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 No: CA/LA/04/19
Board of Quazis Case No: 84/16/A/CMB
Matale Quazi Case No: 164B/CM/5/16/MTL

M.N. Nasrina
No. 26, Kurunagala Road,
Galewala.

Applicant

Vs.

N. Rinas
No. 35/6, Muslim Colony,
Kaduruwela,
Pollonnaruwa.

Respondent

AND

N. Rinas
No. 35/6, Muslim Colony,
Kaduruwela,
Pollonnaruwa.

Respondent-Appellant

Vs.

M.N. Nasrina
No. 26, Kurunagala Road,
Galewala.

Applicant-Respondent

AND NOW BETWEEN

N. Rinas
No. 35/6, Muslim Colony,
Kaduruwela,
Pollonnaruwa.

Respondent-Appellant-Petitioner

Vs.

M.N. Nasrina
No. 26, Kurunagala Road,
Galewala.

Applicant-Respondent-Respondent

Before: **M. T. Mohammed Laffar, J. and**
S. U. B. Karalliyadde, J.

Counsel: M. Yoosuff Nasar with Eksith Madawela for the Petitioner.

Safana Gul Begum, instructed by M.M. Pathima Risda for the Respondent.

Argued on: 19.01.2022.

Written Submissions on: 06.12.2019 (by the Petitioner)

04.12.2019 (by the Respondent)

Decided on: 15.03.2022.

Mohammed Laffar, J.

The Respondent-Appellant-Petitioner (hereinafter referred to as the "Petitioner") above named had initially sought Leave to Appeal from the Order of the Board of Quazis dated 23.02.2019. This Court granted leave on 14.02.2020 on the questions of law set out in paragraphs 6(a), (d), (e) and (f) of the petition dated 21.03.2019.

The Applicant-Respondent-Respondent (hereinafter referred to as the "Respondent") instituted proceedings before the Quazi for Matale, seeking child maintenance of Rs. 65,000/- monthly from the Petitioner. Having received the notice from the said Quazi, the Petitioner, by letter dated 08.07.2016, requested the said Quazi to take necessary steps to appoint a Special Quazi to hear and determine the matter for the reason that he has death threats (vide document marked P1, page 14).

Thereafter, the learned Quazi proceeded with the *ex parte* inquiry and made the Order *nisi* dated 17.09.2016 directing the Petitioner to pay a sum of Rs.65, 000/- as child maintenance monthly. Subsequently, in terms of Rule 4 of the Fourth Schedule of the Muslim Marriage and Divorce Act, No. 13 of 1951 (as amended), the Petitioner was served with a notice dated 17.09.2016, asking to show cause within a

month as to why the said Order *nisi* should not be made absolute.

The said Rule 4 reads as follows:

> *"Where the Respondent does not appear on the day fixed for the inquiry, the Quazi, if he has dispensed with service of notice on the Respondent or if the service of notice on the Respondent or the posting up of the notice is proved by statement on oath or affirmation, shall proceed with the inquiry ex-parte and shall, if he is satisfied that the claimant or complainant or applicant is entitled to the relief prayed for, make in his favour an order nisi conditioned to take effect in the event of the Respondent not showing cause against it on a day specified for that purpose in the order and shall direct a copy of such order certified under his hand to be served on the Respondent"*

Further, the Rule No. 5 spells out that,

> *"where the respondent fails to appear in any case in which the Quazi has deepened with service of the copy of the order nisi on the respondent….or where the respondent appears but fails to show cause against the order, the Quazi shall make the order absolute."*

It is pertinent to note that the Petitioner in this case, having received the show cause notice, did not appear before the Quazi under Rule No. 6, and preferred an appeal to the Board of Quazis against the said Order *nisi*. The said Rule No. 6 is reproduced as follows:

> *"Where the respondent appears and shows cause to the satisfaction of the Quazi why the order nisi should not be made absolute, the Quazi shall set aside the order nisi and shall proceed with the inquiry as though no default had been made by the Respondent in appearing in compliance with the notice issued under Rule 2."*

When the appeal was taken up before the Board of Quazis, the learned Counsel for the Respondent raised a preliminary legal objection as to the maintainability of the appeal on the basis that there is no right to appeal against the Order *nisi.* The Board of Quazis, in the impugned Order dated 23.02.2019, dismissed the appeal on the footing that the Petitioner has no right to appeal against the Order *nisi*. Being aggrieved by the said Order, the instant leave to appeal application has been filed by the Petitioner.

Having scrutinized the Rules in the Fourth Schedule of the Muslim Marriage and Divorce Act, No. 13 of 1951 (as amended), it is abundantly clear that the Order *nisi* made by the Quazi after an *ex-parte* inquiry is an interim Order. If the Petitioner is not satisfied with the said Order *nisi*, the Fourth Schedule provides an opportunity to the Petitioner to invoke the jurisdiction of the same Quazi to get the Order *nisi* set aside. Instead, the Petitioner in this case opted to prefer an appeal to the Board of Quazis against the Order *nisi* which is erroneous and misconceived in law.

It is to be noted that, under the Muslim Marriage and Divorce Act, No. 13 of 1951 (as amended) a right to appeal

is available against a final Order made by a Quazi under the rules in the Third Schedule or under section 47 of the said Act. In this regard, section 60 (1) of the said Act reads as follows:

> *"Any party aggrieved by any final Order made by a Quazi under the rules in the Third Schedule or in any inquiry under section 47 shall have a right of appeal to the Board of Quazis"*

Besides, proviso of section 60 (1) of the Muslim Marriage and Divorce Act, No. 13 of 1951 (as amended) reads thus,

> *"Provided that there shall be no appeal from an Order absolute made in accordance with the rules in the Fourth Schedule in any inquiry under section 47."*

The Rule No. 10 of the Fourth Schedule of the said Act reads as follows:

> *"No appeal shall lie against any order absolute made by the Quazi in pursuance of the rules in this Schedule, but if any person against whom an order absolute has been made appears within a reasonable time after such order and satisfies the Quazi that he was prevented from appearing to show cause against the making of the order absolute by reasons of illness, accident, misfortune or other unavoidable cause or by not having received notice of the proceedings, the Quazi may upon such terms and conditions as he may think it just and right to impose set aside the order*

> *absolute and proceed with the inquiry as though there had been no default in appearances."*

In the light of the proviso to section 60 (1) and the Rule 10 of the Fourth Schedule of the Act, it is crystal clear that there is no right to appeal from the Order *nisi* and Order absolute made in accordance with the Rules in the Fourth Schedule.

In the circumstances, I am of the considered view that the impugned Order of the Board of Quazis dismissing the appeal of the Petitioner on the basis that *there is no right to appeal from the Order nisi made by the Quazi* is absolutely within the purview of the provisions of the Muslim Marriage and Divorce Act, No. 13 of 1951 (as amended), and therefore, I see no reason to interfere with the same.

Be that as it may, the Petitioner, having received a notice from the Quazi, pertaining to the child maintenance application filed by the Respondent, instead of appearing before the Quazi, dispatched a letter dated 08.07.2016 to the Quazi, requesting him to handover the case to a Special Quazi under section 67 of the said Act. However, in terms of the provisions of section 67 of the said Act, the Petitioner has no right to request the Quazi to hand over the proceedings to another Quazi. A Quazi is bound to transfer proceedings to another Quazi only on the directions of the Judicial Service Commission. In this regard, the observation rightly made by the Board of Quazis in the impugned Order is appreciated by this Court, which is reproduced as follows:

"It is worth mentioning here that the Respondent-Appellant being a medical doctor by profession having been well aware that the other cases were transferred by the Judicial Service Commission and not by the Quazi, (the Quazi has no power to transfer a case on his own) he has chosen to dictate his own terms to the learned Quazi to transfer this child maintenance case without duly applying or complaining to the Judicial Service Commission to transfer the said case. It is the Judicial Service Commission which is the sole authority in respect of appointment of special Quazi and transfer of cases under Section 67 of the Muslim Marriage and Divorce Act..."

[Vide page 3 of the Board Quazis dated 23.02.2019 (marked as P5)]

Section 67 of the said Act reads thus,

*"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.”

The learned Counsel for the Petitioner by appending document marked X, X1 (vide motion dated 20.09.2019), Y and Y1 (vide motion dated 21.10.2019) submitted that, upon the Petitioner’s request, the Judicial Service Commission by its letter dated 04.11.2016 transferred the present proceeding to the Quazi Court of Mawanella from the Quazi Court of Matale. Thus, the learned Counsel for the Petitioner contended that *the learned Quazi for Matale has no jurisdiction to hear and determine the case and the said proceedings to be set aside forthwith, soon after the appointment of the Quazi for Mawanella by the Judicial Service Commission to hear the matter.* Accordingly, the learned Counsel for the Petitioner took up the position that *as the matter was transferred from the Quazi Court of Matale to the Quazi Court of Mawanella, the Order of the Quazi Court of Matale is of no effect*. The learned Counsel for the Petitioner, in the course of the argument further contended that, *when the transfer is effected by Judicial Service Commission, any proceedings including Orders whatsoever made is to be set aside*.

However, it is to be noted that the impugned Order of the Quazi Court for Matale which was challenged by the Petitioner in the Board of Quazis was made on 17.09.2016, prior to the letter of transfer (appointment of new Quazi) of the Judicial Service Commission (vide document marked X). The Petitioner challenged the said Order of the Quazi Court

of Matale in the Board of Quazis on 14.10.2016 which is also prior to the said letter of transfer of the Judicial Service Commission dated 04.11.2016. Therefore, it is apparent that the direction issued by the Judicial Service Commission to transfer the case from the Quazi Court of Matale to the Quazi Court of Mawanella was issued while the appeal was pending before the Board of Quazis. In other words, when the Judicial Service Commission issued the said direction of transfer the case to the Quazi Court of Mawanella, there was no case proceedings before the Quazi Court of Matale and the matter was well adjudicated by the learned Quazi according to law. There were no impediments for the learned Quazi of Matale to hear and determine the case. In my view, the said direction of the Judicial Service Commission dated 04.11.2016 cannot be effectuated retrospectively to invalidate the impugned Order of the learned Quazi. Unwittingly, the Judicial Service Commission proceeded to take the matter out of the former Quazi without knowing the fact that the said learned Quazi adjudicated the case according to law. As such, if this Court concede the position taken by the learned Counsel for the Petitioner that – "*when the transfer is effected by the Judicial Service Commission, any proceedings including orders whatsoever made is to be set aside*", I am afraid, this sort of defence may amount to an abuse of the legal process. In future, any party or person interested in a Quazi proceeding, without participating in any inquiry or dishonouring Quazi Court's notices, soon before delivering an order, may simply make an application to the Judicial

Service Commission saying that, “I am not happy with the (former) Quazi and transfer my case to another Quazi”. This is not the true proposition of the law. Indeed, when an aggrieved party thinks that ***a fair and impartial inquiry cannot be had before such Quazi***, he may directly write to the Judicial Service Commission to transfer his/her case to another Quazi to effectuate a fair and impartial inquiry.

However, when a person raises a defence of bias at the inquiry, the situation is different. In such a case, 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 ***S. Victor Wijerathne v. Tissa R. Balalle and Others,*** **CA/Writ/262/14 (Court of Appeal Minutes of 05.08.2021)** and ***Manna Dewage Shifani v. M.I.M. Nasar***, **CA/LA/06/19 (CA Minutes of 14.02.2022)**.

In ***Manna Dewage Shifani v. M.I.M. Nasar*** (supra), the Petitioner made a written complaint to the Judicial Service Commission against the Quazi for Colombo-East alleging that the said Quazi acted in bias. Despite the said allegation of bias, the Quazi for Colombo-East decided the matter against the Petitioner in a short period of one month from the date of the complaint. Therefore, this Court precisely observed that 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. It was in those circumstances, this Court, *inter alia*, held that *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.*

However, in the instant case, the Petitioner has never raised an objection on bias and therefore, the learned Quazi was not bound to recuse himself from hearing and determining the proceeding in question.

Moreover, even if the Judicial Service Commission wittingly, has taken the matter out of the former Quazi and appointed another Quazi, knowing the facts that the said Quazi has delivered an appropriate order upon concluding the inquiry and the Petitioner has filed an appeal to the Board of Quazis, by its direction, the impugned order cannot be set aside. The legality of the impugned order can only be challenged in a proper appellate forum (court of law). Judicial Service Commission is not an appellate forum but an apex body which administer and supervise the judicial officers in this country.

Therefore, I cannot agree with the contention of the Petitioner.

For the foregoing reasons, I dismiss the appeal with costs fixed at Rs. 50,000/- and affirm the Order *nisi* dated 17.09.2016 made by the Quazi of Matale and the order of the Board of Quazis dated 23.02.2019.

Appeal dismissed with costs.

Judge of the Court of Appeal

S. U. B. Karalliyadde, J.

I agree.

Judge of the Court of Appeal