

**SHERIFF AND OTHERS**

**v.**

**JAMALDEEN**

COURT OF APPEAL.

DE SILVA, J.

WEERASURIYA, J.

CA 03/96.

WAKFS TRIBUNAL No. W/TRIB/66.

31<sup>ST</sup> JULY, 1998.

28<sup>TH</sup> SEPTEMBER, 1998.

*Muslim Mosques and Charitable Trusts Act (Wakfs Act), S.9E(3) S.29(1), S.39(1)(2) - Trustees seeking a declaration that they are vested with and entitled to the land - Certificate from Director - Whether it is mandatory?*

**Held :**

(i) The right of five or more persons to institute proceedings in the District Court in terms of S.39(1) or the right to institute proceedings in the Wakfs Tribunal in terms of S.29(1) and S.9E(2) is preceded by a condition that such plaint or application before the District Court or Wakfs Tribunal, as the case may be requires to be accompanied by a Certificate by the Director that such plaint or application as the case may be, has been approved by the Board.

(ii) It is a "Sine qua non" for persons interested in the trust or mosque to obtain a certificate from the Director, if they wish to invoke the jurisdiction of the District Court/Wakfs Tribunal.

*M. Markani with M.I.M. Jauffer* for Plaintiff Respondent.

*T.M. Abbas* for Defendant Respondent.

*Cur. adv. vult.*

December 11, 1998.

**WEERASURIYA, J.**

The 1st and 2<sup>nd</sup> plaintiff-appellants by plaint dated 25. 10. 94, claiming to be trustees of the Muslim charitable Trust or Wakf, established by Wakfs deed No. 3484 dated 16. 12. 43, attested by John Wilson, Notary Public, instituted

proceedings against the defendant-respondent seeking a declaration that they are vested with and entitled to all the land and premises bearing No. 28, Hulftsdorp Street, Colombo 12, morefully described in the schedule to the plaint, ejection of the defendant-respondent therefrom and damages. Thereafter, the plaint was amended by adding 3<sup>rd</sup>-5<sup>th</sup> plaintiff-appellants as presently constituted.

On 14. 10. 95, learned Counsel for the defendant-respondent raised a preliminary objection in regard to the maintainability of the plaint on the ground that a certificate as raised under Section 29 of the Muslim Charitable Trusts or Wakfs Act has not been attached to the plaint. Upon the application of the parties, Wakfs Tribunal allowed written submission to be tendered and the Tribunal by its order dated 29. 07. 95 upholding the objection raised by the defendant respondent, dismissed the application of the plaintiff-appellants. It is from the aforesaid order of the Tribunal that this appeal has been lodged.

At the hearing of this appeal, the case of the plaintiff-appellants was presented on the following basis namely:

- (a) that the Wakfs Tribunal has misdirected itself by holding that Section 39(2) compels the plaintiff-appellants to obtain a certificate from the Director;
- (b) that the Wakfs Tribunal has erred by holding that according to Section 9E(3) the certificate of the Director was a mandatory requirement.

The contention of learned Counsel for the plaintiff-appellants that the Wakfs Tribunal has misdirected itself on the applicability of Section 39(2) was based on the following grounds:

- (1) That section 39(2) would apply only to actions filed in the District Court.

- (2) That no section under Part V of the Act requires a certificate from the Director to accompany a plaint filed in the Wakfs Tribunal.
- (3) That provisions of section 29(1) and 29(7) as amended have no application to this case.

Section 39(1) of the Muslim Mosques and Charitable Trust or Wakfs Act as amended by Act No. 33 of 1982 deals with the power to institute action in the District Court of the district in which the whole or any part of the subject matter of the trust or wakf is situated to obtain a decree providing for both or either of the following namely:

- (a) enumerating the properties comprised in the trust or wakf; and
- (b) granting such relief as the circumstances of the case may require.

Section 39(2) however provides that no action other than action instituted by the Director shall be entertained by the District Court unless the plaint is accompanied by certificate under the hand of the Director that the action has been approved by the Board. In the circumstances, it is to be observed that Part V of the Act incorporating Sections 32-42 deal with matters relating to jurisdiction of District Court and matters relating thereto. It is manifest that provisions of Section 29(1) to Section 29(5) stipulate the conditions and the manner for suspension and removal of trustees by the Board for acts of misfeasance, breach of trust, neglect of duty or failure to comply with the provisions of the Act.

Further, Section 29(7) as amended prohibits any application to the Wakfs Tribunal other than by the Director to be entertained unless the same is accompanied by a certificate under the hand of the Director that the application has been approved by the Board. Thus, one is justified in asserting that these provisions have no relevance to the instant case.

Learned Counsel for the plaintiff-appellants contended that plaintiff-appellants base their case in terms of Section 9J and that a certificate from the Director is totally unnecessary. However, it is to be observed that Section 9J provides the Wakfs tribunal to have exclusive jurisdiction to inquire into matters relating to Muslim Charitable Trust or Wakfs as provided for by Section 9E(1). Nevertheless, one has to be mindful that Section 9E(1) encompasses an inclusive provision.

The Muslim Mosques and Charitable Trust or Wakfs Act as amended provide for the appointment of a Director and such number of Deputy Directors as may be necessary and a Board consisting of the Director and seven members appointed by the Minister.

It is convenient at this stage to consider the position the Director is placed with, in regard to the institution of proceedings in the District Court and Wakfs Tribunal.

Section 39(1) empowers the Director upon a direction given by the Board in that behalf in respect of a Muslim Charitable Trust or Wakf to institute action in the District Court to obtain relief as provided for in Section 39(1)(a) and (b).

Section 29(6) lays down that the Director upon direction issued by the Board in that behalf in respect of a registered mosque may as against a trustee of that mosque make an application to the Tribunal for an order seeking relief as provided for in Section 29(6)(a)-(d).

Section 9E(2) authorises the Director upon a direction given by the Board in that behalf to make an application in respect of a Muslim Charitable Trust or wakf to the Wakfs Tribunal for relief in terms of Section 9E(1)(a)-(i).

Nevertheless, it is relevant to note that any five or more persons interested in the Muslim Charitable Trust or Wakf have been given the option to institute proceedings, seeking relief in the District Court or Wakfs Tribunal as the case may

be. Thus, Section 39(1) permits any five persons interested in that trust or wakf to institute action to obtain a decree in terms of Section 39(1)(a) and (b). Section 29(1) lays down that any five persons interested in that mosque may as against a trustee of that mosque make an application to the Wakfs Tribunal for an order in terms of Section 29(1)(a)-(d). Further section 9E(2) permits any five or more persons interested in that trust or Wakf to make an application to the Walf's Tribunal seeking relief in terms of Section 9E(1)(a)-(I).

It is a remarkable feature of these sections that the right of five or more persons to institute proceedings in the District Court in terms of Section 39(1) or the right to institute proceedings in the Wakfs Tribunal in terms of Sections 29(1) and Section 9E(2) is preceded by a condition that such plaint or application before the District Court or the Wakfs tribunal as the case may require, be accompanied by a certificate by the Director that such plaint or application as the case may be, has been approved by the Board. In fact, in all these provisions, District Court or the Wakfs Tribunal is precluded from entertaining such plaint or application as the case may be unless the same is accompanied by a certificate from the Director. Thus, it is a *sine qua non* for persons interested in the trust or mosque to obtain a certificate from the Director if they wish to invoke the jurisdiction of the District Court or Wakfs Tribunal as the case may require.

Learned Counsel for the plaintiff-appellants contended that the requirement of issuing a certificate by the Director would amount to an inquiry held by the Tribunal of first instance and therefore contrary to the provisions of Section 9J. This contention of learned Counsel for the plaintiff-appellant is untenable for the reason that Section 9E(1) which provides for the general powers of the Tribunal and application for relief in terms of such powers are qualified by the provision of Section 9E(3) which imposes a mandatory requirement for an application other than by the Director, to be entertained by the Tribunal only where it is accompanied by a certificate from the Director that the application has been approved by the Board.

Therefore, I am unable to accede to the proposition of learned Counsel for the plaintiff-appellants that a certificate from the Director in matters relating to Muslim Charitable Trust or Wakf is totally unnecessary.

For the foregoing reasons. I dismiss this appeal with costs and affirm the order of the Wakfs Tribunal dated 29. 07. 95.

**J. A. N. DE SILVA J.** - I agree.

*Appeal dismissed.*