the

Board of Quazis. The Court of Appeal has one set of Rules and the Supreme Court has another set of Rules made by the Chief Justice under the Constitution (presently under Article 136). The above-mentioned case considered Rule 47 of the Supreme Court Rules 1978. Similarly, the Board of Quazis has yet another set of Rules.

The Rules which are applicable to an appeal from an order of Quazi are set out in the Fifth Schedule of the Muslim Marriage and Divorce Act, No.13 of 1951, as amended, under the heading "Rules for Appeal". There is no such Rule in the Fifth Schedule to say that a petitioner or an appellant in an application filed before the Board of Quazis shall in a separate averment state that he has not previously invoked the jurisdiction of the Board of Quazis.

But section 62 of the Muslim Marriage and Divorce Act provides for the Supreme Court to make separate Rules, if it deems necessary, to be applicable in the proceedings before the Court of Appeal filed against orders of the Board of Quazis. But there is no such section in the said Act which enables the Supreme Court to make Rules regarding the procedure to be adopted before the Board of Quazis. Section 62 of the Act reads as follows:

62(1) Any party aggrieved by any order of the Board of Quazis on any appeal under section 60 may, with the leave of the Court of Appeal first had and obtained, appeal to that court from such order.

(2) The Supreme Court may, from time to time, make such general rules as to it shall seem meet for regulating the

> mode of applying for leave to appeal and of prosecuting appeals from orders of the Board of Quazis and for regulating any matters relating to the costs of such applications for leave to appeal and of appeals.

In respect of the proceedings before the Board of Quazis, in terms of section 94(1)(c) of the Muslim Marriage and Divorce Act, it is the Minister in charge of the subject who has the authority to make regulations *inter alia* for and in respect of "*the form and method of appeals to the Board of Quazis and all matters incidental or appertaining to the hearing such appeals and the recording of verdict or decision of the board*". The section 94(3) further states that "*Every regulation made by the Minister under this section shall be published in the Gazette. A regulation shall not come into operation unless it has been approved by Parliament nor until notification of such approval has been published in the Gazette*." It is not clear whether such regulations have been made by the Minister. The Board of Quazis has not referred to such regulations in the impugned order.

As I stated at the outset, the respondent refused to come before this Court to contest the petitioner's appeal before this Court. However, the respondent had been represented by a counsel before the Board of Quazis. In the written submissions filed before the Board of Quazis dated 14.12.2013, the counsel for the respondent whilst first candidly admitting that "there is no format for Applications before the Board" has nevertheless justified the application of the Supreme Court Rules in Appeals before the Board of Quazis in order to maintain "the respectability of the Board" as "the Board of Quazis is also an

Appellate Body". I need hardly emphasize that the Supreme Court Rules and/or the Court of Appeal Rules cannot be applied in the proceedings before the Board of Quazis on that basis.

I must at this juncture emphasize that Rules—whether it be Supreme Court or the Court of Appeal or the Board of Quazis—have been made not to obstruct justice but to facilitate justice. Hence those Rules shall be interpreted and applied so as to promote justice and not to thwart justice. Here there is no complaint that the petitioner has previously invoked the jurisdiction of the Board of Quazis on the same matter. It is heartening to note that the trend of authority in the recent past is to interpret the Rules quite liberally. The Superior Courts have taken the view that the strict or absolute compliance of the Rules is not necessary.

In *Kiriwanthe v. Nawaratne [1990] 2 Sri LR 393 at 404* Mark Fernando J. stated:

> *The weight of authority thus favours the view that while all these Rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of non-compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefor, in the context of the object of the particular Rule.*

In *Senanayake v. Commissioner of National Housing [2005] 1 Sri LR 182 at 184* Marsoof J. stated:

> *I am of the view that the Court of Appeal (Appellate Procedure) Rules, 1990 have been formulated to facilitate the judicial process and with a view of achieving justice rather than injustice. It appears from Rule 3(14) that it is contemplated that where there is some non-compliance with the Rules, the Registrar should put up the application for an order of Court. The intention of this Rule is to give an opportunity for the Court to exercise its discretion with respect to the matter as is implicit from the use of the word "may" in the last sentence of Rule 3(1)(a). Furthermore I am of the view that in applications for prerogative relief where this Court enjoys a supervisory jurisdiction, Court should not non-suit a party where the non-compliance with Rules takes place due to no fault of that party.*

I am firmly of the view that cases shall, as far as possible, be disposed of on merits and not on technical grounds. The latter, in my view, is easy and speedy. But that is not what litigants expect from Court. They want speedy but substantial justice—justice which ensures a fair trial on merits. I fully endorse the following valid observation made by Wigneswaran J. in *Senanayake v. Siriwardene [2001] 2 Sri LR 371 at 375*:

> *Courts are fast making use of technical grounds and traversing of procedural guidelines to dispose of cases without reaching out to the core of the matters in issue and ascertain the truth to bring justice to the litigants. This tendency is most unfortunate. It could boomerang on the judiciary as well as the existing judicial system.*

There is no justification for the Board of Quazis to dismiss the application of the petitioner *in limine* on the ground that there is

no specific averment in the petition to say that the petitioner hereinbefore did not invoke the jurisdiction of the Board of Quazis on the same matter.

In my view, the Supreme Court and Court of Appeal Rules are inapplicable in proceedings before the Board of Quazis.

Let me now consider the second ground upon which the application of the petitioner was dismissed without going into the merits. That is on the basis that "*the petitioner has not averred any exceptional circumstances for delay in filing this revision application.*" I cannot understand what is meant by averring exceptional circumstances for the delay. In my view, showing exceptional circumstances to come by way of revision is one thing, and the delay in coming to Court is another thing. There is nothing called showing exceptional circumstances for the delay. What you are expected to do is to explain the delay, and not showing exceptional circumstances for the delay. It appears that the Board has tried to apply those principals without exactly knowing the true meaning of them.

Express provisions have been made in section 63 and the proviso to Rule 1 in the Fifth Schedule of the Muslim Marriage and Divorce Act, for the Board to entertain appeals filed out of time.

According to the Quasi Court Records, the respondent has made an application on 8th October 2009 stating that the petitioner did not pay maintenance to the child from March 2007, which was said to be in total a sum of Rs.260,000/=. Then according to the typed notes under the date 10.10.2009, straightaway the Quazi has issued the Enforcement Certificate to the Magistrate's

Court. It is thereafter the petitioner has gone before the Board of Quazis. Then the respondent before the Board of Quazis, in paragraph 7 of her statement of objections, has stated that she received maintenance until June 2008. This is contrary to her earlier position where she told the Quazi that she received maintenance until March 2007.

Be that as it may, it is the position of the petitioner that, the maintenance paid was not to the child but to the wife, or at least, both to the child and the wife, but after the registration of the divorce in October 2007, the wife is not entitled to maintenance. There is clearly a matter to be looked into.

There is a more serious matter the Board of Quazis should not have overlooked. It has been transpired during the proceedings before the Board of Quazis that proceedings before the Quazi on 09.09.2006 (according to the legible translation) have been altered to the disadvantage of the petitioner. In the first place, I must mention that the Quazi's handwriting cannot be read at all. He has not taken any interest to write legibly. He has made journal entries illegibly and irresponsibly. The serious matter is not that one. In the photocopy of the proceedings issued to the petitioner what the Quazi has originally appears to have written is "*Maintenance to be paid at Rs.10,000/= with effect from today*." After issuance of that copy, but before sending the record to the Board of Quazis the words "*to child*" has been introduced after "Rs.10,000/=" to read as "*Maintenance to be paid at Rs.10,000/= to child with effect from today*." This is crucial to the petitioner's application. This is a serious matter on the part of the Quazi, if he has done it. Up to now, he has not denied it. I fail to understand why and how the Board of

Quazis just ignored it without taking a serious note of it. I direct the Chairman of the Board of Quazis to make an initial inquiry into that matter and then refer the matter with his observations and with the relevant documents including the contradictory proceedings to the Secretary of the Judicial Service Commission for suitable action.

There is no magic in the phrase "exceptional circumstances". Nor is there fixed meaning to it. It depends on facts and circumstances of each individual case. The petitioner after narrating his case in the petition filed before the Board of Quazis in paragraph 21 has stated that there are exceptional circumstances for the Board to exercise its revisionary jurisdiction.

The Board has taken the view that the petitioner has come before the Board on 06.06.2010 challenging the order of the Quazi dated 09.09.2006 and there is an unexplainable delay. Firstly, the petitioner went before the Board of Quazis not on 06.06.2010 but on 06.08.2010. Secondly, nowhere does the petitioner state in the petition that he challenges the order dated 09.09.2006. His complaint as I understand is that during the course of his Talak Divorce Application, without a formal application, an order was made to pay maintenance in a sum of Rs.10,000/= both to the respondent wife and the child, but after he obtained Talak divorce, he is not bound to pay maintenance to his former wife.

It appears that the Quazi did not write in the proceedings whether that sum is only for the child or only for the wife or for both, but later added the words "for child" after the sum.

As I said earlier the respondent having waited several years after the divorce, filed an application before the Quazi complaining that the petitioner does not pay maintenance to the child in a sum of Rs.10,000/= per mensem. In my view, when that application was made by the respondent, what the Quazi should have done was not to forthwith issue Enforcement Order to the Magistrate Court, but to issue Notice to the petitioner and then make a suitable order.

The above views shall not be regarded as concluded views of this Court, but made to emphasize the fact that there are exceptional circumstances for the Board to look into in this matter on merits and there is no delay in coming before the Board of Quazis.

In *Lulu Balakumar v. Balasingham Balakumar [1997] BALR 22* Justice Mark Fernando remarked that: "*mere delay does not automatically amount to laches, and that the circumstances of the particular case, the reason for the delay, and impact of the delay on the other party, must all be taken into account.*" His Lordship further commented that: "*In any event, the question of laches cannot be determined only by considering how many trial dates, or how long a period of time, has lapsed. The circumstances are relevant.*"

I set aside the order of the Board of Quazis dated 20.12.2014 and direct the Board of Quazis to hear the appeal of the petitioner on merits and make a suitable order in accordance with law.

Appeal allowed.

Judge of the Court of Appeal