

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

In the matter of an Application for Leave to Appeal under Section 62(1) of the Muslim Marriage and Divorce Act No. 13 of 1951 from an Order of the Board of Quazis dated 12/10/2024.

**Court of Appeal Case No.**

**LTA/0016/2024**

**Ahamed Mubarak Ali Mohamed  
Azran,**  
No. 12, Moors Road,  
Dehiwela.

Presently in  
No. 28, Albert Place,  
Dehiwela.

**Respondent-Appellant-Petitioner**

**Vs.**

**Fathima Nusrath Fareez,**  
No. 31, Nelson Place,  
Colombo-06.

**Applicant-Respondent-Respondent**

Before: **M. T. MOHAMMED LAFFAR, J.**  
**P. KUMARARATNAM, J.**

Counsel: Safana Gul Begam for the Petitioner.  
Nasreen Naushadh for the Respondents.

Supported on: 25.11.2024  
Decided on: 17.01.2025

**MOHAMMED LAFFAR, J.**

The Petitioner (Husband) is seeking leave to appeal from the Order of the Board of Quazis dated 12/10/2024 in case bearing No. BQ/44/21/A/CMB. We heard the learned Counsel for the Petitioner in support of this application. We heard the learned Counsel for the Respondent as well.

The Petitioner married the Respondent on 10/01/2020 under and in terms of the Muslim Marriage and Divorce Act No. 13 of 1951 (as amended). There are no children to the parties by this marriage. Since there were matrimonial disputes between the Petitioner and the Respondent (wife), the Respondent, in terms of section 28(1) of the said Act made an application before the Quazi of Colombo South for *Fasah* divorce upon certain allegations against the Petitioner. After inquiry, the said Quazi on 10/11/2021 granted divorce to the Respondent against the Petitioner. Being aggrieved by that Order, the Petitioner preferred an appeal to the Board of Quazis. Having heard the appeal, the Board of Quazis in its Order dated 12/10/2024 dismissed the appeal. It is against that Order, that the Petitioner is seeking leave to appeal.

Having heard the submissions of both Counsel, it has transpired that the grounds of appeal relied upon by the Petitioner are, *inter alia*, as follows.

1. In an application filed under Section. 28(1) of the said Act, is it mandatory to adhere to the rules set out in the 3<sup>rd</sup> schedule of the said Act?
2. Whether the Quazi of Colombo South, in the course of the inquiry pertaining to the matter in hand, had obtained the assistance of assessors in accordance with Rule 7 of the 3<sup>rd</sup> schedule to the said Act.

The learned Counsel for the Respondent contended that in an application under Section 28 of the said Act, adhering to the rules in the 3<sup>rd</sup> Schedule by the Quazi is not mandatory. The learned Counsel for the Respondent has relied upon the following judgments in order to substantiate her position.

- a. **Deen v Rauf 1997 2 SLR at page 253** (Ameer Ismail J)
- b. **Irshath v Asmiya CA/LA/03/2018**, Court of Appeal Minute dated 11/07/2019 (Mahinda Samyawardane J)

Having scrutinized the foregoing judgments, it appears to this Court that in **Deen v Rauf** the allegations leveled against the husband were not disputed by the husband's representative. In that scenario, Ameer Ismail J took up the position that the services of the assessors in terms of Rule 7 of the 3<sup>rd</sup> schedule are not compulsory. It is understood that when the allegations leveled against the husband are admitted or undisputed, the necessity does not arise to appoint assessors to assess the evidence adduced against the husband and/or to assist court to arrive at a final determination. As such, the determination in **Deen v Rauf** is purely based on the facts of that case.

Samayawardane J in **Irshath V Asmiya** enunciated that adhering to the rules set out in the 3<sup>rd</sup> schedule is not mandatory purely on the basis of the determination made by Ameer Ismail J in **Deen's case**.

It is abundantly clear that the facts of the aforesaid cases are very much devoid of the facts of the instant application. In these respects, I hold that the determinations of the aforesaid cases are not applicable to the facts of the case in hand.

In this application, the allegations leveled against the Petitioner are not admitted by the Petitioner, and therefore, those allegations are to be established in accordance with the rules set out in the 3<sup>rd</sup> Schedule.

In an application filed under section 28(1) of the said Act, the fault of the husband has to be established. As such, it is mandatory to adhere to the procedure set out in the 3<sup>rd</sup> schedule of the said Act. Section 28(1) is reproduced as follows;

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

In an inquiry, under Section 28(1) of the said Act read with Rule 07 of the 3<sup>rd</sup> Schedule, the Quazi shall empanel 3 Muslim assessors to assist him in the hearing of the Application. It is to be noted that the word "shall" is used in Section 28(1) and in Rule 7 of the 3<sup>rd</sup> schedule. Rule 7 of the 3<sup>rd</sup> schedule is re-produced as follows;

*"The Quazi shall then proceed, in the manner prescribed by regulations made under the Act, to empanel three Muslim assessors (hereinafter in this schedule referred to as "Muslim assessors) to assist him in the hearing of the application".*

In this scenario, it is abundantly clear that the intention of the legislature was that adhering to the rules set out in the 3<sup>rd</sup> schedule is mandatory in hearing applications under section 28(1) of this Act.

In those circumstances, this Court, without any ambiguities, holds that adhering to the rules set out in the 3<sup>rd</sup> schedule in hearing applications under Section 28(1) of the said Act is mandatory.

At this point it is to be ascertained whether the Quazi of Colombo South in the instant application had obtained the assistance of 3 Muslim assessors before making his order in terms of Rule 07 of the 3<sup>rd</sup> Schedule. It is borne out from the proceedings before the learned Quazi of Colombo South dated 21/04/2021, 20/05/2021, 05/08/2021, 21/10/2021, 10/11/2021 the learned Quazi had obtained assistance of three muslim assessors. Moreover, the report dated 21/10/2021 submitted by the assessors substantiates the fact that the assessors have discharged their duties within the purview of the provisions of the said Act. Having scrutinised the documents annexed along with the Petition, on the balance of probability it is well established before court that the learned Quazi has complied with Rule 07 of the 3<sup>rd</sup> Schedule of the said Act.

It is pertinent to be noted that under Section 114(d) of the evidence Ordinance where it is presumed that the judicial and official acts are regularly and properly performed. As such, it is the considered view of this Court that the learned Quazi of Colombo South has properly adhered to the aforesaid provisions of law.

In those circumstances, I am of the view that there is no basis for this Court to grant leave to appeal. Thus, the leave is refused and the application is dismissed without cost.

*Leave Refused. Application dismissed. No Costs.*

***JUDGE OF THE COURT OF APPEAL***

**P. KUMARARATNAM, J.**

*I Agree*

***JUDGE OF THE COURT OF APPEAL***