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

In the matter of an application for leave to appeal under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 61(1) of the Muslim Marriage and Divorce Act, No. 13 of 1951 as amended.

C.A. L.A. Case No.02/2010

Board of Quazis Case No.4359

Quazi Court of Avissawella Case No.247/T and Case No.243/T

N.M.M. Madany,

No. 182, Ganithapura, Warakapola.

APPLICANT

-Vs-

M.S. Fathima Farsana,

No. 170/9, Avissawella Road, Ruwanwella.

RESPONDENT

AND BETWEEN

M.S. Fathima Farsana,

No. 170/9, Avissawella Road, Ruwanwella.

RESPONDENT-APPELLANT

-Vs-

N.M.M. Madany,

No. 182, Ganithapura, Warakapola.

APPLICANT-RESPONDENT

AND BETWEEN

N.M.M. Madany by his Attorney M.D. Neina Mohamed

No. 182, Ganithapura, Warakapola.

APPLICANT-RESPONDENT-PETITIONER

-Vs-

M.S. Fathima Farsana,

No. 170/9, Avissawella Road, Ruwanwella.

RESPONDENT-APPELLANT-RESPONDENT

AND NOW BETWEEN

M.S. Fathima Farsana,

No. 170/9, Avissawella Road, Ruwanwella.

RESPONDENT-APPELLANT-RESPONDENT-PETITIONER

-Vs-

N.M.M. Madany by his Attorney M.D. Neina Mohamed

No. 182, Ganithapura, Warakapola.

APPLICANT-RESPONDENT-PETITIONER-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : M.Yoosuf Nazar for the Petitioner (Appellant)
M.H.A.Raheem with M.M.Mohideen
for the Respondent (Respondent)

Decided on : 02.05.2019

A.H.M.D. Nawaz, J.

After leave was granted in this matter, both Counsel agreed that the appeal could be disposed of on the same oral arguments that were advanced in order to obtain leave. At the stage of the argument for leave, the matter was comprehensively dealt with by both Mr. Yoosuf Nazar and Mr. M.H.A. Raheem and I proceed to deliver the judgement based on the oral argument and the written submissions that have been filed.

The Applicant-Respondent-Petitioner-Respondent (hereinafter referred to as "the Respondent") and the Respondent-Appellant-Respondent-Petitioner above named (hereinafter referred to as "the Appellant") began to live at *Ganithapura, Warakapola* at the Respondent's house after marriage. Both sired a male child out of their wedlock. The Respondent after marriage had gone to Saudi Arabia for employment. It is on record that the Respondent found a house on rent in *Ganithapura* for him and the Petitioner in order to lead the lives separately from their parents. It was averred by the husband that the wife had left *Ganithapura* on 21.10.2003 and went to live with her parents at *Ruwanwella*. She had not returned to *Ganithapura* although the Respondent had asked her to come on 20.04.2004. The Respondent husband by a writing complained to the *Quazi* of *Avissawella* to summon his wife and son for an inquiry in Case No. 1641 and made a request of the *Quazi* to persuade his wife to return to his house. On 24.07.2004 the learned *Quazi* called both parties and attempted a reconciliation by asking both parties to live together. It would appear that where the Respondent found a house at *Ganithapura* and Grama Niladhari issued a certificate to that effect, it is the version of the Respondent that the Appellant wife insisted on the Respondent that he found a house in *Ruwanwella* for her to

reside there. No reconciliation could be effected because the Respondent could not find a house in *Ruwanwella*. The Respondent's application, Grama Niladhari's writing and the order made on 02.08.2004 have been annexed to the pleadings and one could gather these facts upon a perusal of all these documents.

Since the Appellant was not willing to return to *Ganithapura*, the Respondent next moved to institute *Talaq* proceedings in the *Quazi* Court in *Avissawella* on 02.08.2004 to divorce the Petitioner giving the same Case No. 1641. The learned *Quazi* assigned Case No. 247/T. When this matter was called on 23.08.2004, the *Quazi* was successful in arriving at a settlement between the parties as the Appellant wife was willing to return to resume cohabitation with the Respondent at *Ganithapura*. The divorce proceedings were shelved and withdrawn. When the *Quazi* called the case on 28.08.2004, the Respondent was present but the Appellant was not absent. The *Quazi* dismissed the said case on 28.08.2004. The Application for divorce and the order made on 23.08.2004 have all been annexed for the perusal of this Court.

The Appellant had not resumed cohabitation with the Respondent in *Ganithapura*, *Warakapola* as promised by her although he had invited her several times. On 06.09.2004 he filed another application for divorce in the *Quazi* Court of *Avissawella* in Case No. 248/T. The *Quazi* of *Avisaawella* called this case on 15.09.2004, 22.09.2004 and 13.10.2004. As there was no reconciliation between the parties on 27.11.2004, the *Quazi* permitted the Respondent to pronounce *Talaq* on her at 11.05 a.m. The application and order of the *Quazi* dated 27.11.2004 have been marked as **Z1** and **Z2**.

The Appellant by a writing dated 28.11.2004 addressed to the Secretary of Board of *Quazis* preferred a Revision Application by registered post against the pronouncement of the *talaq* in *Quazi* Court in Case No. 247/T. In the said application the Appellant had preferred the appeal under Sections 43 and 44 of the Muslim Marriage and Divorce Act. The Board of *Quazis* assigned Case No. 4010. The Board could not serve notice on the Respondent as he was employed in Saudi Arabia. In the meantime the Board of *Quazis* by registered letter

dated 28.03.2005 addressed to the *Quazi* of *Avissawella* asked his explanation regarding Case No. 247/T. The *Quazi* by registered letter dated 05.04.2005 gave his explanation regarding Case No. 247/T and also regarding Case No. 248/T. In his letter the *Quazi* stated *Talaq* Case No. 247/T was withdrawn on 23.08.2004 and the Applicant filed a fresh Case No. 248/T on 06.09.2004 and the case was inquired into on four dates and on completion of the inquiry pronouncement of the *Talaq* was entered aby him on 27.11.2004. This letter is annexed hereto which was marked P6 in the Revision Application No. 4010. The Board of *Quazis* treated the Appellant's writing as a petition of appeal.

A notice was served on the Respondent's father to appear in the Board of *Quazis* Case No. 4010. He was present in the Board of *Quazis* on 18.03.2006. In Board of *Quazis* Case No. 4010. Both counsel who appeared for the respective parties agreed that this Case No. 247/T could be remitted back to the *Quazi* of *Ratnapura* for a *de novo* inquiry and the Board agreed and recommended to the Judicial Service Commission that that course of action could be adopted and all the previous orders of the *Quazi* of *Avissawella* were set aside.

This shows that both counsel without knowing that Case No. 247/T has been withdrawn and the Board too without studying the explanation give to the Board by the *Quazi* of *Avissawella* by registered post marked P7 agreed to recommend to the JSC for sending this Case No. 247/T to *Ratnapura Quazi* for inquiry.

Thereafter this case had been called in the Board of *Quazis* on 01.07.2006 without noticing Neither the Respondent nor his father was present

A perusal of that day's proceedings before the Board of *Quazis* brings out the fact that a new Case No. 248/T was added together with Case No. 247/T when there was no appeal or amendment of the appeal against the pronouncement of *Talaq* or any revision application against the proceedings or the order in Case No. 248/T by the Respondent-Appellant or any motion to mention this Case No. 248/T together with Case No. 247/T and the Board made the same order as they had made on 18.03.2006.

The Board of *Quazis* on its own motion took up this Case on 01.07.2006 and made a recommendation to the JSC that the above cases be heard *de novo* by the *Quazi* of *Ratnapura* and all orders given by the *Quazi* of *Avissawella* were set aside- see the proceedings marked P9 and A3 filed by the Appelant.

The Respondent argues he had been unaware of the order made on 01.07.2006 and it was only through his father he had come to know about these proceedings. His father, he avers, had come to know of this through the *Quazi* of *Ratnapura* after he was summoned by the Quazi. By a Power of Attorney the Respondent had appointed his father as his Attorney to file papers against the order made on 01.07.2006. He filed a Revision Application No. 4359 on 09.01.2008 in the Board of *Quazis* invoking the inherent powers of the Board to revise, review and consider the *ex parte* order dated 01.07.206 and prayed that the order be set aside as it was made *per incuriam*.

In his application he stated that he had suffered a miscarriage of justice when the order of the *Quazi* of *Avissawella* allowing him to pronounce *Talaq* in Case No. 248/T was set aside without any notification to him and this was in the teeth of the fact that the Appellant had not preferred any appeal or revision application in the Board of *Quazis* and he sought the relief that the order of the learned *Quazi* in Case No. 248/T be restored.

After both parties tendered written submissions, the Board of *Quazis* made order on 06.03.2010.

The Board of *Quazis* exercising its inherent power set aside its order dated 01.07.2006 as it was made *per incuriam* and also set aside all consequential orders to the above order and the Board held that the order of the learned *Quazi* of *Avissawella* in Case No. 248/T was legal and binding- see the order of the Board of *Quazis* marked **A11** filed by the Appellant.

Being aggrieved by the order of the Board of *Quazis* dated 06.03.2010, the Appellant filed an application seeking leave to appeal in terms of Section 62(1) of the Muslim Marriage and Divorce Act (hereinafter referred to as "the Act"). Leave was granted and the Appellant's

contention is that no exceptional circumstances had been urged in the invocation of the revisionary jurisdiction and the *per incuriam* rule has no application to the facts of the case.

The question that now arises for consideration is on the validity of the order of 01.07.2006 and whether the order of the present Board made on 06.03.2010 setting aside the order of 01.07.2006, as it was made *per incuriam* is justified upon an exercise of the inherent jurisdiction of the Board.

The question of validity of the order made on 01.07.2006 in Case Nos. 247/T and 248/T

Initially the Board made an order on 01.7.2006 in respect of the above two cases without an application in revision or appeal against the order made by the learned *Quazi* of *Avissawella* or any complaint in writing in respect of Case No. 248/T to the Board by the Appellant and without notice served on the Respondent, violating the cardinal principle of natural justice *(audi alterm partem)* which postulates two elements namely;

i. That a person who will be affected by an order should have prior notice of the matter against him; and

ii. Such person be heard in opposition to the order that is sought before it is made.

Section 44(2) of the Muslim Marriage and Divorce Act is a classic example where the principle of *audi alterm partem* has been given statutory effect.

Section 44(2) states:-

> *"No order under this section shall be made by the Board of Quazis to the prejudice of any person unless he has had an opportunity of being heard either in person or by his representative."*

It is crystal clear that there has been a failure to comply with the principle of *audi alterm partem* embodied in the Muslim Marriage and Divorce Act. The Board has made the order on 01.07.2006 without having served any notice on the Respondent.

The failure to serve notice on the Respondent and the concomitant contravention of the principle of *audi alterm partem* denuded the Board of jurisdiction and the order made in those circumstances would be null and void.

It is crystal clear that there was no application before the Board in respect of Case No. 248/T. The Board had just mentioned Case No. 248/T along with Case No. 247/T and made the impugned order on 01.07.2006 without jurisdiction. In fact in my view there was a patient want of jurisdiction in the Board to have made that order.

Tennekoon C.J. in the case of ***Perera v. The Commissioner for National Housing*** 77 N.L.R. 361 drew a distinction between two classes of jurisdictional defects. The first class consists of instances where there is a lack of total want of jurisdiction. In the second class the court has jurisdiction but is denuded competence or jurisdiction because of a failure to comply with such procedural requirements as are necessary for the exercise of such power by the court. Tennekoon C.J. observed that both cases constitute jurisdictional defects that result in judgments or orders that are void.

I would in the circumstances hold that the failure to serve notice on the Respondent before making the order on 01.07.2006 and the making of the order without an application before the Board in respect of Case No. 248/T would constitute jurisdictional defects that render the order made by the Board null and void and of no force or avail.

After both parties tendered their written submissions, the Board of *Quazis* exercising its inherent powers set aside the order dated 01.07.2006 and all consequential orders to the above order and further held that the order of the learned *Quazi* of *Avissawella* in Case No. 248/T was legal and binding- see the order marked **A11**

The next question that arises for consideration is the validity of the order made on 06.03.2010.

The validity of the order made on 06.03.2010

In the case of ***Esabella Perera v. Emalie Perera Hamine*** (1990) 1 Sri L.R. 03, S.N. Silva J. (as His Lordship then was) held that a void order resulting from latent or contingent want of jurisdiction can be challenged in the very court itself that made it, except in few instances where specific procedure *i.e.*, laid down in the Civil procedure Code or any other law for the purpose, by invoking the inherent jurisdiction of the court.

Gravin, S.P.J. observed in the case of ***Mohamed v. Annamala Chettiar*** (1932) 12 C.L. Rec. 228 as follows:-

> *"No court may disregard the law of the land or purport in any case to ignore its provisions. Where a matter has been specially dealt with or provided for by law there can be no question that the law must prevail, for justice must be done according to law. It is only when the law is silent that a case for the exercise by a court of its inherent powers can arise."*

In the case of ***Sivapathalingam v. Sivasubramaniam*** (1990) 1 Sri L.R. 378, 388 S.B. Goonewardea A.J. (Fernando J. and Dheeraratne J. agreeing) adopted Lord Cain's decision in the case of ***Roger & Others v. Comptoir D'Escompote de Pari*** (1871) LR3PC465.

> "Now their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court" does no injury to any of the suitors, and when the expression "the act of the Court is used, it does not mean merely the act of the Primary Court, of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter to the highest Court which finally disposes of the case..."

He further observed that this case is authority for the proposition that there is an inherent power in Courts not referable to a particular jurisdiction specially given by written law to correct its errors which result in injury to a suitor. As Lord Cairns said it became the duty of the aggregate of all tribunals from the lowest to the highest to take care that an act of the Court does no injury to any of the suitor in the course of the whole of the proceedings, the authority wherever redress is made must be referable to an inherent power.

The principle set out in this case was followed by Sansoni J. (with H.N.G. Fernando J. agreeing) in the case of ***Sirinivasa Thero v. Sudassi Thero*** (1969) 3 N.L.R. 31, 34 wherein the learned judge pointed out that it is a rule that a court of justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by such act.

In ***Salim v. Santhiya*** (1965) 69 N.L.R. 490, T.S. Fernando J. referred to the case of ***Sirinivasa Thero v. Sudassi Thero*** *(supra)* where the court pointed out that it is a rule that a court of justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by its act.

In ***Albert v. Veeriahpillai*** Sharvananda J. in a Labour Tribunal case, said:-

> *"Breach of principles of natural justice goes to jurisdiction and renders an order or determination made in proceedings of which the person against whom the order of determination was made has had no notice, void, As the applicant had no notice of the haring on the 2nd October 1966, the proceedings of that date are a nullity, and the Tribunal had in the circumstances no jurisdiction to make an order dismissing the application of the appellant. Hence the order of dismissal dated 31st October 1966 was made without jurisdiction and the Labour Tribunal had the inherent jurisdiction to set aside that order, on it being satisfied that the applicant has had no notice of the hearing."*

In the case of ***Moosajees Ltd., v. Fernando*** (12) H.N.G. Fernando, S.P J. at page 419 stated thus:-

> *"This Court has also exercised an inherent power to correct error in a judgment which has occurred per incuriam. I doubt whether this power is exercisable only by the Judge who had pronounced the judgment; for if so. There would be no means of correcting even a manifest clerical error discovered in a judgment after the death or retirement of the judge who pronounced it."*

In ***Ehambaram and Another v. Rajasuriya*** Nagalingam, A.J. made the following observations; *"it is true that this Court has, acting in revision, modified or even vacated judgments pronounced by it on appeal when appraised of the circumstances that the court had erred in regard to an obvious question of fact or flaw; and one may go so far as to say that those are cases where, an error being pointed out the court without wanting to hear arguments would ex mero motu proceed to set the error right".*

In the case of ***Sivapathalingam v. Sivasubramaniam*** *(supra)* Goonawardena A.J. also cited the principle set down in the case of ***Doraisami v. Annasamy Ayyar and others*** (1899) ILR 23 Madras 306. It was held there that the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the part of the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he has lost and that it is the duty of the court to enforce that obligation unless it could be shown that restitution would clearly be contrary to the real justice of the case.

In the case of ***Ranmenikhamy v. Thisera*** (1962) 65 N.L.R. 214 T.S. Fernando J. held that, *"inasmuch as the order rejecting the appeal was made per incuriam the Court had inherent jurisdiction to set aside its own order".*

In this case when an appeal had been preferred to the Supreme Court it was rejected on the ground that notice of appeal had not been served but subsequently it was proved to the court notice in fact had been duly served.

There are several instances where the courts have exercised its inherent jurisdiction.

In the case of ***Abeysinghe v. Abeyweera*** (1995) 2 Sri L.R. (1995) 2 Sri L.R. 104 Ranaraja J. held that the proceedings being void, the person affected can apply to have same set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court.

In the case of ***All Ceylon Commercial and Industrial Workers Union v. Ceylon Petroleum Corporation and Another*** (1995) 2 Sri L.R. 295 it was held that this Court has not been vested **with presented to** this Court. The extraordinary jurisdictions of this Court to correct its own errors and revise or modify its judgments have been set out in numerous reported judgments and referred to in two other SC judgments namely ***Hettiarachchi v. Seneviratne*** S.C. Appln. 127/94 - SCM 04.07.94 and ***Senarath v. Chandraratne Commissioner of Excise*** S.C. Appln. 231/95 - SCM 24.08.95.

In the case of ***Selvedurai v. RaJa*** (1940) 41 N.L.R. 423 the Court observed: *"this Court has an inherent jurisdiction to grant, in appropriate circumstances, relief against on in respect of even previous*

judgments of this Court itself in order "to do justice". This Court shall exercise this jurisdiction only in matters for which no express statutory provision has been made and in exercising this jurisdiction, this Court to see that its decision is in harmony with sound general legal principles and is not inconsistent with the intention of the Legislature".

Coming to more recent times that Supreme Court, inter alia, analyzed the decisions of about seventy cases and laid down the inherent powers and the *per incuriam* principle in the case of ***Jayaraj Fernandopulle v. De Silva and others*** (1996) 1 Sri L.R. 70 as follows:-

i. All courts have inherent power in certain circumstances to revise and order made by them.

ii. The attainment of justice is a guiding factor.

iii. An order made on wring facts given to the prejudice of a party will be set aside by way of remedying the injustice caused.

iv. The court has inherent powers n correct decisions made *per incuriam*. A decision will be regarded as given *per incuriam* if it was in ignorance of some inconsistent statute or biding decision-wherefore some part of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong.

In the case of ***Ceylon Ceramics Corporation v. Premadasa*** (1984) 2 Sri L.R. 250 it was held that although the court had no power to reinstate criminal appeal dismissed in the absence of the appellant unless the order has been made *per incuriam* yet it is not powerless trio rectify a wrong committed by its own act. The court has inherent power to repair the injury done to a party by its own act.

The authorities cited above undoubtedly make clear that all courts civil and criminal and other institutions like Board of *Quazis* and Labour Tribunals empowered to act judicially have an inherent power to rectify their own errors.

In view of the above decisions the Board rightly held on 06.03.2010 that the Board had erred in making the order *ex parte* on 01.07.2006. The Board enjoys the right to rectify the

error made by the previous Board and that the Board can exercise the inherent power as there is no specific provision contained in the Act.

Board of Quazis

I hold that the order of the Board dated 06.03.2010 is based upon the exercise of its inherent jurisdiction.

Section 839 of the Civil Procedure Code is reflective of the inherent powers. The second Board in its order dated 06.03.2010 **(All)** observed as follows:-

> *"when considering this application, I at one stage pondered about dismissing it on the grounds of delay and on the ground of an earlier application being withdrawn-vide P11. But as it was h3ld by the Court of Appeal in the aforementioned case of* ***Kariyawasam v. Pridarshini*** *"No man shall be put in jeopardy by a mistake by as court" and as the Petitioner has explained the delay in paragraphs 18 and 19 of the petitioner, I decided to make this order."*

In view of the above, the Board, exercising its inherent powers, set aside the order of the Board dated 01.07.2006 as it was made *per incuriam*. Further for the sake of clarity and for the avoidance of ambiguity, all consequential orders to the above order are also set aside and the Board held that the order of the learned *Quazi* of *Avissawella* in Case No. 248/T is legal and binding.

Therefore from the foregoing, the Board of *Quazis* made the right order and I affirm the order made by the Board of *Quazis* and dismiss this appeal.

JUDGE OF THE COURT OF APPEAL