

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

*In the matter of an Application for Leave to  
Appeal in terms of Section 62 of the Muslim  
Marriage and Divorce Act.*

**Court of Appeal**

**Case No: LTA 04/2023**

Board of Quazis

Case No: 05/2020/R/CMB

Quazi Court of Colombo South

Case No: 6572/FD/2019/CS

Fathima Shafka Lahir,  
No. 10, Balapokuna Road,  
Kirulapone.

**Applicant**

**Vs.**

Fazil Mohamed Farook,  
No. 137, Nawala Road,  
Nugegoda.

**Respondent**

**AND BETWEEN**

Fathima Shafka Lahir,  
No. 10, Balapokuna Road,  
Kirulapone.

**Applicant-Petitioner**

**Vs.**

Fazil Mohamed Farook,  
No. 137, Nawala Road,  
Nugegoda.

**Respondent-Respondent**

**AND NOW BETWEEN**

Fazil Mohamed Farook,  
No. 137, Nawala Road,  
Nugegoda.

**Respondent-Respondent-Appellant**

**Vs.**

Fathima Shafka Lahir,  
No. 10, Balapokuna Road,  
Kirulapone.

**Applicant-Petitioner-Respondent**

**Before:** S. U. B. Karalliyadde, J

Dr. D. F. H. Gunawardhana, J.

**Counsel:**

Shabry Haleemdeen with Muneez Mohamed instructed by Chinthani Kaushalya for the  
Respondent-Respondent-Appellant

Nadvi Bahaudeen with Samedha Nizar instructed by Ahmed Imran Irfana for the  
Applicant-Petitioner-Respondent

**Argued on:** 22.06.2025 and 01.09.2025

**Delivered on:** 30.09.2025

**Dr. D. F. H. Gunawardhana, J.**

## **Judgement**

### **Introduction**

The Applicant-Petitioner-Respondent (hereinafter referred to as the “Respondent” or the “Applicant”) married the Respondent-Respondent-Appellant (hereinafter referred to as the “Appellant”) under the Muslim Marriage and Divorce Act (hereinafter referred to as the “MMDA”) on the 6<sup>th</sup> January 2002.

The Appellant has sired 4 children borne by the Respondent within their marriage; since then, they lived happily until the differences started to appear in their homefront. There had been some disputes in their matrimony due to the Appellant’s behaviour; and also, his contracting a second marriage to a Moroccan lady. Even thereafter, the Respondent tolerated her husband and his behaviour until it became intolerable. Consequently, she decided to file an application in terms of Section 28(1) of the MMDA for a *Fasah* divorce. Having filed the said application for a divorce, she also filed an affidavit dated 19<sup>th</sup> June 2019.

The affidavit filed on the 19<sup>th</sup> June 2019 was supported by the affidavit of her brother who also has categorically and unequivocally supported the facts stated in the original affidavit by the Respondent and moved for a *Fasah* divorce. The second affidavit filed by the Respondent dated 31<sup>st</sup> January 2020 also asked for a *Fasah* divorce in unequivocal terms.

Then, in replying to the said affidavits, the Appellant filed a letter and denied that any cause of action had accrued to the Respondent for her to seek a *Fasah* divorce.

However, at the inquiry before the Quazi, instead of a *Fasah* divorce sought by the Respondent, the learned Quazi had given a *Mubarah* divorce in favour of the Respondent. Being aggrieved by

the order granting the *Mubarah* divorce in favour of the wife (the Respondent), the Respondent went to the Board of Quazi to revise the said order by way of a revision application.

By the impugned order of the Board of Quazi marked **P9**, dated 11<sup>th</sup> February 2023, the Board of Quazi set aside the *Mubarah* divorce granted in favour of the wife (the Respondent), and sent the case back to the Quazi to consider relevant evidence and then make an order on the application for a *Fasah* divorce sought by the wife (the Respondent).

Being aggrieved by the said order, the Appellant appealed to this Court. The matter was argued before me and my learned brother on 22<sup>nd</sup> June 2025 and resumed on 1<sup>st</sup> September 2025, during which the following arguments were advanced.

However, in addition to the written submissions filed in terms of the rules, the counsel filed post-argument submissions as well, wherein the counsel for the Appellant took up two points which I will refer to in the course of my judgment. In addition, Mr. Nadvi Bahaudeen also replied to the said two points in his submissions filed subsequent to the oral submissions made at the hearing on the said date.

## **Arguments**

The first contention of Mr. Shabry is that, on a perusal of the application marked as **P1**, along with the Petition, the original Applicant has made the application not in terms of Section 28(1) but under Section 28(2) of the MMDA. The divorce obtainable under Section 28(1) of the MMDA is a *Fasah* divorce, whilst Section 28(2) of the MMDA provides for *Khula* and *Mubarah* divorces. Therefore, there is no question of converting a *Fasah* divorce into a *Mubarah* divorce, as the Applicant made a general, undifferentiated application to obtain a divorce, without expressly seeking a *Fasah* divorce in terms of Section 28(1) of the MMDA.

To buttress his argument, he relied upon the documents marked **Y5** and **Y6** as those documents have been submitted based on *Mubarah* divorces. Further, Mr. Shabry argued that there is no answer to the application made before the Quazi Court, under Section 27 of the MMDA by the husband, and Section 28 of the MMDA by the wife.

In addition to that, he contended that no formal pleadings are required to be filed in the proceedings before the learned Quazi; and also, no evidence is taken which is subject to cross-examination by the opposing counsel at the inquiry. The role played by the learned Quazi is of an inquisitorial nature, and he takes down the statements made by the parties or the evidence submitted by them in the normal course and not in the form of formal evidence as in a court of law. Therefore, the concept of adversarial systems followed under the Civil Procedure Code or the Criminal Procedure Code is not followed under the MMDA when parties apply for a divorce.

Further he contended that, what is reflected in **Y10** or **P2** is the proceedings of the inquiry on the last date, and having inquired into the matter with the assistance of the three assessors, who formed their opinion and expressed their view on the matter, the learned Quazi granted a *Mubarah* divorce in favour of the Applicant. Therefore, she cannot be heard to complain against such.

The next contention of Mr. Shabry is that, on the application of the Applicant, directing the Quazi to hold an inquiry again by the Board of Quazis is erroneous and not tenable in law; and therefore, this appeal should be allowed.

Finally, he contended that the Applicant obtained the divorce against the husband with the consent of the Respondent, and then ten individuals signed the decree of divorce granted by the learned Quazi, as evidenced in **P10**. Therefore, the Applicant cannot now resile from what was mutually agreed upon. Accordingly, the Board of Quazis should not have entertained the appeal made.

However, on the other hand, Mr. Bahaudeen contended that although there is no distinction in making the application, and upon perusal of the application to the learned Quazi, **P1**, in clear and unequivocal terms, she has sought a *Fasah* divorce which falls within the ambit of Section 28(1) of the MMDA.

The next contention of Mr. Bahaudeen is that, although the counsel for the Appellant argued (having referred to certain documents filed by him) that the Respondent consented to grant a *Mubarah* divorce instead of a *Fasah* divorce, and the learned Quazi never considered that fact. Further, the learned Quazi never embarked upon an inquiry as required by Rules 7, 11, and 12 of the Third Schedule of the MMDA, which are the applicable rules for the application before the Quazi; thereby, he has flouted the law.

In addition to that, Mr. Bahaudeen contended that the gravity attached to a *Fasah* divorce is very serious, as the burden is totally on the wife to establish the matrimonial fault of the husband as stipulated in Section 28(1) of the MMDA, in addition to the rules of the Sect. Therefore, at least two witnesses have to be called by the applicant to establish her grounds for a *Fasah* divorce. Thereafter, only the Respondent can give evidence in rebuttal, if any. However, the inquiry, as reflected in **P10**, was not held in accordance with the rules. Therefore, the learned Quazi has misdirected himself in law and fact.

In addition to that, he argued that the assessors were appointed on the very same day, and their opinions and views are not reflected, except for the family counsel's view. Therefore, acting without evidence itself is biased, and not allowing the adducing of evidence is also biased. As such, he contended that the Quazi is prejudiced against the applicant and biased towards the Respondent. As such, the learned members of the Board of Quazi are justified in granting relief, as they have

directed a new and proper inquiry to be held according to the law; and therefore, there is no prejudice against the Respondent.

However, Mr. Bahaudeen contended that no inquisitorial role was played by the Quazi, whereas what is expected of the Quazi is to conduct a proper inquiry. Further, the learned Quazi cannot exercise unrestrained discretion when he embarks upon such an inquiry, as deduced by Justice Weerasekara in the case of *Pathmawatie v. Jayasekare*<sup>1</sup>.

### **Respondent's original application for *Fasah* divorce**

Now I will consider the Respondent's original application dated 19<sup>th</sup> June 2019, which is for a *Fasah* divorce. In support of her application, she has filed an affidavit on the same date marked as **Y2**. In the said affidavit she has referred to the fact that she conducted herself as a devoted wife even when he faced financial difficulties due to his lavish habits, particularly his spending on the Moroccan woman. She continued to support him despite this conduct until it became cruel and intolerable. Even after his marriage to the Moroccan woman, though without happiness, she remained loyal and caring towards him. However, when the Appellant's cruelty and inhuman treatment extended to her and the children, she decided to seek a *Fasah* divorce as recognized under Muslim law, which she specifically pleaded for in her affidavit. Her affidavit was also supported by her brother's affidavit, who has given the said affidavit as the male guardian of the Respondent, which is marked as **Y3**.

In his affidavit filed in response to the earlier affidavit filed by the Respondent, the Appellant has stated that he is a committed husband and therefore, willing to proceed with the marriage. However, replying to the said letter, the Respondent filed another letter dated 7<sup>th</sup> November 2019 before the

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<sup>1</sup> [1997] 1 SLR 248

Board of Quazi, where she categorically asked for a *Fasah* divorce on account of the conduct of the husband, the Appellant. That is a part of the record of the Quazi, and it is referred to as Y7. The reply to the letter marked as Y8 was again filed by the Appellant, where he stated that he is not willing for a *Fasah* divorce. There is also a minute of the Moulavi where it mentions that the Respondent asked for a *Fasah* divorce.

On the further perusal of the applications filed, I found the minutes of the Quazi's inquiries filed as P2 and dated 16<sup>th</sup> January 2020, stating that the Quazi suggested, instead of a *Fasah* divorce, a *Mubarah* divorce should be granted as both parties were willing.

### **Types of divorce under the MMDA**

It is undisputed positions of law conceded by the counsel on either side that Sri Lankan law recognises four types of divorces governed by the Muslim Marriage and Divorce Act; namely, *Talaq*, *Fasah*, *Khula* and *Mubarah*<sup>2</sup>.

*Talaq* is a form of divorce available to the husband, who may unilaterally pronounce divorce<sup>3</sup>. *Fasah* is a form of divorce available to the wife, where she may apply to the Quazi for dissolution of the marriage on the basis of fault on the part of the husband, such as cruelty, failure to maintain, or desertion, and available under Section 28(1) of the MMDA. For clarity I will reproduce the same;

*“28. (1) 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’*

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<sup>2</sup> Jaldeen, M.S., ‘*The Muslim Law of marriage divorce and maintenance in Sri Lanka*’ (2<sup>nd</sup> Revised Ed. 2004). Peace, Education and Research Publishers; Colombo, Sri Lanka.

<sup>3</sup> Section 27 of the MMDA and rules to be followed in Schedule II of the Act.



*under the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed,”*

*Khula* is another form of divorce where the wife initiates the divorce and offers to return the Mahr or the dowry that was provided to the wife by the husband in exchange for her release from the marriage. *Mubarah* refers to divorce by mutual consent of both parties. These two forms of divorce fall within the ambit of Section 28(2) of the MMDA as reproduced below;

*“28. (2) Where a wife desires to effect a divorce from her husband on any ground not referred to in subsection (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure.”*

### **The issue before the Quazi**

In this case, the only question before the Quazi is whether the wife (Respondent) is entitled to obtain a *Fasah* divorce, instead of a *Mubarah* divorce, which she has never sought from the very inception of the proceedings that she has initiated as way back as in the year 2019. However, from the beginning, the husband never wanted a divorce, and in fact wanted to reconcile with the wife, which is reflected in his original letter referred to as **Y6**, and thereafter in the affidavit filed as **Y8**, where he has consented to a *Mubarah* divorce instead of a *Fasah* divorce. Therefore, the question arises whether the wife is entitled to a *Fasah* divorce, instead of a *Mubarah* divorce, although both can be obtained by the wife.

I will discuss the reasons as to why *Fasah* divorce is important for the wife in this case. In addition to that, I will also advert on as to why the wife is entitled to a *Fasah* divorce instead of a *Mubarah* divorce, and the importance thereof.

In addition to that, I further discuss whether she is entitled to maintain an application for a *Fasah* divorce. Subsequently, the next question arises whether the original Quazi who granted a *Mubarah* divorce instead of a *Fasah* divorce has erred in fact and in law. Consequently, requiring this Court to decide whether the Board of Quazi is right or erred in fact and in law, when they decided to set aside the *Mubarah* divorce granted to the wife instead of the *Fasah* divorce and send the case back to the Quazi to reconsider the evidence on the basis for a *Fasah* divorce.

### ***Fasah* divorce**

*Fasah* divorce is a religious divorce which an innocent wife can obtain against a husband, who is guilty of cruelty and negligent of his duties as a husband. The sanctity attached to a *Fasah* divorce is much higher than the sanctity attached to a *Mubarah* divorce, since only an innocent wife can obtain a *Fasah* divorce against a guilty husband. The burden proof of a *Fasah* divorce is solely and entirely on the wife. In addition to that, the gravity of the *Fasah* divorce is further underscored by the fact that to establish the existence of a right to have a *Fasah* divorce, an innocent wife has to call at least two witnesses, apart from her own evidence; this is something that has gone beyond the parameters of the Evidence Ordinance<sup>4</sup>, where to establish a certain fact, one witness is sufficient.

Therefore, it is very clear that the sanctity attached to the *Fasah* divorce as opposed to the *Mubarah* divorce is much higher, and the gravity of a *Fasah* divorce against the husband is also greater than a *Mubarah* divorce. A *Mubarah* divorce can only be obtained by the wife with consent of the husband. Therefore, the guilt of the husband need not be established *vis-a-vis* the innocence of the wife need not be established in obtaining a *Mubarah* divorce as the mere consent of the parties is

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<sup>4</sup> Section 134 of the Evidence Ordinance

sufficient. Therefore, religiously, the gravity and sanctity attached to the *Mubarah* divorce is much less than that of a *Fasah* divorce. In addition to that, in establishing a Mubarah divorce, there is no sufficient number of witnesses required.

As such, a lady who is very much attached to the religion and believes in the essence of Islam, has decided to go for a *Fasah* divorce in this case as she never expected to have such a divorce if not for a husband's guilty conduct. Therefore, from the beginning as I mentioned above, the Respondent (the Applicant) as the innocent spouse, whilst making an application has moved for a *Fasah* divorce in the very first affidavit, as well as subsequent affidavits filed by her within the span of six months.

In this case by **P1**, the Respondent has sought a divorce for the circumstances stated therein. However, **P1** is in the model which is adopted from the Third Schedule of the MMDA to be followed to make an application under Section 28(1); and it is not necessary to mention the type of divorce the applicant seeks. For clarity I will reproduce the grounds upon which the Applicant sought the divorce found in document marked as **P1**<sup>5</sup>;

*“The Respondent has been neglecting to maintain the Applicant and failing to discharge duties of a husband towards the Applicant, biased towards the second wife of him, caused mental stress, abused verbally and ignorance.”*

However, in the affidavit filed along with the **P1**, marked as **Y2**, the Respondent as the Applicant seeking divorce from her husband, has categorically and unequivocally stated the circumstances in which she seeks a divorce and has sought such a divorce on the basis of a *Fasah* divorce as the innocent spouse, attributing the guilt to her husband, which she can attribute religiously. Her

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<sup>5</sup> Page 100 of the Brief

brother, who is the male guardian of the Respondent, also has supported her version and sought a *Fasah* divorce on behalf of his sister, the Respondent. Even by the subsequent letter marked as **Y8**, dated 19<sup>th</sup> December 2019, the Respondent (the wife) has sought a *Fasah* divorce.

In fact, on the perusal of **Y7** which is the proceedings on 7<sup>th</sup> November 2019, the learned Quazi of Colombo has categorically mentioned that he would conclude this matter as a *Fasah* divorce matter in unequivocal terms. However, subsequently, as reflected in **Y11** the proceedings of 16<sup>th</sup> January 2021, instead of a *Fasah* divorce, a *Mubarah* divorce has been granted. The said proceedings have also stated that there is no reason to grant a *Fasah* divorce.

### **The Quazi erred**

Accordingly, the Quazi, when he granted the *Mubarah* divorce has not considered the application and the supportive affidavits filed by the Respondent (the wife), well-supported by her witness, her brother, and the stand that they had taken from the beginning right throughout the proceedings for a *Fasah* divorce. When somebody specifically sought a *Fasah* divorce made in terms of Section 28(1) of the MMDA as mentioned above, the Quazi “shall” follow the rules in the Third Schedule. The operative words shall follow;

*“28. (1) Where a wife desires to effect a divorce ... Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule **shall** be followed,” [Emphasis is mine]*

According to Rule 11 of the Third Schedule, the Quazi is required to conduct the proceedings. Strict compliance is necessary thereof, which reads thus:

*“11. The Quazi shall maintain a record of the proceedings in the case and shall enter therein the statements made on oath or affirmation by the wife and her witnesses and by the husband (if he is*

*present) and his witnesses-Of the wife's witnesses the **number examined shall not be less than two in, any case. The record of every such statement shall be read over by the Quazi to the person who has made it and, after any necessary corrections have been made therein, shall be signed by such person. Where such person refuses to sign such statement, the fact of such refusal shall be recorded by the Quazi.***" [Emphasis is mine]

According to which, the number of witnesses necessary is also mentioned. In addition to the Applicant, and two more witnesses are also required to establish the grounds of a *Fasah* divorce sought by the Respondent, which the Quazi in this case has never allowed. Instead, he has granted a *Mubarah* divorce based only on the affidavits, letters, and the report of the assessors and nothing else. Justice Laffar in the case *Ahamed Mubarak Ali Mohamed Azran vs. Fathima Nusrath Fareez*<sup>6</sup> has clearly emphasized the requirements to be followed in the proceedings of a *Fasah* divorce sought under Section 28(1) of the MMDA.

In those circumstances, he is not justified in granting a *Mubarah* divorce since lower sanctity is attached to it in comparison to a *Fasah* divorce, and on the application made by the Respondent to revise order granting the *Mubarah* divorce by the Quazi, the Board of Quazi by the impugned order has set aside the same, and sent it back to the Quazi to reconsider the evidence and consider the application for a *Fasah* divorce.

Therefore, it is very clear that no prejudice is caused to the Appellant (Respondent to the original divorce application) who was never willing to grant a *Fasah* divorce and contested the same, because the guilt is attributable to him. Therefore, religiously, the blame is on him; instead, he has

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<sup>6</sup> LTA/0016/2024

attempted to move for a *Mubarah* divorce without properly adducing evidence or properly contesting the application of the Respondent (the wife).

As such, it is my view that the Board of Quazi is justified in making the impugned order. However, in this application at the argument stage, two new matters were raised for and on behalf of the Appellant; the first matter was whether the proceedings before the Quazi was inquisitorial or adversarial. In support of his argument, he relied upon certain reports prepared by Justice Dehideniya for and on behalf of the Human Rights Commission. With all due respect to Justice Dehideniya I hold that I am not bound by such reports or opinions, unless Justice Dehideniya has made such observations or judicial expression.

Secondly, I do not need to go that far to decide whether the proceedings are adversarial or inquisitorial, because the Respondent (the wife) who sought a divorce has right throughout maintained that she seeks a *Fasah* divorce, and not a *Mubarah* divorce. It is also to be noted that her application has been made in that behalf, in terms of Section 28(1) and the rules of the Third Schedule in the MMDA, which the Quazi in this case has failed to follow.

The second matter the Appellant raised is whether the Respondent (the wife) is entitled to revision before the Board of Quazi. For the reasons mentioned above, the Board of Quazi is justified in revising the impugned order of the Quazi granting a *Mubarah* divorce.

**Conclusion**

For the reasons adumbrated by me, it is my view that there is no merit in this appeal, and I move to dismiss this appeal. Since it seems to be a frivolous appeal, I order Rs. 105,000 (One Hundred and Five Thousand Rupees) as costs of this appeal payable by the Appellant to the Respondent.

**JUDGE OF THE COURT OF APPEAL**

**S. U. B. Karalliyadde, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**