

DEEN
v.
RAUFF

COURT OF APPEAL.
ISMAIL, J.
CALA 122/95.
BOARD OF QUASIS.
NO. E 23306.
QUAZI COURT, COLOMBO SOUTH.
N 3698/D.
APRIL 3 AND 4, 1997.

Muslim Marriage and Divorce Act, No. 13 of 1951 – Section 28(1) of the Act – Fasah Divorce – Quazi Court – Shafie Law.

The respondent while residing at the matrimonial house together with her petitioner husband filed an application on 22.6.92 at the Quazi Court seeking a 'Fasah' Divorce under section 28(1) of Act, No. 13 of 1951, on the ground of ill-treatment.

The petitioner too initiated proceedings seeking a divorce from his wife in August 1992, on the ground of immorality and unfaithfulness on her part. However no proceedings appear to have been taken on this application.

According to the journal entries, it is recorded that the father of the respondent has sent a letter objecting to a divorce being granted to her. The father had alleged that the respondent is having an immoral relationship with one S, and he had also expressed fear that if his daughter is granted a divorce she would sell her properties and would emigrate.

The Quazi accepted that grounds amounting to a 'fault' under Muslim Law for the grant of a 'Fasah' divorce have been established by the respondent wife.

The petitioner appealed to the Board of Quazis on the ground that the Quazi had failed to comply with the Rules in the Third Schedule to the Act and that he has conducted the proceedings in violation of the rules of evidence and had been influenced by extraneous considerations. The Board of Quazis after holding that the Quazi has clearly erred in failing to hold the inquiry in conformity with the rules as prescribed in the Third Schedule, observed that in any event the Quazi had conducted a complete inquiry, and that there was ample evidence for the grant of a fasah divorce and did not consider it appropriate in the circumstances of this case to remit it for a fresh inquiry.

On Appeal –**Held:**

(i) The petitioner's representative conceded that the petitioner did assault the respondent, that the petitioner continued to maintain only the children, such admissions may be regarded as a substantiation for the requirement of proof by two witnesses.

(ii) Habitual physical ill-treatment is not necessary to establish a 'fasah' divorce. The method, degree and standard of ill-treatment required to constitute a 'fasah' divorce amongst Muslims belonging to the Shafie sect are much less than that is required under the common law. No physical ill-treatment is necessary for a fasah divorce according to Shafie Law. If a husband makes his wife's life miserable by cruelty of conduct even when it does not amount to physical ill-treatment, the wife can claim a 'fasah' divorce.

(iii) The petitioner's representative has not made any application to the Quazi nor has any endeavours been made to call witness or to offer any other evidence to substantiate the allegations of immoral conduct on the part of the respondent.

(iv) Under the Muslim Law, a husband who habitually makes false allegations of adultery against his wife is guilty of cruelty and that such cruelty is a valid ground for divorce.

"She is equally entitled to a separation when he charges her with unfaithfulness to him and yet refuses to establish the accusation by a formal proceeding."

APPLICATION for Leave to Appeal from the Order of the Board of Quazis.

Cases referred to:

1. *Abdeen v. Johora* – Vol. 3 MM & DLR 77.
2. *Zanooba v. Nazim* – Vol. 3 MM & DLR 108.
3. *Rasheeda v. Usoof Deen* – Vol. 4 MM & DLR 162.

Faisz Musthapha P.C. with *Thahir* for the petitioner.

M. Markhani with *Dr. M. S. Jaldin* for the respondent.

Cur. adv. vult.

May 09, 1997.

ISMAIL, J.

The application of the petitioner for leave to appeal from the order of the Board of Quazis dated 7.6.95 was refused at the conclusion of the hearing on 4.4.97. The reasons for such refusal are now being set out.

The petitioner abovenamed married the respondent on 18th December 1976. There are three children by the said marriage, two of whom are girls born on 11.7.80 and 16.4.83 and third, a boy born on 11.7.86. They are presently in the custody of the respondent.

The respondent wife while residing at the matrimonial home together with the petitioner husband filed an application on 22.6.92 in the Colombo South Quazi Court seeking a 'fasah' divorce under section 28(1) of the Muslim Marriage and Divorce Act, No. 13 of 1951, as amended, - Cap. 134 - LE - 1980-revised edition (unofficial).

The appellant-petitioner left for Japan in connection with his employment shortly after receiving notice from the Quazi Court and he did not appear personally at any stage of the proceedings held before the Quazi. His sister Mrs. Naima Sidique who held a power of attorney from him attended to all matters in connection with the application for divorce filed by the respondent.

When this matter came to be considered by the Quazi on 20.11.93 the respondent moved for an early determination of her application for divorce which had been filed about one and a half years previously on 22.6.92. The case had by this time during the one and a half year period been called on more than 8 occasions on which the respondent was present while, as noted earlier, the petitioner has not participated in these proceedings at all in person. He had gone abroad for employment and was represented by his sister. The inquiry then commenced with the applicant-respondent adducing reasons for her seeking a divorce. She stated that the petitioner assaulted her on 17.6.91, in regard to which she has made a complaint at the Wellawatte Police Station and had taken medical treatment. She produced a copy of the said complaint dated 24.6.91 and a copy of an undated letter sent to her by the petitioner in this regard. She also alleged that the petitioner was spreading false rumours about her. She undertook to state her case more fully in writing.

Mrs. Naima Sidique, the petitioner's representative stated to the Quazi that the applicant's father is opposed to his daughter being granted a divorce and that her brother, the petitioner is abroad temporarily in Japan and employed there due to the wrongful conduct of his wife and that he continues to send money for

maintenance only for the children. The petitioner's representative did not, however, seek to challenge the allegation of assault on the wife or her complaint to the police or even the further allegation that the petitioner was spreading false rumours about his wife.

The applicant respondent thereafter set out in detail her reasons for seeking a divorce in a letter dated 26.3.94 forwarded to the Quazi. She has referred to the incidents of assault, the attempts made by her husband to have her property transferred to him and his failure to maintain her.

The Quazi has noted in his order that there was no possibility of a settlement between the parties and that after the incident of assault referred to by the wife, she and her children were living since June 1991 in a room in the same house apart from the husband.

Meanwhile, the petitioner had also initiated proceedings seeking a divorce from his wife in August '92. A copy of a registered letter dated 9th August 92 (XI) sent by the appellant-petitioner to the Quazi who held office previously, that he is seeking a divorce from his wife was forwarded by his representative along with the written submissions. Thereafter the appellant-petitioner wrote on 28.2.94 (X3) to the Quazi giving his reasons for seeking a divorce from his wife. He confirmed that he is seeking a divorce from his wife on the ground of immorality and unfaithfulness on her part. He alleged that his wife was seeking a divorce from him to enable her to marry one Sivapathanathan with whom she was having an 'illicit affair'. It was also pleaded in the said letter that it is evident from her father's statement that she is still continuing with her immoral activities. He desired that a divorce be granted to him on his application. However, no proceedings appear to have been taken on the husband's application for divorce and the present case is in respect of proceedings held before the Quazi pursuant to the application for a 'fasah' divorce made by the wife.

According to the journal entry dated 23.10.93 it is recorded that the father of the applicant-respondent has sent a letter objecting to a divorce being granted to her. The Quazi has referred to the contents of a statement dated 24.9.93 written by the father of the respondent alleging that the cause for the dispute between his daughter and her

husband is his daughter's immoral relationship with one 'Sivapatham'. He also expressed fear that if his daughter is granted a divorce she would sell her properties and would emigrate to Canada. The applicant-respondent's father has not appeared before the Quazi thereafter and his evidence has not been recorded at the inquiry.

The inquiry continued on 19.3.94 and two witness named M. K. Ashroff and M. A. Hassen gave evidence for the applicant wife. The witness Ashroff stated the appellant-petitioner has assaulted and harassed the applicant-respondent. The appellant-petitioner's representative accepted his evidence regarding the assault but stated that it took place only when he was provoked. The parties have thereafter tendered written submissions and the Quazi delivered his order on 30.9.94 granting the applicant wife a divorce. The Quazi has accepted that grounds amounting to a 'fault' under Muslim Law for the grant of a 'fasah' divorce have been established by the respondent wife.

Being aggrieved by the order of the learned Quazi, the appellant-petitioner's representative Mrs. Sidique filed a petition of appeal dated 29.4.94 to the Board of Quazis chiefly on the ground that the Quazi has failed to comply with the rules in the Third Schedule to the Act and that he has conducted the proceedings in violation of the rules of evidence and has been influenced by extraneous considerations. Learned counsel for the appellant-petitioner referred in particular to the failure of the Quazi to empanel the assessors in the manner prescribed by the regulations, the failure to administer the oaths to them before they commenced their functions, the failure of the witnesses to give evidence on oath or affirmation and the failure to obtain the opinions of the assessors on the points arising for adjudication. The submission of counsel that the learned Quazi has erred in failing to comply with the rules in the Third Schedule is justified.

The Board of Quazis has in this connection referred to its judgment in Vol. 4 MM & DLR 65 where it was observed that it was regrettable that some Quazis are not familiar with the procedure prescribed to be followed in the Quazi courts. In the present case the assessors were present when the statement of the respondent and her witnesses were recorded. The petitioner being absent, his representative did not seek to cross-examine the witnesses or offer a serious challenge to the case put forward by the respondent. The Quazi has permitted

the respondent additionally to state her case in writing and has accepted documents tendered by both parties along with their submissions. The learned Quazi has clearly erred in failing to hold the inquiry in conformity with the rules as prescribed in the Third Schedule to the Act. However, the Board of Quazis having considered that the Quazi has conducted a complete inquiry and that there was ample evidence for the grant of a 'fasah' divorce did not consider it appropriate, in the circumstances of this case, to remit it for a fresh inquiry.

The petitioner's representative conceded that the petitioner did assault the petitioner but that it was confined to occasions when he was provoked. She also conceded that the petitioner continued to maintain only the children. The case for the respondent wife was that long before she filed this application for divorce in June '92, she has been living apart from her husband since June '91 with her children in a room though in the same house. This is confirmed by the petitioner in paragraph 6 of his petition of appeal filed before the Board of Quazis where it is additionally stated that the respondent also refused to fulfil her conjugal and marital obligations during the period. In *Abdeen v. Johora*⁽¹⁾ where the respondent admitted all the facts alleged by the respondent wife which entitled her to a divorce, Hearne J. held that such admission may be regarded as a substitute for the requirement of proof by two witnesses.

Section 28(1) Muslim Marriage and Divorce Act is as follows:

"Where a wife desires, to effect a divorce from her husband, without his consent, on the ground of ill-treatment or on account of any act or omission on his part which amounts to a 'fault' under the Muslim Law governing the sect to which the parties belong the procedure laid down in the Third Schedule shall be followed."

The Board of Quazis in *Zanooba v. Nazim*⁽²⁾ made the following observations on a consideration of the repealed section 51 of Chapter 99 LEC which provided for a 'fasah' divorce.

"It will be observed that habitual physical ill-treatment is not necessary to establish a 'fasah' divorce. The method, degree and standard of ill-treatment required to constitute a 'fasah' divorce amongst Muslims belonging to the Shafie Sect are much less than that is required under the Common Law of Ceylon. As a matter of fact, no physical ill-treatment is necessary for a 'fasah' divorce

according to Shafie Law. If a husband makes his wife's life miserable by cruelty of conduct, even when it does not amount to physical ill-treatment, the wife can claim a 'fasah' divorce". (vide Amir Ali, Volume II, Fourth Edition, at page 585).

The petitioner has made the allegation that his wife is having an 'illicit affair' with one Sivapathanathan and that she is seeking a divorce to enable her to get married to him. The respondent on her part has stated that the petitioner is spreading false rumours about her. The petitioner has specifically stated in paragraph 5 of his petition of appeal that the respondent is continuing to maintain an extra marital relationship with the said Sivapathanathan. It has also been submitted that these allegations have not been proved to be false and that the respondent's father too has made serious allegations of misconduct on her part. The petitioner faults the Quazi for not exercising his inherent powers to summon the respondent's father to give evidence regarding this matter. Yet, the petitioner's representative has not made any application to the Quazi in this regard nor has any endeavour been made on behalf of the petitioner to call witnesses or to offer any other evidence to substantiate these allegations of immoral conduct on the part of his wife. Pule J. held in *Rasheeda v. Usoof Deen*⁽³⁾ that under the Muslim Law a husband who habitually makes false allegations of adultery against his wife is guilty of cruelty and that such cruelty is a valid ground for divorce. Amir Ali on Muslim Law, 5th ed. at page 522 says that "She is equally entitled to a separation when he charges her with unfaithfulness to him and yet refuses to establish the accusation by a formal proceeding".

The Board of Quazis has accepted the position that there was ample evidence before the Quazi to entitle the respondent to an order for 'fasah' divorce which has now been registered on 7.7.95, as evident from the certificate of the registration of the divorce (X5). In my view the Board of Quazis was justified in affirming the order of the Quazi granting the respondent a fasah divorce.

For these reasons the application of the appellant-petitioner for leave to appeal from the order of the Board of Quazis was refused. No costs.

Leave to appeal refused.