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

In the matter of an appeal in terms of the Muslim Marriage and Divorce Act against the judgment of the Board of Quazis.

C.A. L.A. Case No.05/2016

Board of Quazis Case No.13/13/R/CMB

Quazi Court of Colombo West Case No.1174/T

Fazal Mahmood Mushin,

No.16/1, Galpotta Road,

Nawala.

APPLICANT

-Vs-

Priyanganie Sunimala Anokha Jayawardhana Fathima,

No.9, Crestwood,

Hokandara Road,

Thalawathugoda.

RESPONDENT

AND

Fazal Mahmood Mushin,

No.16/1, Galpotta Road,

Nawala.

APPLICANT-PETITIONER

-Vs-

Priyanganie Sunimala Anokha Jayawardhana Fathima,

No.9, Crestwood,

Hokandara Road,

Thalawathugoda.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

Priyanganie Sunimala Anokha Jayawardhana Fathima,

No.9, Crestwood,

Hokandara Road,

Thalawathugoda.

RESPONDENT-RESPONDENT-APPELLANT

-Vs-

Fazal Mohmood Mushin,

No.16/1, Galpotta Road,

Nawala.

APPLICANT-PETITIONER-RESPONDENT

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

COUNSEL : Razik Zarook, PC with Rohana Deshapriya and Chanakya Liyanage for the Respondent-Respondent-Appellant

N.M. Shaheid with Shihar Hassan for the Applicant-Petitioner-Respondent

Decided on : 19.10.2018

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

What happens when a young couple who belongs to two different religions first goes through a Muslim marriage and thereafter contracts another marriage under the General Marriage Ordinance? If the husband is a Muslim (Fazal Mahmood Mushin) and wife (Priyanganie Sunimala Anokha Jayawardhana) a Catholic, which law will govern the question of divorce when the holy wedlock has turned into an unholy deadlock and the husband in this instance seeks to dissolve their marriage after so many years of cohabitation as husband and wife?

After leave was granted against the order of the Board of Quazis dated 14th May 2016, the argument on the merits took place on several dates and it must be recorded that though the late Mr. Farook Thahir argued this matter along with Mr. N.M. Reyaz on behalf of the husband (the Respondent before this Court), Mr. N.M. Shaheid took over the case of the Respondent after the demise of Mr. Farook Thahir. The pith and substance of the jurisdictional bar of the Quazi that was raised in this case is plain as a pikestaff but the facts need to be traversed before one assays the jurisdictional question.

After withdrawing an action for divorce that he had filed first in the District Court on 09.08.2012, the husband-Fazal Mahmood Mushin (the Respondent before this Court) filed an application for a *Talaq* in the Quazi Court of Colombo West. The then officiating Quazi of Colombo West was confronted with an objection to jurisdiction when the wife (the Appellant before this Court) called in question the competence of the Quazi to inquire into the matter. Her objection was premised on the ground that the Quazi was destitute of jurisdiction since she had not converted to Islam at the time of her purported marriage to the Respondent. The Quazi thereupon sought an opinion from the Board of Quazis on what he thought was a knotty question as to his jurisdiction, as the jurisdiction for the consideration of any question of Muslim law arising in any proceedings is vested in the Board of Quazis in terms of Section 46(1) of the Muslim

Marriage and Divorce Act No. 13 of 1951 as amended (the MMDA). In response the Board of Quazis directed the Quazi to cause an investigation and satisfy himself if the Appellant-wife was not a Muslim as she claimed.

In terms of Section 46(3) of the MMDA, the Board of Quazis directed the learned Quazi of Colombo West that he must cause an inquiry to be convinced that the Appellant was not a Muslim and in terms of Section 2 of the said Act he had to decide whether he had the jurisdiction to hear the case and in order to ascertain the remit of that jurisdiction, the learned Quazi could call for documents specified in the letter of guidelines sent by the Board of Quazis. This was the long and short of the directions of the Board of Quazis.

It would appear that the learned Quazi did call for the said documents stated in the letter of the Board of Quazis from both the Appellant and the Respondent. The documents that had been specified for perusal by the learned Quazi to satisfy himself as to whether the Appellant was a Muslim or not are the following:-

i. a certified copy of the plaint filed by the Respondent in the District Court pertaining to the divorce suit;
ii. a certified copy of a document which depicts the reasons for the withdrawal of the relevant case;
iii. a copy of the marriage certificate of the parties in accordance with the provisions of the Muslim Marriage and Divorce Act;
iv. a copy of the marriage certificate of the parties in accordance with the provisions of the General Marriage Ordinance;
v. a copy of the marriage certificate issued by the Archdiocese of Colombo at St. Theresa's church, *Thimbirigasyaya*; and
vi. documents pertaining to the baptism of the two children of the parties.

The letter containing the above directions on behalf of the Board of Quazis was addressed to the then Quazi of Colombo West on 26th December 2012. When one peruses the journal entries of the proceedings of the Quazi of Colombo West, it is clear that the learned Quazi acknowledges the receipt of the above letter on the 1st of January

2013. Having called for the documents and fixed the matter for reconciliation if it was possible, the Quazi of Colombo West kept recording the fact that the Appellant had been consistently raising the objection that there was a want of jurisdiction in the Quazi to hear and determine the application for *Talaq* filed by the Respondent-husband.

When this matter came up again on the 16th February 2013, the learned Quazi recorded his decision in the following tenor:-

> *"I am unable to continue this case as I feel I have no jurisdiction to hear this case and I dismiss this case."*

The Respondent-husband being aggrieved by the learned Quazi's order dated 16th February 2013 preferred a revision application to the Board of Quazis in terms of Sections 43 and 44 of the MMDA seeking *inter alia* to set aside the order of the Quazi and to direct the learned Quazi or preferably another Quazi to recommence the Respondent's original *Talaq* application. In opposition to this revision application to the Board of Quazis, the wife-Priyangani Sunimala Anokha Jayawardhana (the Appellant before the Court of Appeal) averred the following *inter alia* in her statement of objections:-

a) she was never a Muslim and never took the name of "Fatima";
b) she could not have entered into a Muslim marriage under the said circumstances;
c) the Appellant and the Respondent married in the *Thimbirigasyaya* Church subsequent to three months' classes at the church, prior to this marriage, since it is a requirement by the church for registration of marriage;
d) the first two children of the parties are Catholics;
e) the Appellant and the Respondent as a family lived as Catholics;
f) a few days before the marriage ceremony was scheduled at the church, the Respondent had invited the Appellant for dinner at his place to introduce his relations and through the Respondent's mother he invited the Appellant to a separate room and got her to sign some papers stating that they were customary matters and that the Appellant signed the said papers to oblige her future husband;

g) after the Respondent withdrew the District Court divorce case and when the *Talaq* application was subsequently filed by the Respondent, it was only then that the Appellant found out that the said signature was obtained on a purported Muslim Marriage registration document and that the Petitioner was misled into signing the said papers to register the marriage under the Muslim Marriage and Divorce Act;

h) after obtaining an opinion from the Board of Quazis, the learned Quazi held that the Petitioner is not a Muslim and therefore the Respondent is estopped from making the revision application to the Board of Quazis;

i) the Respondent has no exceptional circumstances to make the Revision Application to the Board of Quazis and that the Respondent has not come by way of an Appeal;

j) the Respondent has suppressed facts from the Board of Quazis which were revealed in her Statement of Objections.

The Respondent in his counter objections dated 25th January 2014 traversed the claims of the Appellant repudiating them.

The Board of Quazis in its judgment dated14th May 2016ruled that the Quazi possessed jurisdiction to hear the application of the husband for a *Talaq*. No doubt the judgment laments that the learned Quazi had failed to inquire into the matter despite directions from the Board of Quazis. In fact Section 46(3) of the Muslim Marriage and Divorce Act declares that when the Board of Quazis determines a question of law reserved for its consideration under subsection (1) and communicates its opinion to the Quazi who referred the question, the Quazi shall, in the proceedings in which the question arose, be bound by such opinion. But the Quazi simply declined jurisdiction and it is this rejection and dismissal of the application for a *Talaq* that led to revisionary proceedings before the Board of Quazis and that appellate tribunal held that the Quazi must proceed to inquire into the application for divorce. In these appellate proceedings before this Court, it is the judgment of the Board of Quazis dated 14th May 2014 that is impugned by the wife-the Appellant before this Court.

I must observe that long before the Quazi submitted what he thought was a question of Muslim law to the Board of Quazis, a perusal of the minutes of proceedings before him shows that on 03rd September 2012 the Quazi himself had come to a decision that he had jurisdiction and notwithstanding such conclusions to assume jurisdiction, he began to entertain doubts about whether he had jurisdiction and I find that it is this lurking doubt that led to the reference of this question to the Board of Quazis on 15th December 2012.

So much will suffice for the facts and I will now proceed to analyze the aforesaid facts in order to arrive at the answer that is posed by the quintessential question before this Court namely "Does the Quazi have jurisdiction to embark on an inquiry into the application for *Talaq* before him?".

I would summarize the arguments advanced before me. There was no valid Muslim marriage because the Appellant was not a Muslim nor did she convert to Islam. This was the contention put forward by the learned President's Counsel for the wife. Absent conversion which she alleges never took place but the husband traverses that allegation declaring that conversion did in fact take place, could there be a valid Muslim marriage? Assuming without conceding that the Appellant did not convert to Islam, was the non-conversion an impediment to Priyanganie Sunimala Anokha Jayawardhana, who also carries the sobriquet *Cuckoo Jayawardhana*, to have validly married Mushin-the Respondent? In other words is conversion to Islam a condition precedent to the constitution of a valid Muslim marriage if the bride professes Catholicism and the bridegroom is an adherent of the Islamic faith? Could not there be a valid Muslim marriage even without conversion if the bride happens to be a Christian or a Catholic or even a Jewess? If there was a valid Muslim marriage, what happens to the second marriage that took place five days after the Muslim marriage?

These are but some of the interestingly important questions that surface to the fore in this case and many a fascinating argument has been put forward by the respective Counsel who appeared for the husband and wife.

Mr. Razik Zarook, President's Counsel who appeared on behalf of the Appellant quite eloquently faulted the appellate tribunal-the Board of Quazis for directing the Quazi of Colombo West to assume jurisdiction as he contended that the Quazi would have no jurisdiction over a marital cause, when one party is a Muslim and the other remains a Catholic and that the second marriage at the Church prevails over the first Muslim marriage even if the Muslim marriage ever existed. Mr. N.M. Shaheid for the husband (the Respondent before this Court) forcefully countered this argument by stating that after a lapse of so many years since the Muslim marriage took place, the Appellant cannot now be heard to plead ignorance of the validity of the Muslim marriage and the evidence thereof emanating from the marriage certificate issued under the Muslim Marriage and Divorce Act.

The pivotal question to pose in this backdrop is whether there exists a valid Muslim marriage in the first instance before one goes to juxtapose the 2nd marriage at the Church and rule on its validity vis-à-vis the 1st marriage. I do have to consider this question as the two marriage certificates-one before the Registrar of Muslim Marriages and the other under the General Marriage Ordinance figure prominently in the case.

As I said before, despite the initial decision to assume jurisdiction, the learned Quazi seems to have labored under the impression that when the wife alleges that she never embraced Islam, his jurisdiction to inquire into the application made by the husband for a divorce according to Muslim law (a *Talaq* as is known in this instance) is taken away. This misgiving on the part of the Quazi seems to emanate through a reading of Section 2 of the Muslim Marriage and Divorce Act which states:-

> *"This Act shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Sri Lanka who are Muslims."*

In fact this provision formed the basis of the argument of the learned President's Counsel that the Appellant would not be subject to the jurisdiction of the Quazi as she does not profess to be a Muslim. The gist of the argument of Mr. Razik Zarook, P.C was that in order for a Muslim marriage to take place under the provisions of the Muslim Marriage

and Divorce Act, both parties contracting the holy matrimony must be Muslims. Understandably as the argument went, the word Muslim here should mean a Muslim by birth or a Muslim by conversion and this argument was based on the premise that the male and female marrying under the Muslim Marriage and Divorce Act must be both Muslims either by birth or conversion.

Does then the MMDA exclude from its ambit the marriage between Fazal Mahmood Mushin and Priyanganie Sunimala Anokha Jayawardhana as she alleges she remained a Catholic at the time of her marriage on 06.02.1989? Before I consider the question whether the MMDA excludes the marriage between Fazal Mahmood Mushin and Priyanganie Sunimala Anokha Jayawardhana (a Catholic as she claims at the time of marriage), there is an all important question that has to be answered first. Assuming without conceding the veracity of the assertion that the Appellant never converted to Islam and she remained a Catholic at the time of marriage, could not Fazal Mahmood Mushin have contracted a valid marriage with her in the eyes of Muslim law? Could there be a valid marriage between a Muslim male and a Catholic female? The answer to this question is in the affirmative and the applicable sources of Muslim law in this country endorse and validate such nuptials.

Sources of Muslim Law

Even without conversion Priyanganie Sunimala Anokha Jayawardhana *aka* Cuckoo Jayawardhana was competent to marry Fazal Mahmood Mushin even if she was a Catholic and Muslim law recognizes as valid a marriage between a Muslim man and a Catholic female. What then are the sources of Muslim Law in this country that validate and authorize this position? In ***Fathima Mirza v. Anzar*** (1971) 75 N.L.R 295-a celebrated judgment on the history and effect of a ***Khula*** divorce, Weeramantry, J. (with whose lead judgment Samarawickrame, J. agreed) stated:-

> *"For a Muslim no doubt the whole of the Quran and the Hadiths are his province, the former is the bedrock of Muslim Law and the latter are second in authority only to the Quran itself."*

The learned Judge made this statement to indicate his approach to decide the question in issue in that case, to hold that the form of divorce known as *Khula* is not available to a wife except with the consent of her husband. The above dictum also signifies that the Holy *Quran* and *Hadiths* (sayings and actions of Prophet Mohamed (PBUH)) are primary sources of Muslim Law in the country and so recourse is always had to these sources on any points that arise for consideration in the context of a Muslim law marriage.

The Holy *Quran* upholds the validity of a marriage between a Muslim man and a woman belonging to a revealed religion such as Christianity. In *Sura Maida* (The Holy *Quran*- Edited by Abdullah Yusuf Ali V-6), the Almighty Allah says:-

> *"Lawful unto you in marriage*
> *Are not only chaste women*
> *Who are believers, But*
> *Chaste women among*
> *The People of the Book....."*

Thus the Muslim law recognizes a "mixed marriage" only in circumstances where a Muslim marries a *Kitabiya*, *i.e.* a woman with a religion revealed in scriptures, such as a Jewess, or a Christian. In all other cases where only one party is a Muslim, there is no marriage in the eyes of Muslim law. Here in the case before me the Respondent-Respondent-Appellant wife contended that she never converted to Islam nor was she a Muslim on 06th February 1989 when she "married" the Respondent purportedly under the Muslim law. Her conversion to Islam or purported conversion as the learned President's Counsel Mr. Razik Zarook called it, never took place though the marriage certificate attests to a Muslim marriage on 06th February 1989. The argument was to the effect that admittedly she was a Catholic on 06th February 1989 and there was only one Muslim (the Respondent) before the Muslim Registrar though the marriage certificate eloquently speaks of a solemnization of a Muslim marriage on 06th February 1989. In other words it was an argument that called in question a marriage certificate which the appellant had signed on 06th February 1989.

One fact stands as plain as a pikestaff. It must be pinpointed that even though she alleges she remained a Catholic on 06th February 1989, the fact remains that she was indeed a *Kitabiya* or *Kitabia* whom a Muslim, according to Muslim law, could join in holy wedlock on that day. Thus it became a valid marriage in the eyes of Muslim law as it is a not unlawful for a Muslim man to marry a Christian or Catholic even if she has not converted to Islam. To all intents and purposes it was a marriage which was Muslim law compliant. Apart from the above *Quranic* verse I have cited above, some eminently authoritative texts on Muslim law support this view. In fact alluding to sources of Muslim law in this country, De Sampayo, J. in ***Narayanen v. Saree Umma*** (1920) 21 N.L.R 439 juxtaposed them vis-à-vis the Muhammadan Code of 1806:-

> *"By a long course of judicial practice, which cannot be questioned, the original sources of Muhammadan law and the recognized commentaries thereon have always been referred to as authorities on any points not provided for in the Muhammadan Code of 1806."*

In fact by the expression "original sources", De Sampayo, J. must have necessarily meant the four important sources of Muslim law namely the Holy *Quran*, *Hadiths* (traditions of the Prophet Mohamed (PBUH)), *Ijmaa* or consensus of opinion and *Qiyas* or analogical deductions. In addition to these original sources of Muslim law, Muslim law in this country is also sourced by celebrated commentaries of jurists and any legislative enactments on Muslim law. Both De Sampayo, J. and Weeramantry, J. in the cases cited above were quick to point out that if the legislative enactment on Muslim law is silent on an issue that confronts court, the aforesaid original sources and the commentaries by jurists would be consulted. There is no mention made of a marriage between a Muslim male and a Catholic such as the Appellant in the Muslim Marriage and Divorce Act No. 13 of 1951 but that does not mean that such a marriage has been excluded by the enactment as it is acknowledged to be valid by Holy Quran and authoritative jurists.

Even the rudimentary Muhammadan Code of 1806 did not provide for these types of marriages. The abecedarian enactment-Muhammadan Code of 1806 had its provenance in what the Dutch had prepared and enacted as a Statute of Batavia.

Professor T. Nadaraja in his ***Legal System of Ceylon*** 1972 at p 14 traces the Code to a compilation brought to the island in 1770 from Batavia at the request of the Dutch Governor Falck.

Sir Alexander Johnstone the primogenitor of the Code had it translated into English and placed it before the Governor in Council in August 1806 as the "Code of Mohamedan laws observed by the Moorsin the Province of Colombo and acknowledged by the Head Moormen of the District to be adapted to the present usages of the caste"-*see* Extract of the Minutes of the Council, August 5, 1806 legislative Enactments of Ceylon 1972. The Code had been signed a few days earlier by twenty "Maricars, Arbitrators, Priests and Inhabitants" who affirmed that" to their knowledge and of the learned High Priests whom they consulted, it was agreeable to the laws and customs to be observed in their community - Nell L - "***The Mohammedan Laws of Ceylon*** (1837) - Colombo pp 46-56.

Though De Vos in his monograph on Mohammedan law says that the Code of 1806 was "no other than a translation, from the Dutch into English, of the *Byzondere Wetten*", Basnayake, C.J alluded to a statement appearing at the end of the Code and observed in ***Mohideen v. Sulaiman*** (1957) 59 N.L.R 227 at 230 that the Code was an independent compilation

The statement appearing at the foot of the Code refers to 20 Muslim elders mentioned above, giving their imprimatur to the Code, whilst acknowledging that they had themselves consulted learned High Priests. The Code, which was originally applicable in the Province of Colombo was extended to the whole island by Section 10 of Ordinance No.5 of 1852.

Even during the time of the Mohammedan Code, if there was a *non liquet* on a particular matter or whenever the incomprehensive Code was silent on a Muslim law issue, general principles of Muslim jurisprudence emanating from the original sources I have referred to above were brought in to supplement the scanty codification that was the Mohammedan Code of 1806. After having heard some weighty arguments of the then

Solicitor General M.T. Akbar who later adorned the Supreme Court, Bertram C.J in the case of ***King v. Miskin Umma et al*** 26 N.L.R 330 observed:-

> *"The Code of 1806 is not exhaustive of the Muslim law applicable to Ceylon. It has to be read in the light of the general principles of that jurisprudence."*

In fact M.T. Akbar, the Solicitor General at the time (as His Lordship then was) had argued quite forcefully in the case that the Code may even be supplemented by text-books recognized as authorities. The learned Solicitor General had cited before Court *Amir Ali, vol II* and *Wilson's Anglo-Muhmmadan law* to buttress his argument that the Code had to be supplemented and this was accepted by Bertram C.J in ***King v. Miskin Umma*** *(supra)*.

It is thus clear that in the event of a *casus omissus* or *non liquet*, the prevalent Muslim Marriage and Divorce Act, No. 13 of 1951 which replaced the Muhammadan Code of 1806 and the subsequent Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929, has to be necessarily supplemented by sources of Muslim law both original and supplementary. I have already alluded to the observation of two other celebrated judges namely De Sampayo, J. and Weeramantry, J. who took the opportunity to recognize recourse to other sources of Muslim law in those respective cases-***Narayanen v. Saree Umma*** and ***Fathima Mirza v. Anzar*** *(supra)* and it is for this reason that I was impelled to look at passages from the Holy *Quran*, because Muslim Marriage and Divorce Act, No. 13 of 1951 is silent on a marriage between a Muslim male and a *Kitabia* such as a Catholic female. The *Quranic* verses lend validity to the marriage between Fazal Mahmood Mushin and Priyanganie Sunimala Anokha Jayawardhana. In the same way well-acknowledged and authoritative commentaries on Muslim law contain some percipient comments on the validity of a marriage between a Muslim male and a Catholic female.

The *locus classicus* on Muslim law, *Mulla on Principles of Mahomedan Law* the 22nd Edition (2017) which incorporates the recent Triple *Talaq* judgment of the Indian Supreme Court along with some relevant extracts thereof states at p 345 that a Mahomedan male (*i.e.* a

Muslim) may contract a valid marriage not only with a Mahomedan woman, but also with a *Kitabia*, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. *Mulla* goes further in regard to females other than *Kitabia.*

> *"A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular."*

In other words the marriage of a Muslim male to a non-Muslim, other than a *Kitabia*, is only irregular, because that irregularity can be cured by her conversion to Islam-also see Professor Asaf Ali Asghar Fysee's celebrated textbook of remarkable excellence-*Outlines of Muhammadan Law*, 5th Edition (2008) at p 75. Though the question of marriage between a Muslim male and non-Muslim female, other than a *Kitabia*, does not arise in this case, I find it apposite to allude to that question for the sake of completeness at the expense of these observations being termed as *obiter* but the knowledge of what happens to a marriage between a Muslim man and a non-*Kitabia* such as a Hindu always satisfies a curious inquisitor and hence it is the necessity for these observations. If such a marriage between a Muslim and a Hindu for instance does indeed take place, albeit prohibited, on the ground of religion, what would be the effect? Fysee quotes Ameer Ali to the following tenor:-

> *"A Muslim may, therefore, lawfully intermarry with a woman belonging to Brahmo sect. Nor does there seem to be any reason why a marriage with a Hindu woman whose idolatry is merely nominal and who really believes in God should be unlawful. The Moghul Emperors of India frequently intermarried with Rajput (Hindu) ladies and the issue of such unions were regarded as legitimate and often succeeded to the imperial throne"*-see Ameer Ali on Mahommedan Law Volume II p 154.

So Ameer Ali too proceeds to lay down that such unions are merely irregular, and not void. Significantly, the Indian jurist Syed Ameer Ali did not place a strict interpretation on the *Qur'anic* verse on marrying non-Muslim women. For in the Holy *Qu'ran, Sura* II, verse 221, it is said: *"Do not marry unbelieving women until they believe"*. Thus the marriage between a Muslim and a Hindu woman is only invalid (irregular, according to the

nomenclature) and does not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam which would at once remove the bar and validate the marriage-*see* also ***Ishan v. Panna Lal*** (1928) 7 Pat. 6: 103 I.C.430: AIR 1928 Pat 19.

I reiterate that the above discussion on a Muslim getting betrothed to a non-Muslim other than a *Kitabiya* is beside the point as that question does not arise in this case and I made the above observations in regard to a Muslim and a Hindu woman in order to complete the narrative so to speak as regards differences in religion between the spouses but I hasten to highlight the fact that in this case I am confronted with a situation in which the Respondent-husband alleges that he married the Appellant-wife under Muslim law, whilst the Appellant has vehemently maintained that she never converted to Islam and at all times material she was a Catholic.

Even if she has not converted to Islam and remained a Catholic, in my view that does not alter the status of her marriage. The Respondent-husband being a Muslim married a *Kitabiya* and thus it was a valid marriage in the eyes of Muslim law.

The Muslim Marriage and Divorce Act, No. 13 of 1951 as amended has not disavowed a marriage between a Muslim and a *Kitabiya* explicitly and the marriage sits as a validly constituted matrimony vis-à-vis the current enactment. Taking the view as I do namely notwithstanding the fact that the general principles of Muslim law that obtain in this country do recognize the marriage between the Appellant and Respondent, can it be argued that its registration would be prohibited by Section 2 of the legislation which insists that: *"This Act shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Sri Lanka who are Muslims."*

Though Section 2 confines the remit of the application of the Act *to the marriages and divorces, and other matters connected therewith, of those inhabitants of Sri Lanka who are Muslims*, it must be noted that the legislature does not stipulate that both parties to the marriage must be Muslims and if this view is adopted, then a valid marriage between a Muslim man and a *Kitabiya* would fall within the ambit of the Muslim Marriage and Divorce Act.

I need not go so far as this, as the requirements of a Muslim marriage do not predicate registration for its validity. In other words the validity of an otherwise valid Muslim marriage is not defeated by a non-registration of the marriage. According to Muslim law, a marriage (a *Nikah* in Arabic) is a permanent and an unconditional civil contract (which comes into immediate effect) made between two persons of opposite sexes with a view to mutual enjoyment and procreation and legalizing of children. Justice S.A. Rahman writing the judgment of the Pakistani Supreme Court in ***Khurshid Bibi v. Moh Amin*** P.L.D 1967. S.C. 97 pithily summed up:-

> *"Among the Muslims, marriage is not a sacrament, but is in the nature of a civil contract. Such a contract undoubtedly, has spiritual and moral overtones but legally, in essence, it remains a contract between the parties....."*

If a marriage in Islam is a contract and not a sacrament, it simply means that it can be contracted without any ceremonies-see *Mohammedan Law by Seymour Vesey-FitzGerald.*

Essentials of a valid Muslim marriage

If a Muslim marriage *(Nikah)* is a civil contract, hence, it should attract all the ingredients of a valid contract with its concomitant incidents, which are determined in combination with the religious connotation. It is then essential to the validity of a Muslim marriage that there should be an offer *(ijad)* made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal *(quidul)* by or on behalf of the other, in the presence of and hearing of two male or one male and two female witnesses. The consent of the bride is generally given by her *Wali* (her marriage guardian). There must be free consent between the parties and neither writing nor any religious ceremony is essential.

Registration of the Muslim marriage

As I said, Muslim law does not require registration of a marriage as a requisite for a valid marriage. On other hand, Muslim law never prohibits registration of a marriage. These principles are, to an extent, mirrored in Sections 16 and 17 of the Muslim Marriage and Divorce Act. Section 16 is an important provision as far as a marriage between a Muslim

male and a *Kitabia* such as a Catholic female is concerned. It lays down that merely because an otherwise valid Muslim marriage is not registered, the non-registration of such a marriage will not render that valid marriage invalid. So even if a different view is held that the marriage between the Appellant and Respondent is incapable of being registered under the MMDA because only one person was a Muslim before the Registrar, as the Appellant claims, yet the marriage will remain valid and effectual to all intents and purposes and Section 16 eventuates in that result. It is acknowledged to be a valid Muslim marriage and such validity is not disavowed by the MMDA merely because the enactment is silent on a marriage of that type. The argument that a marriage between a Muslim male and a *Kitabiah* cannot be registered under the MMDA can be made only if one takes the view that both parties to the contract of marriage must be Muslims. This view is possible only if Section 2 of the MMDA is narrowly interpreted. As I have commented before, one has to take a broader view of that section and since the marriage itself is valid in the eyes of the Muslim law, it is preposterous to contend that the legislature intended the non-registration of these marriages. In any event the registration will only afford evidence of the marriage and the non-registration will not have the effect of nullifying the marriage for Section 16 of the MMDA provides that nothing contained in the Act shall invalidate or validate any marriage or divorce which is otherwise valid or invalid.

Registration of the Marriage under the MMDA

The Registrar of Muslim Marriages did indeed proceed to register this marriage and he indicates in the marriage certificate that the Appellant had become a *Hanaffi* at the time of registration thus connoting a conversion. In the case of ***Abdul Cader v. Razik*** 54 N.L.R 201, the Privy Council, while affirming the judgment of the Supreme Court (52 N.L.R 156) held that a *Hanafi* bride who has attained the age of puberty can marry without the consent of a *Wali* or marriage guardian. According to the Registrar, both the bride and bridegroom were Muslims at the time of registration.

In view of my holding that conversion is immaterial to the constitution of a valid Muslim marriage between a Muslim male and a Catholic female, the question of conversion or otherwise does not arise before me and I would remind myself that conversion after all cannot be fully tested since, as several authors emphasize, the thought of a man is not triable-*see Tayyibji* on *Muslim law, The personal law of Muslims in India and Pakistan* (1968) with references to old English cases at p 7.

As I have said above, the Petitioner was a *Kitabiya* and remained a *Kitabiya* and therefore what she entered into on 06.02.1989 was a valid marriage in the eyes of the Muslim law. Therefore the assertion that she could not have entered into a Muslim marriage is erroneous for the reason that there need not be a conversion for a valid Muslim marriage to have ensued, provided the bride was a *Kitabia. Kitab* means a book, that is, a book of revealed religion. *Kitabi* means a male who believes in Christianity or Judaism. *Kitabia* is a female who believes in either of these religions.

Impugnation of the certificate of marriage under Muslim Marriage and Divorce Act

The fact remains that the Appellant sought to impugn the marriage certificate. It was contended that the Appellant signed some papers at the Respondent's house and only later she came to know that it was a purported registration of a marriage under the Muslim Marriage and Divorce Act. The marriage certificate under the Muslim Marriage and Divorce Act is dated 06.02.1989 and the Appellant was seeking to make these assertions of invalidity almost after 23 years of matrimony. She further states in her objections to the Board of Quazis that she saw the purported marriage certificate for the first time only when she received a notice from the Quazi Court.

The marriage certificate dated 06.02.1989 records the full name of the person conducting the "*Nikah*" ceremony as Mr. Jazuli Salahudeen who is also designated as the Registrar of Muslim marriages. The name of the bride is specified as Priyanganie Sunimala Anokha Jayawardhana Fatima and in the column for bride's *wali*-the Appellant herself has signed as ***Pjayawardhana.*** There is a notation to the effect that *wali* is not present as the bride is a *Hanaffi.*

The Appellant does not claim that the Registrar of Muslim marriages inserted the above details subsequently. She does not allege that she signed a blank sheet of paper as on her own admission she came to know later that this was a marriage certificate. There is no duress or inducement alleged by the Appellant as regards the signing of the marriage certificate.

If she was mistaken about *some papers* which she signed, then why did not she seek the assistance of a legal forum to invalidate this document immediately after she had signed these papers in 1989? If the marriage contract is vitiated by an invalidating factor, it is open to a party to have it set aside but when the husband filed for a *Talaq* on 12th December 2012, 23 years had lapsed since the marriage. It is too late in the day to call in question the solemnization of the Muslim marriage under any recognized ground of vitiating factors known to contract law. One cannot disavow from one's signature in those circumstances-*see* ***Thoroughgood v. Cole*** (1584) 2 Co Rep 9a. *Thoroughgood's Case* brought to the fore the doctrine of *non est factum* at the end of the 16th century but Holdsworth in his *History of English Law*, Vol 8, p 50 states that the doctrine was much older than that case. I will presently return to this defence and its modern modifications. As regards signatures one has to bear in mind the case of ***L'Estrange v. Graucob*** (1934) 2 KB 394 KBD.

The Rule in L'Estrange

The rule in ***L'Estrange v. Graucob*** (1934) 2 KB 394 affirms that the clauses of a written contract are binding on signatories. Spencer writing an article entitled ***Signature, Consent, and the Rule in L'Estrange v. Graucob*** (1973) Cambridge Law Journal 104 submitted that signature of a document indicates actual consent to its contents; a person who signs a document is thereby estopped from denying consent to the contents of the documents.

Even the *parol* evidence rule prevents the admission of evidence to add to, vary or contradict a written instrument. It is well recognized *though* that fraud,

misrepresentation and possibly *non est factum* would afford defences against the ***L'Estrange*** signature rule.

Fraud, if at all must be specifically averred and proved and the pleadings do not bear out specific allegations of fraud against the Respondent. In any event the Appellant had the option of affirming or repudiating the contract and it is incumbent on the victim of fraud to repudiate the contract ***within a reasonable time*** if he or she intends to do so-*see* ***R. W. Lee-An Introduction Roman-Dutch Law***, 5th Edition at p 228.

Non Est Factum

Neither will the defence of *non est factum* (it is not my deed) avail the Appellant as that defence is available only when;

a. the document signed was mistakenly signed by the party who is alleging that it is void; and
b. that the document is fundamentally different from what that party thought it to be; and
c. that party was not negligent in signing that document.

Nowhere does the Appellant allege that the contents of the marriage certificate are wholly or radically different from those which she assumed them to be. In the absence of deception or fraud by the other party or a third party, the doctrine will normally require the signatory to lack real understanding of the document by reason of defective education, illness or innate capacity. None of these disabilities afflicted the Appellant at the relevant time. From the material available in the record, it would appear that the Appellant is such an accomplished lady of panache and style that she can barely take refuge in remissness or unintelligence on her part and it is improbable and incredible that having regard to the age, educational background and social status of the Appellant, it could be said that she was hoodwinked or misled into signing the document without knowing that it was a marriage certificate.

Modern decisions have restricted the scope of the *non est factum* doctrine in two ways. The signatory's decision not to read a document will nearly always exclude this defence-*see*

United Dominions Trust Ltd., v. Western [1976] QB 513; ***Hambros Bank Ltd., v. British Historic Building Trust*** [1995] NPC 179. Failure to read will be irrelevant only if the signatory would have been none the wiser even if he/she had carefully read the document. That might be so if this particular party lacks the skill or intelligence to discern its true legal sense. However, not reading because one has mislaid one's glasses, *etc*, is not an excuse-*see* ***Saunders v. Anglia Building Society*** (sometimes cited as ***Gallie v. Lee***) [1971] AC 1004, HL. I would also allude to ***Pathiraja Mudiyanselage Nimalasena v. L.B. Finance Company Ltd.,*** [CA 831/2000 (F) DC Colombo 6971/HP delivered on 6.02.2017] where I had occasion to deal with the plea of *caveat subscriptor* or *non est factum* in the context of a hire purchase contract.

Best Evidence

In light of the above reasoning the Appellant would also be hard put to overcome Section 71 of the Muslim Marriage and Divorce Act which is to the effect that a certified copy of the marriage certificate is the best evidence. The phrase "best evidence" has received recognition in the statute law of Sri Lanka and in our Courts. Section 41(1) of the Marriage Registration Ordinance No. 19 of 1907 states that, "the entry made by the Registrar in his marriage register book under sections 34, 35, and 40 shall constitute the registration of the marriage, and shall be the 'best' evidence thereof before all courts and in all proceedings in which it may be necessary to give evidence of the marriage"-*see* ***Seneviratne v. Halangoda et al*** 22 N.LR 472.

Similar provision had been made by the repealed Kandyan Marriage Ordinance No. 3 of 1870, and in the present Kandyan Marriage and Divorce Act No. 44 of 1952. The question whether the character of a Kandyan marriage can be proved by oral evidence by other than that stated in the register was considered in the case of ***Mampitiya v. Wegodapela*** (1922)24 N.L.R. 129 and it was held that in Section 39 of the repealed Kandyan Marriage Ordinance No. 3 of 1870, which declares that the entry in the register shall be "the best evidence" of the marriage and of the other facts stated therein, and that if it does not appear in the register whether the marriage was in *binna* or *diga*, such marriage shall be

presumed to have been contracted in *diga* until the contrary is proved. Bertram C.J. asserted that, 'It is of the essence of "best evidence" according to the English law that it excludes all evidence of inferior character'. In this case, a Kandyan woman, whose marriage was registered as a *diga* marriage and who continued to live in the *mulgedera*, was held not to have forfeited her rights in the paternal estate.

> *"As I understand the effect of the enactments and the cases is as follows; As between, or as against the parties, or their respective representatives in interest, the register of the marriage is conclusive of the intention with which the marriage was celebrated, unless the case is shown to be one of mistake or fraud, or can otherwise be brought within the equitable exceptions of section 92 of the Evidence Ordinance. Persons not parties, however, are not bound by the register, but are entitled to show that the true character of the marriage was not in fact such as it is represented to be".* Per Bertram C.J.

Thus one could observe that although an entry in a marriage certificate is clothed with the description that it is the best evidence, extrinsic evidence could be led to contradict the entry. The expression best evidence does not connote irrebuttable presumption or the entries are decisive or conclusive. As Bertram C.J pointed out in ***Mampitiya v. Wegodapela*** *(supra)*, a party could lead extrinsic evidence to contradict a question of fact because the entry may have found its way into the certificate through fraud or mistake. Or one could invoke the equitable exceptions in Section 92 of the Evidence Ordinance to vary, add to or subtract from the terms of the certificate but if there is long delay which signifies acquiescence such laches will operate against a party.

As I said before, the Appellant in this case does not plead fraud against the Respondent. Neither does she specifically draw the attention of court to the equitable pleas found in the proviso (1) to Section 92 of the Evidence Ordinance. In fact proviso (1) to Section 92 lists out vitiating factors such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that the contract is wrongly dated, want or failure of consideration and mistake in fact or law. These are all equitable pleas

whose unreasonably belated invocation is frowned upon by the maxim of equity-Delay defeats equity.

Delay defeats equity

This maxim is at times stated in the form-"equity assists the diligent and not the tardy and indolent." The courts of equity will not uphold a claimant's rights when she has unduly delayed in bringing the claim. This means that a person who delays unnecessarily in making a claim in equity can be found guilty of acquiescing to the conduct complained of by her failure to do anything about it. Having signed the marriage certificate as far back as 6th February 1989, she raised the issue of non-conversion only after a lapse of 23 years in 2012. She sought to impugn the question of fact after a long effluxion of time.

The Appellant signed the Muslim marriage register in the room where a marriage guardian (a *Wali*) would normally sign thus raising the probability that she voluntarily accepted the offer of the proposal of marriage in writing. Both on the signature rule as adumbrated in ***L'Estrange*** *(supra)* and in equity, the Appellant would be estopped from denying the contents of the marriage certificate to which she had appended her signature.

In any event permission to lead contrary evidence after so many years would be otiose and infructuous as even if she succeeds on non-conversion, her marriage to Fazal Mahmood Mushin is validated by Muslim law notwithstanding her denial of conversion.

Proof of marriages without marriage certificates

I have already observed that even if the marriage certificate is invalidated, extrinsic evidence would be permitted to prove a valid marriage. There are cases in Sri Lanka where marriages have been proved even without a marriage certificate.

In other words extrinsic evidence could be led to establish the existence of the marriage. In the case of ***The King v. Peter Nonis*** 4 9 N.L.R 16, Windham, J. (with Howard C.J agreeing) held that the expression "best evidence" in Section 38 of the Marriage Registration Ordinance merely signifies that the entry in the register shall prevail over any other evidence as to marriage in case of conflict as to whether the marriage was

celebrated at all or as to its character or any particulars regarding it. In this case the Appellant was charged with bigamy. The prosecution produced no entry in the marriage register book in proof of the first marriage but called in evidence the first wife and the officiating priest. This evidence was uncontradicted. Windham, J. stated that the "best evidence" rule in England has been subjected to a whittling-down process for over a century, and today it is not true that the best evidence must be given, though its non-production where available may be a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead. The expression "best evidence" certainly does not, and never did, mean that no other direct evidence of the fact in dispute could be tendered.

Thus marriage certificates do not furnish the sole evidence of marriage; Proof of marriage can be established by other means as happened in ***The King v. Peter Nonis*** *(supra)*. Even in the case of a Muslim marriage recognized as valid under Muslim law, extrinsic evidence could be given to establish the marriage. In ***Mt. Bashiran v. Mohammad Hussain*** (1941) 16 Luck.615; AIR Oudh 284, it was held by the Oudh Court that the proposal and acceptance need not be in any particular form. In this case there was evidence of the consent of the girl and that the husband had agreed to the dower and it was held that under the circumstances *after the lapse of a long time after the marriage, all the formalities required should be presumed to have been complied with.* Similarly, where the person who performed the *Nikah* was dead, the evidence of a witness was enough to prove the *Nikah* and it was held that the exact words of offer and acceptance need not be proved- ***Alamgir v. The State*** (1956) 35 Pat. 93-98-99.

The pith and substance of the above discussion is that extrinsic evidence is available either to contradict or confirm a marriage but as regards a denial of the marriage, equity will shut the door to court's jurisdiction if a party controverting and denying a marriage has lain in dormancy for years and when third party rights like those of the children have intervened, a court should be slow to entertain an effort to deprive a relationship of legal origin.

The registration of the valid Muslim marriage effected by the registrar will also attract the presumption enshrined in illustration (d) of Section 114 of the Evidence Ordinance which states that *judicial and official acts have been regularly performed.*

The second marriage under General Marriage Ordinance

It is manifest upon a perusal of the record that having entered into a valid Muslim marriage on 06th February 1989, *almost 5 days later* on 11th February 1989 both Fazal Mahmood Mushin and Priyanganie Sunimala Anokha Jayawardhana registered their marriage under the Marriage Registration Ordinance. On the same day as the registration of the 2nd marriage under the Marriage Registration Ordinance, the marriage was re-registered under Archdiocese of Colombo at St. Theresa's church, *Thimbirigasyaya.*

These certificates pertaining to the 2nd marriage are all available on the record and it was the contention of Mr. Razik Zarook, PC that it is this subsequent marriage that is valid in law. I have already held that there exists a valid Muslim law marriage between the parties. If the same parties marry again under a different system of law, what consequences do follow? Can they change their marital regime so soon after the first marriage?

I would think that ***Natalie Abeysundere v. Christopher Abeysundere and another*** (1998) 1 Sri.LR 185 has already settled this question in this country. The Supreme Court decision lays down the proposition that if the first marriage is under one system of law, the marriage must first be dissolved under that system of law and it is only thereafter that parties can contract a 2nd marriage under a different system of law. In fact, the divisional bench of 5 Judges of the Supreme Court drew in aid the principles laid down in the Indian case of ***Sarla Mudgal v. Union of India*** (1995) 3 SCC 635(1995) SUPP 1 S.CR 250 wherein Justice Kuldip Singh made a very pertinent observation:-

> *"Marriage is the very foundation of the civilized society. The relation once formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilization can exist."*

Though there are factual differences between the cases of ***Natalie Abeysundere v. Christopher Abeysundere*** *(supra)* and the instant case before me, I would respectfully adopt as the general proposition that once rights and liabilities accrue under one system of law upon marriage, these rights and liabilities must be terminated upon a dissolution of the 1st marriage or death and it is only thereafter that the second marriage under a different system of law can be contracted.

Unless this has happened, a 2nd marriage of a Muslim husband, without having his first marriage dissolved under the applicable law pertaining to the first marriage, would be invalid, if he were to choose another regime to contract the second marriage. In the case of ***Katchi Mohamed v Benedict*** 63 N.L.R 505, a man professing Islam at the time of his first marriage married a second time under the Marriage Registration Ordinance, while his first Muslim marriage was in existence. He was charged for bigamy upon his marrying a Roman Catholic lady after himself going through a ceremony of conversion at St. John's Church, Mutwal, about two months before his marriage. All three judges of the Divisional Court (Basnayake, C.J, Gunasekara, J. and T.S. Fernando, J.) came to the conclusion that having regard to the evidence led in the case the prior Muslim marriage was yet subsisting at the time of the 2nd marriage. T.S. Fernando, J. drew attention to Section 18 of the Marriage Registration Ordinance which enacted *"no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall have been legally dissolved or declared void"*. The learned judge poignantly pointed out that the expression "marriage" which occurs twice in section 18 does not bear the same meaning in each instance. What is, in section 18, declared not to be valid is a "marriage" as defined in section 64; but a marriage in the expression "a prior marriage" in the same section 18 is, in his opinion, not limited to a marriage as defined in section 64, and the context requires that it be given its ordinary and natural meaning and interpreted as denoting any legally recognized marriage. Interpreting the expression "a prior marriage" in Section 18 *inpari materia*, E.H.T. Gunasekara, J. too opined that the term must be understood to mean any marriage and not any marriage except a Kandyan or Muslim marriage.

In other words the expression "a prior marriage" would mean any marriage which includes a Muslim marriage. If this prior marriage is not annulled or terminated, the 2nd marriage would be invalid by virtue of Section 18 of the Marriage Registration Ordinance. I am fortified in this approach by the opinions of the three learned Lordships who decided ***Katchi Mohamed v Benedict*** *(supra)*. The prior marriage of the Appellant and the Respondent was contracted under Muslim law. This marriage had to be legally dissolved or declared void before either contracted a 2nd marriage under the General Marriage Ordinance. It makes no difference that the couple who got spliced in the first marriage are the same two persons who purported to marry a second time. The 2nd marriage would be invalid if the first marriage remains intact. ***Katchi Mohamed*** also lends support to the principles that emanated from the Supreme Court in ***Natalie Abeysundere v. Christopher Abeysundere*** *(supra)*.

Apostasy

Does a Muslim male commit apostasy when he goes through a conversion ceremony? In fact in ***Katchi Mohamed v Benedict*** *(supra)*, the Supreme Court was invited by the Attorney-General to consider whether under Muslim law a marriage was automatically dissolved by apostasy. The Supreme Court declined to go into the issue of apostasy as the accused had maintained the stance at the trial and the appellate proceedings that he had never abandoned the Islamic faith although he had gone through the conversion ceremony with a view to changing his name and marrying the Roman Catholic woman. In the matrix of this analysis the 2nd marriage of the Appellant and Respondent under the General Marriage Ordinance would have no impact whatsoever on their 1st Muslim marriage, as the first Muslim marriage continued to remain valid and *ipso facto* the second marriage was void.

Nullity

Mr. Razik Zarook, P.C also advanced arguments based on nullity of the first marriage.

Section 47(1)(i) of the Muslim Marriage and Divorce Act empowers a Quazi to inquire into and adjudicate upon any application for a declaration of nullity either by a husband

or by a wife. In my view the allegation that the Appellant did not become a Muslim does not invalidate her marriage with the Respondent *ab initio*. On the contrary the argument based on nullity engaged the question of legal impediments to marriage and none of the complaints of the Appellant would amount to those permanent impediments that render a marriage void *ab initio* in Muslim law. Those permanent impediments that go to nullify a Muslim marriage are:-

1. polyandry
2. consanguinity
3. affinity
4. fosterage
5. marriage with infidel man
6. marriage with infidel woman
7. Unlawful conjunction
8. Marriage during *Iddat*
9. Marriage during *Ihram*
10. *Talaq*

The impediments (1), (2), (3), (4) and (5) above are regarded by all jurists as capable of rendering the marriage void *ab initio*. The MMDA sets out some of these impediments in sections 80 (1) and (2) of the said Act. I need not go into these grounds as the Muslim marriage between the Appellant and Respondent is not tainted by any of the legal impediments enumerated above. The only nullity or annullability that was complained of by the Appellant was due to the vitiating factor of *non est factum* in regard to the signing of the marriage register, which I have shown not to arise upon the facts as alleged by the Appellant. Even her allegations of mistake or fraud are, if at all, so belated that there has been acquiescence by silence. ***L'Estrange*** rule too will put paid to the pleas of mistake or fraud and a delay of 23 years defeats equitable relief. In any event notwithstanding non-registration the Muslim marriage between a Muslim male and a *Kitabia* gains validity and such a marriage between the Appellant and Respondent has subsisted for such a long

length of time that children too have acquired rights under the consequences supervening upon the marriage.

Before I part with this judgment, I would observe that any revision of Muslim Marriage and Divorce Act should take cognizance of the marriages contracted between Muslim males and *Kitabia*s as well and statutory provisions incorporating these types of marriages should be enacted specifically to deal with these marriages.

Finally there remains a valid Muslim marriage whose dissolution should lie within the domain of a Quazi. By a narrow interpretation of section 2 of MMDA, the jurisdiction to invoke the jurisdiction of the Quazi in regard to divorce or dissolution of this marriage cannot be denied to Quazi courts. Section 98 (2) of the MMDA enacts:

> *"It is hereby further declared that in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect to which the parties belong."*

The Muslim marriage certificate denotes the Appellant as having embraced the *Hanaffi* sect, which she has consistently denied. I have taken the view that the long delay in giving vent to the denial of this particular status deprives her of invoking equity and estoppel would operate against her from leading any evidence on this aspect. In any event the question of conversion is irrelevant as there exists between the contending parties a valid Muslim marriage sans conversion. In such a situation the Quazi must enjoy the jurisdiction to entertain the application for a divorce. If one acknowledges that the Appellant remains a Catholic and the Respondent a Muslim, then section 2 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 creates a legal fiction that the Appellant shall be taken to be of the same race and nationality as her husband for matrimonial rights and in the event one utilizes the rule in Section 2, then it would boil down that the Quazi would decide the question of divorce by applying the sect law to which the Respondent husband belongs.

Curious as they are as the plethora of issues that have surfaced in the case but yet on the question of divorce that the parties to this case have been agitating for and against, I

think it appropriate to refer to one of the verses of the Holy *Quran*-the primary source of Muslim law, which is *Sura* IV (*Sura Nisa*) verse 35. It reads:-

> *"If ye fear a breach*
> *Between them twain,*
> *Appoint two arbiters*
> *One from his family,*
> *And the other from hers;*
> *If they wish for peace,*
> *God will cause*
> *Their reconciliation:*
> *For God hath full knowledge,*
> *And is acquainted*
> *With all things."*

From the verse quoted above, it appears that there is a condition precedent which must be complied with before the *talaq* (divorce) is effected. The condition precedent is that when the relationship between the husband and wife is strained and the husband intends to give '*talaq*' to his wife there must be an arbiter each from his side and that of the wife and the arbiters must attempt at reconciliation, with a time gap so that the passions of the parties may cool down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to pronounce '*talaq*'. The '*talaq*' must be for good cause and must not be the mere desire, sweet will, whim and caprice of the husband. It must not be secret.

Maulana Mohammad Ali, an eminent Muslim jurist, in his *Religion of Islam*, after referring to, and considering, the relevant verses on the subject has observed:-

> *"From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."*

I certainly take the view that women married under Muslim law do not stand in constant peril of instant divorce and the law governing divorce as stipulated in the sources must be stringently followed by Quazis.

Having given my anxious consideration to all the issues arising in this case, I set aside the order of the learned Quazi dated 16.02.2013 wherein he had declined jurisdiction and affirm the judgment of the Board of Quazis dated 14th May 2016. Accordingly I proceed to dismiss the appeal of the Appellant and direct the learned Quazi to entertain the application of the Respondent for a *Talaq* and dispose of it according to law.

JUDGE OF THE COURT OF APPEAL