

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

In the matter of an appeal under Article 138
of the Constitution read with section 62(1) of
the Muslim Marriage and Divorce Act, No. 13
of 1951 (as amended).

CA Case No: CA/LA/06/2019

Board of Quazis Case No: BQ/51/14/R/CMB

Special Quazi for Colombo East Case No: 117/T

M.I.M. Nasar,
No. 40/3, Main Street,
Battaramulla.

Presently in
No. 50, Dampitiya Road,
Kekunugolla.

APPLICANT

VS.

Manna Dewage Shifani,
No. 34/1, Kolamunna,
Piliyandala

RESPONDENT

AND

Manna Dewage Shifani,
No. 34/1, Kolamunna,
Piliyandala

RESPONDENT-PETITIONER

VS.

M.I.M. Nasar,
No. 40/3, Main Street,
Battaramulla.

Presently in
No. 50, Dampitiya Road,
Kekunugolla.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Manna Dewage Shifani,
No. 34/1, Kolamunna,
Piliyandala.

RESPONDENT-PETITIONER-PETITIONER

VS.

M.I.M. Nasar,
No. 40/3, Main Street,
Battaramulla.

Presently in
No. 50, Dampitiya Road,
Kekunugolla.

APPLICANT-RESPONDENT-RESPONDENT

Before: **M. T. Mohammed Laffar, J.**

Counsel: M. Yoosuff Nasar for the Petitioner.

Safana Gul Begum for the Respondent.

Argued on: 09.12.2021.

Written Submissions on: 21.01.2022 and 20.04.2021 (by the Applicant-Respondent-Respondent).

Decided on: 14.02.2022.

Mohammed Laffar, J.

The Respondent-Petitioner-Petitioner (hereinafter referred to as the “Petitioner”) is seeking Leave to Appeal from the order of the Board of Quazis dated 23.02.2019 dismissing the petition of the Petitioner filed against the order of the Quazi of Colombo-East dated 08.03.2014 in case No. 117/T and the order of the Quazi of Colombo-West dated 07.06.2014 in case No. 117/T.

On 10.03.2021, having heard the learned Counsel for the Petitioner in support of this application and the learned Counsel for the Applicant-Respondent-Respondent (hereinafter referred to as the “Respondent”), this Court granted Leave to Appeal on the questions of law set out below:

- (1) Whether the talak divorce granted by the learned Quazi of Colombo-East on 08.03.2014 is bad in law on the basis that the Petitioner objected to the said Quazi to hear the matter and the Petitioner had further sent a letter to the Judicial Service Commission requesting for another Quazi.
- (2) Whether the order of the learned Quazi of Colombo-West, who was specially appointed by the Judicial Service Commission, declined to hear the case in dispute is bad in law.
- (3) Whether the order of the Board of Quazis dated 23.02.2019, affirming the said orders of the learned Quazis of Colombo-East and Colombo-West are misconceived in law.

The facts in a nutshell

The case bearing No. 117/T was instituted by the Respondent (husband) against the Petitioner (wife) seeking, *inter alia*, for pronouncement of *talak* divorce before the Quazi for Colombo-East. Having received notices issued by the said Quazi, the Petitioner was present before the Quazi. Subsequently, by letter dated 04.02.2014, the Petitioner informed the Quazi for Colombo-East that *she would not attend the Quazi Court as the said Quazi was biased* (vide page 38 of the brief). The Petitioner has leveled several allegations against the said Quazi in the said letter. A copy of the said letter was dispatched to the Judicial Service Commission as well. Furthermore, the Petitioner had dispatched an undated letter to the Judicial Service Commission, requesting for a new Quazi to hear this

case on the basis that *she has no trust on the Quazi for Colombo-East* (vide page 41 of the brief).

On 08.03.2014, despite the said letter dated 04.02.2014, the Quazi for Colombo-East granted *talak* divorce. Having considered the complaint made by the Petitioner, the Judicial Service Commission by letter dated 03.04.2014, appointed the Quazi for Colombo-West to hear and determine the instant case (vide page 30 of the brief). On 07.06.2014, the Quazi for Colombo-West declined to hear the case on the footing that the *talak* divorce has already been granted by the Quazi for Colombo-East (vide page 27 of the brief).

Being aggrieved by the said orders of the Quazis of Colombo-East and Colombo-West, the Petitioner invoked the Revisionary jurisdiction of the Board of Quazis to set aside the said orders. The Board of Quazis, having heard the submissions of the learned Counsel for the parties dismissed the said application on 23.02.2019. Being aggrieved by the said order the instant appeal has been preferred by the Petitioner.

The Order of the Quazi for Colombo-East dated 08.03.2014

Section 67 of the Muslim Marriage and Divorce Act, No. 13 of 1951 (as amended) provides that,

“Where it appears to the Judicial Service Commission, on the application of any party to, or any person interested in, any proceedings instituted or to be instituted under this Act before a Quazi, that a fair and impartial inquiry cannot be had before such Quazi, or where a Quazi himself makes an application in that behalf to the said Commission, the Commission may order that such proceedings be instituted before and heard by a special Quazi appointed in that behalf by the Commission under section 14 and, in the event of any such order being made, any proceedings taken before the first-mentioned Quazi in respect of the matter to which such application relates shall be of no effect.”

It is true that a Quazi is entitled to proceed with any proceedings filed before him until a decision is made by the Judicial Service Commission under section 67 of

the Muslim Marriage and Divorce Act. However, when a party to an action is exercising his statutory right under section 67 of the said Act, requesting the Judicial Service Commission to appoint a new Quazi on the ground of basis of the present Quazi, there is a moral duty cast upon the present Quazi to delay the matter till he obtains further instructions from the Judicial Service Commission.

In the instant case, the Quazi for Colombo-East was fully aware that there is a written complaint made by the Petitioner to the Judicial Service Commission against him. It is to be noted that very grievous allegations have been leveled against the Quazi in the written complaint. The Quazi concerned has mentioned in the impugned order dated 08.03.2014 as to the complaint made by the Petitioner. Despite the above facts, the Quazi for Colombo-East decided the matter against the Petitioner in a short period of one month from the date of the complaint.

The conduct of the Quazi for Colombo-East, not delaying the proceedings for the directions of the Judicial Service Commission pertaining to the complaint made by the Petitioner, not seeking further instructions from the Judicial Service Commission and concluding the proceedings in a short period of time buttress the allegations leveled against him by the Petitioner. In these respects, it appears to this Court that the Petitioner had not been given a *fair trial* before the Quazi Court.

It is well settled that every member of a court of law that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that adjudicators should be able to act impartially, objectively and without any bias. In such cases, the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. Thus, it is often said that "*justice must not only be done but must also appear to be done*" [vide *R v. Sussex Justices, ex parte McCarthy* (1924) 1 KB 256].

The principle which emerges from bias is not concerned with the fact that the decision maker was biased, but with the possibility that he or she might have been biased i.e., a real likelihood of bias [vide *Simon v. Commissioner of National Housing* (1972) 75 NLR 471]. It is necessary to point out, however, that courts will not merely uphold a plea of bias simply because a party has raised it. It should be made clear that a party wishing to raise a complaint of bias has to do so with the adjudicator. The adjudicator is enjoined to consider such objection and make a decision. Where the objection of bias has not been raised before the adjudicator, the complainant has to demonstrate actual bias in the proceedings on appeal or judicial review.

Question of likelihood of bias can only, logically, be raised before or perhaps during the proceedings in question. It can never be based on conjecture or on flimsy insubstantial grounds and there must be material which shows a tendency to favour one side unfairly at the expense of the other [vide *Dr. Karunaratne v. Attorney General and Another* (1995) 2 Sri LR 298 – *per* Gunersekera, J at page 302]. In such cases, an affected party would normally be expected to request that the person suspected of such bias recuse himself from participation in the proceedings in question. Parties may be held to have waived the right to invoke the bias rule if they were fully informed of the facts that could support a claim of bias but failed to raise the issue in a timely manner. Vide *Canada (H.R.C.) v. Taylor* [(1990) 3 SCR 892] and *In re Human Rights Tribunal and Atomic Energy of Canada Ltd.* [(1986) 1 FC 103 (CA)]. Accordingly, in my view, where a party does not raise any objections then such party cannot rely on the ground of likelihood of bias on appeal or judicial review. This ensures that the tribunals' decisions are not set aside based on a point that had not been brought to their attention (vide *S. Victor Wijerathne v. Tissa R. Balalle and Others*, CA/Writ/262/14, Court of Appeal Minutes of 05.08.2021).

In the instant case, the Petitioner has categorically, in writing, informed the Quazi and the Judicial Service Commission that the said Quazi is bias. In such a situation, the Quazi would have declined to hear the case and requested for a new Quazi from the Commission in order to get rid of the allegations leveled against him. In contrast, the Quazi in the instant case, determined the matter in a very short period of time against the Petitioner who made allegations against

him, which amounts to bias. In my view, when a party to an action expressly and logically informed Court that the adjudicator is bias, such adjudicator becomes disqualified to adjudicate the matter on the doctrine of *fair trial*.

In these respects, I am of the view that the decision of the Quazi for Colombo-East dated 08.03.2014 is palpably misconceived in law and liable to be set aside.

Furthermore, in terms of the Rule No. 2 of the Second Schedule of the Muslim Marriage and Divorce Act, the *talak* shall be pronounced before two witnesses, which reads thus,

“... The husband, if desires to proceed with the divorce, shall pronounce the talak in the presence of the Quazi and two witnesses, and the Quazi shall forthwith record such pronouncement and shall cause notice thereof to be served upon the wife, if she is not present...”

It is borne out from the impugned order of the Quazi for Colombo-East dated 08.03.2014 that, the *talak* has not properly been pronounced before the witnesses though it is stated by the Quazi that the same was pronounced before two witnesses (vide page 38 of the brief). There is a document filed of record at page 33 of the brief stating that, the *talak* was pronounced before two witnesses whereas *the name and the addresses of the purported witnesses have not been mentioned in the said document*. In the circumstances, it appears to this Court that the *talak* in dispute has not been pronounced in terms of the provisions of the Muslim Marriage and Divorce Act.

The Order of the Quazi for Colombo-West dated 07.06.2014

It is abundantly clear that the order made by the Quazi for Colombo-West dated 07.06.2014, refusing to hear the matter on the basis that the *talak* divorce was already granted by the previous Quazi was palpably erroneous. It is pertinent to be noted that, once the Quazi for Colombo-West is appointed by the Judicial Service Commission, under section 67 of the Muslim Marriage and Divorce Act, the entire proceedings taken before the first mentioned Quazi in respect of the matter to which such application relates shall be of no effect. As such, there is no legal impediment for the present Quazi to comply with the directions of the

Commission. If the present Quazi is of the opinion that he is unable to proceed with the matter, he should obtain prior instructions from the authority (Judicial Service Commission) before making the impugned order. In the circumstances, the arbitrary order made by the Quazi for Colombo-West, refusing to hear the application of the Petitioner is erroneous and misconceived in law.

The Order of the Board of Quazis dated 23.02.2019

Having scrutinized the order of the Board of Quazis, it appears to this Court that the Board of Quazis totally failed to consider the grievous allegations leveled against the previous Quazi by the Petitioner. As I have already stated, on the concept of *fair trial*, it is advisable for an adjudicator not to hear a case where the parties have no faith and trust on him, even though that there are no legal impediments for him to proceed with the matter. Similarly, the Board of Quazis has misdirected itself that there is no provision for the Quazi of Colombo-West to inform the Judicial Service Commission as to the dismissal of the Petitioner's application. In terms of section 67 of the said Act, when the Quazi for Colombo-West is appointed by the Judicial Service Commission to hear and determine the matter, if the said Quazi is not in a position to comply with the directions of the Commission, he is duty bound to inform the Commission before making any adverse order. Thus, the impugned order of the Board of Quazis is also bad in law.

For the foregoing reasons, I proceed to allow the appeal with cost fixed at Rs. 50,000/-.

The order of the Quazi for Colombo-East dated 08.03.2014 in case No. 117/T, the order of the Quazi of Colombo-West dated 07.06.2014 in case No. 117/T and the order of the Board of Quazis dated 23.02.2019 in case No. 51/14/R/CMB are hereby set aside.

The Quazi of Colombo-West is ordered to hear and determine the matter a fresh in terms of the directions given by the Judicial Service Commission on 03.04.2014.

The Registrar is directed to issue a copy of this judgment to the Board of Quazis, the Quazi for the Colombo-West, the Quazi for the Colombo-East and the Secretary to the Judicial Service Commission.

Appeal allowed.

Judge of the Court of Appeal