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

In the matter of a Leave to Appeal under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 62(1) of the Muslim Marriages Divorce Act No. 13 of 1951 (as amended).

C.A.L.A No.01/2014

Board of Quazis Case No.
BQ-166/2010

Quazis for Udunuwara
Case No. 727/M

Mohamed Razik Fathima Rizna,
No.92, Ganahinna,
Welamboda.

APPLICANT

-Vs-

Mohamed Ansar Mohamed Muzny,
No.24/12J, Weerakoon Garden,
Kandy.

Appearing by his Attorney

Abdul Cader Mohamed Ansar,
No.24/12J, Weerakoon Garden,
Kandy.

RESPONDENTS

AND BETWEEN

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Mohamed Ansar Mohamed Muzniy,
No.24/12J, Weerakoon Garden,
Kandy.

Appearing by his Attorney

Abdul Cader Mohamed Ansar,
No.24/12J, Weerakoon Garden,
Kandy.

RESPONDENT-APPELLANT

-Vs-

Mohamed Razik Fathima Rizna,
No.92, Ganahinna,
Welamboda.

APPLICANT-RESPONDENT

AND NOW BETWEEN

Mohamed Ansar Mohamed Muzniy,
No.24/12J, Weerakoon Garden,
Kandy.

Appearing by his Attorney

Abdul Cader Mohamed Ansar,
No.24/12J, Weerakoon Garden,
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RESPONDENT-APPELLANT-APPELLANT

-Vs-

Mohamed Razik Fathima Rizna,
No.92, Ganahinna,
Welamboda.

APPLICANT-RESPONDENT-RESPONENT

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

COUNSEL : M. Yoosuff Nasar with Mohamed Rusmi and Nalin Pathirana for the Respondent-Appellant-Appellant
Safana Gul Begum with M.M.P. Risda for Applicant-Respondent-Respondent

Decided on : 15.02.2019

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

Having granted leave to appeal to the Appellant against the order of the Board of *Quazis*, this Court heard both counsel on this appeal and the issue in this case revolves around the interpretation of Rule 1(b) of the Fifth schedule to the Muslim Marriage and Divorce Act, No.13 of 1951 as amended (the Act). The relevant Rule 1(b) reads as follows:-

1. Where by any provision of this Act a right of appeal against any order made by a *Quazi* is conferred on any party, such appeal shall be preferred in writing to the Board of *Quazis*:-
 - a) in the case of an order under subsection (2) or subsection (3) of Section 47, within 10 days from the date on which the order was made;
 - b) in the case of any other order, within thirty days from the date on which the order was made;

Provided that the preceding provisions of this rule shall not affect the power vested in the board by the Act to entertain an appeal which is out of time.

In fact the proviso is reflected in the statute in the form of Section 63(a) which vests a discretion to entertain an appeal notwithstanding lapse of time.

This is an application made by the Respondent (wife) against the Appellant (husband) for maintenance in respect of the Respondent and the issue of the union-a female child. These applications are made under Sections 47(a) and (b) of the Act and the procedure to be followed is specified in the Fourth Schedule to the Act. The Applicant-Respondent-Respondent (hereinafter sometimes referred to as "the Respondent" or "the wife") made this application before the *Quazi, Udunuwara* who conducted an inquiry into the claim on two days namely 12.04.2010 and 27.04.2010. Since Respondent-Appellant-Appellant (hereinafter sometimes referred to as "the Appellant" or "the husband") had been living in Italy and it is on record that he could not present himself before the *Quazi*. The *Quazi* examined the Respondent alone and I observe that the Appellant had notice of the proceedings since the *Quazi* read out the letter sent by the father of the Appellant in response to the notice served on him.

At the end of the inquiry, the *Quazi* made order on 27.04.2010 directing the husband to pay the wife Rs 20,000 *per mensem* and the child Rs 15, 000 *per mensem*. The learned *Quazi* made the payment to be retrospective with effect from 1.04.2010. The learned *Quazi* recorded in the proceedings that his order must be sent to the Appellant in Italy and his father in Sri Lanka by registered post.

Though the *Quazi* made his order on 27.04.2010, he dated the order on 10.05.2010 and admittedly the order was posted only on 19.05.2010. It is then axiomatic that the order was received on a date after 19.05.2010.

Aggrieved by the order of the learned *Quazi* of *Udunuwara* made on 27.04.2010, the Appellant (husband) preferred his appeal to the Board of *Quazis* on 08.06.2010. A preliminary objection on behalf of the Respondent wife was raised before the Board of

Quazis to the effect that the Appellant could not maintain the appeal, since it was out of time. The appeal must be rejected *in limine*-this was the preliminary objection raised in the written submissions of the Respondent dated 20.11.2010.

It is under section 60 under the Act that the Appellant preferred his appeal to the Board of *Quazis* from the order of the *Quazi, Udunuwara*. Section 60(2) of the Act states that all appeals under this section shall be heard and disposed of in accordance with the rules in the Fifth Schedule. Rule 1 of the Fifth Schedule to the Act has the effect that any appeal, other than those preferred against any order under subsection (2) or subsection (3) of Section 47 of the Act, shall be preferred “*within thirty days from the date on which the order was made.*”

Having recourse to Rule 1(b) of the Fifth Schedule, the Respondent-wife contended before the Board of *Quazis* that the appeal preferred by the husband must be rejected *in limine*, as he had filed his appeal long after 30 days from the date of the order had lapsed. The Board of *Quazis* upheld this preliminary objection and rejected the appeal stating that all arguments regarding the merits of the grounds for appeal are rendered merely of academic importance in the light of the fact that this appeal had been filed out of time and the Appellant had failed to satisfy the Board that any of the grounds set out in subsection (a) of Section 63 of the Muslim Marriage and Divorce Act in order for the Board to entertain this appeal despite it being filed out of time, existed-*see* the order of the Board of *Quazis* dated 14.12.2013.

It is this order of the Board of *Quazis* that has been challenged before this Court in appeal. It is crystal clear from the chronology of events that the appeal was filed in the Board of *Quazis* long after the lapse of the prescribed time limit namely 30 days from the date of the order of the *Quazi*. But one poses the question at this stage. This lapse of time is also traceable upon the perusal of the record to the haphazard way in which the *Quazi* has sought to serve his order. The *Quazi* passed his order for maintenance on 27.04.2010 but dated it only on 10.05.2010. Moreover he sought to communicate it by posting it only on

19.05.2010. Assuming without conceding that the Appellant, if at all he had been living in Sri Lanka around that time, received the order on 20.05.2018, he would have had just 7 days to prefer the appeal. Given the fact that the Appellant was in Italy and the impossibility of the order from Sri Lanka reaching him on time in order for him to reach out to an Attorney-at-Law to draft papers and file the appeal within the appealable period of time, it cannot be gainsaid it was well-nigh impossible. In fact the law cannot expect the performance of what is impossible-*Lex Non Cogit Ad Impossibilia*. Herbert Broom calls this a fundamental legal principle in his *Selection of Legal Maxims Classified and Illustrated*.

The case of *Harding v. Price* (1948) 1 K.B 695 is illustrative of this principle. It is for this reason that Section 63 of the Act vests a discretion in the Board to entertain a belated appeal, notwithstanding such lapse of time, provided that the Board is satisfied that the appeal could not be filed in time owing to illness, accident, misfortune or other avoidable cause. The unavoidable cause can be manifest upon a perusal of the chronology of events in regard to the proceedings had before the *Quazi*.

I take the view that the Board of *Quazis* must have treated this appeal as an appeal filed notwithstanding lapse of time under Section 63 of the Act and heard and disposed of it on the merits. In the circumstances I set aside the order of the Board of *Quazis* dated 14.12.2013 and allow the appeal of Respondent-Appellant-Appellant.

The case is remitted to the Board of *Quazis* with a direction that the Board proceeds to hear this appeal on the merits and dispose of it as expeditiously as it should since the order made by the *Quazi* pertains to claims under Section 47 of the Act.

JUDGE OF THE COURT OF APPEAL