RAHUMAN AND TWO OTHERS
v
TRUSTEES OF THE MOHIDEEN JUMMA MOSQUE

COURT OF APPEAL
MARSOOF, P.C., J. P(C/A)
SRISKANDARAJAH, J.
C.A.L.A. 321/2003
WAKFS TRIBUNAL
APPL. WT/142/2002
AUGUST 26, 2004

Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956 amended by Act, No. 21 of 1962, 33 of 1982, section 4(2) section 15A (2), section 15A(4), section 15A (7) section 54, section 55 – Order to Wakf Tribunal appealable –

Does Revision lie? Appeal/or Leave to Appeal to the Court of Appeal? – Order or Judgment – Civil Procedure Code – Section 754 (2), 755, 756(1), 756(2) (3), (4), (5),)6), (7) section 758(1) of the Industrial Disputes Act – Section 39(2) – Compared – Constitution – Article 118 (g), 127, Art 128, Article 138(1), Muslim Marriages & Divorce Act, 13 of 1951 – section 43, section 44 – Ouster Clause in Wakfs Act. Interpretation Ordinance 21 of 1901 – Section 22 – Substantive power can it be enlarged by a Regulation ?

The respondent-respondent made an application to the Wakfs Board alleging that the Trustees – petitioner appellants – were mismanaging the Mosque property. The Wakfs Board made Order directing the petitioner-appellants to handover to the respondent-respondent the amount the said Trustee had recovered by the sale of Mosque land. The petitioner appellant did not appeal to the Wakfs Tribunal but lodged an application in Revision. The Tribunal held that, it has no powers of Revisionary Jurisdiction. The petitioner-appellant, thereafter moved the Court of Appeal by way of Leave, to appeal. It was contended that, it is a direct appeal that lies and that the Wakfs Tribunal does not have revisionary jurisdiction.

Held:

1) The Wakfs Tribunal has no jurisdiction to act in revision.

2) Every Order made by the Wakfs Tribunal is deemed to be an Order made by a District Court. The application by Leave to Appeal is not misconceived in law.

3) The Final and Conclusive clause would stand in the way of the Wakfs Tribunal reviewing the said impugned decision of the Wakfs Board - section 22 Interpretation Ordinance.

4) Any substantive power possessed by the Tribunal cannot be enlarged by a Regulation.

APPLICATION for Leave to Appeal.

Cases referred to:

1. *Ameer* v *Special Trustees – Davatagaha Mosque & Shrine* – 1999 –1 Sri LR 312.
2. *Halwan and others* v *Kaleelul and Rahuman* - 2000 - 3 Sri LR 50
3. *Dahlan* v *Maharoof* – 1 A1 - Ameen LR 1 (Colombo Grand Mosque case)
4. *Aalim* v *Fark* – 1 A1 - Ameen LR 117 (Thalapitiya Mosque case)
5. *K. Ram Banda* v *River Valleys Development Board* – 71 NLR 25.
6. *Ganeshanathan* v *Goonawardena* –1984 - 1 Sri LR 319.

Cur.adv.vult

October 5, 2004

SALEEM MARSOOF, PC. J(P/CA)

The respondent-respondents made the application dated 2nd February 2001 to the Wakfs Board alleging *inter alia* mismanagement of mosque property by the petitioner-appellants as the trustee of the Mohideen Jumma Mosque of Tillayady, Puttalam. They specifically alleged that the petitioner-appellants sold, without the approval of the Wakfs Board, a land belonging to the said mosque after sub -dividing it into separate blocks and appropriated the proceeds of the sale to their personal use. The Wakfs Board on receipt of this application issued notice on the petitioner-appellants calling for their explanations to the allegations made against them. Thereafter the Wakfs Board inquired into these allegations and found that a part of a land belonging to the mosque which was depicted in Plan No. 216 dated 26th June 1978 made by P. Thangavelu, Licenced Surveyor was divided into 37 lots and sold to various purchasers by the petitioner-appellants at the rate of Rs. 20,000/- per lot, the proceeds of which aggregated to Rs. 740,000/-

On 11th November 2001 the Wakfs Board made a decision in terms of Section 15A(2) of the Muslim Mosque and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Act No. 21of 1962 and Act No. 33 of 1982, to cause a notice in writing to be served on each of the petitioner-appellants in terms of that section directing them to handover within a period not exceeding one month as may be specified in the said notice the said sum of money to the respondent-respondents, who had been in the meantime appointed trustees of the said mosque by the Wakfs Board. The Wakfs Board further directed the Director for Mosques and Muslim Charitable Trusts or Wakfs to file a certificate in the Magistrate's Court of Puttalam in terms of section 15A(4) of the Act in Form XIII in Schedule B of the Muslim Mosques and Charitable Trusts and Wakfs Regulations of 1982, with a view of recovering the said sum of Rs. 740,000/-from the petitioner-appellants in the event they failed to hand over the said sum of money in terms of the notice served on them under section 15A (2) of the Act. The said regulations have been made by the Minister of Muslim Affairs under section 54 of the Muslim Mosques and Charitable Trusts or Wakfs Act and published in the Gazette Extraordinary bearing No. 342/8 of 29th March 1985.

It is expressly provided in section 15A (7) of the Muslim Mosques and Charitable Trusts or Wakfs Act that "a decision of the Board under subsection (2) shall be final and conclusive and shall not be called in question in any court." In my opinion, this provision may not have precluded the petitioner-appellants, if they so desired, from appealing from the said decision of the Wakfs Board dated 11th November 2001 to the Wakfs Tribunal, as in terms of section 9H (1) of the Muslim Mosques and Charitable Trusts or Wakfs Act "any person aggrieved by any order or decision made by the Board may within thirty days of such order or decision appeal in writing to the Tribunal against such order or decision." However, the petitioner-appellants did not in fact lodge any appeal against the said decision of the Wakfs Board, and since they failed to pay any money in pursuance of the aforesaid decision of the Wakfs Board, the Director for Mosques and Muslim Charitable Trusts or Wakfs initiated enforcement proceedings in the Magistrate's Court of Puttalam by filing a certificate in terms of section 15A (4) of the Act. When this matter was pending in the Magistrate's Court of Puttalam, the petitioner-appellants purported to file an application dated 18th November 2002 in the Wakfs Tribunal described as a revision application, seeking *inter alia* to set aside the order made by the Wakfs Board on 11th November 2001. At the hearing before the Wakfs Tribunal a preliminary objection was raised to the effect that under section 9 (H) of the Muslim Mosques and Charitable Trusts or Wakfs Act the Wakfs Tribunal has only an appellate jurisdiction but since it has no revisionary jurisdiction the application of the petitioner-appellants should be dismissed *in limine*.

Before taking up the matter for hearing, the Wakfs Tribunal made order calling for the record of the case from the Walks Board but the Board refused to send the record to the Tribunal stating that the Wakfs Board has made its order under section 15A(2) of the Muslim Mosques and Charitable Trusts or Wakfs Act and that in terms of Section 15A(7) of the Act it was not an 'appealable order'. This compelled the Wakfs Tribunal to make its order based on the material supplied by the petitioner-appellants in their application and without the benefit of perusing the record maintained by the Wakfs Board. The Wakfs Tribunal by its order dated 2nd August 2003 upheld the preliminary objection and dismissed the application

of the petitioner-appellants. In the said order the Wakfs Tribunal has traced the background to this case and having considered several authorities reached the conclusion that the Wakfs Tribunal has no revisionary jurisdiction.

The petitioner-appellants have filed this application in the Court of Appeal on 19th August 2003 seeking leave to appeal from the said order of the Wakfs Tribunal dated 2nd August 2003. It is submitted on behalf of the respondent-respondents that this application for leave to appeal is misconceived in law in as much as a final order of the Wakfs Tribunal attracts a direct appeal to the Court of Appeal under section 55A of the Muslim Mosques and Charitable Trusts or Wakfs Act, and there is no provision in the Act for filing a leave to appeal application. Section 55A of the Act is quoted below:-

> "Every order made by the Tribunal shall be deemed to be an order made by a District Court and the provisions of the Civil Procedure Code governing appeals from orders and judgments of a District Court shall, *Mutatis mutandis,* apply to and in relation to appeals from orders of the Tribunal."

The above provision was considered by this Court in *Ameer* v *Special Trustees-Devatagaha Mosque and Shrine*(1). In that case the appellants filed a direct appeal from an order of the Wakfs Tribunal and the respondents raised a preliminary objection and contended that a direct appeal does not lie and that the proper remedy was by way of leave to appeal. The respondents relied on Regulation 37 of the Muslim Mosques and Charitable Trusts and Wakfs Regulations of 1982, which reads as follows:-

> "Any party aggrieved by any final order made by the Wakfs Tribunal may apply by petition to the Court of Appeal for leave to appeal against any such order and shall give to the other party to the appeal notice of such application as may be provided for by the Civil Procedure Code."

The Court of Appeal noted that in terms of section 54 (4) of the Muslim Mosques and Charitable Trusts or Wakfs Act, every regulation made by the Minister should as soon as convenient after publication in the Gazette be brought before Parliament for approval, and that upon such approval such regulation acquires the

same force and effect as a provision of the Act. Jayawickrama J. observed at page 316 of the judgment that "although these regulations were Gazetted, they were never brought before Parliament for approval ..... Thus, it is very clear that these regulations do not have any force or effect as they have not been approved by Parliament." His Lordship then went on to uphold the contention of the learned President's Counsel who appeared for the respondents in that case that as "the substantive Act itself provides a right of appeal under section 55A" regulations cannot be framed so as to take away such a right. His Lordship further observed as follows at pages 318 to 319 -

> "In the instant case, this appeal is not from an order made by the Wakfs Board or Wakfs Tribunal in the course of any action, proceeding or matter. This appeal emanates from an order which is the final expression of the decision of the Wakfs Tribunal. The order of the Wakfs Tribunal has the effect of a final judgment in the instant case. In fact, the Wakfs Tribunal at page 44 of the brief states that it is a "judgment of the Wakfs Tribunal in case No. W/TRIB/76 Dewatagaha Jumma Mosque and Shrine". The judgment consists of seven pages which is a statement given by the Wakfs Tribunal of the grounds for its order. Thus, it is very clear that this appeal had been preferred against a judgment in terms of section 754 (1) of the Civil Procedure Code .... I agree with the learned President's Counsel that in the present instance, since the order is final in nature a direct appeal has been correctly lodged as the order appealed from finally disposed of the matter and as such is a 'judgment'.

Learned Counsel for the respondent-respondents rely heavily on the decision of the Court of Appeal in this case, and submit that in the light of this decision of this Court in this case, the leave to appeal application filed by the petitioner-appellants is totally misconceived and should be dismissed *in limine.*

It is however necessary to observe that by 1st December 1998 when the decision of this Court in *Ameer v Special Trustees-Devatagaha Mosque and Shrine* (*supra*) was pronounced, the regulations in question had in fact been placed before Parliament and approved by Parliament on 14th September 1997.

Furthermore, section 55A of the Muslim Mosques and Charitable Trusts or Wakfs Act in the context of the regulations made under the Act was considered once again by the Court of Appeal in *Halwan and Others* v *Kaleelul Rahuman*(2). This was an application for the prerogative *writs of certiorari* and *mandamus* which was dismissed for non-disclosure of material facts and for making a false averment that the jurisdiction of the Court of Appeal had not been previously invoked. In fact, the petitioners had filed a leave to appeal application in the Court of Appeal on the same day they filed the writ application, and the application for leave to appeal having been submitted to a Judge as required by section 756(5) of the Civil Procedure Code and an order made that it should be supported in open court within two weeks, was pending at the time when the writ application was heard by this Court. The petitioners had also filed a notice of appeal in the Wakfs Tribunal from the order which was sought to be quashed, which notice had been rejected by the Tribunal because a petition of appeal had not been filed within a period of 60 days. It is apparent that the petitioners had recourse to the leave to appeal procedure as well as the direct appeal as they did not want to take any chances in view of the ambiguity in the language of section 54(4) of the Muslim Mosques and Charitable Trusts or Wakfs Act. His Lordship S.N.Silva, J. (as he then was) subjected section 54(4) of the Act to close scrutiny and concluded that the appropriate procedure is the leave to appeal procedure, and that there was no question of filing a direct appeal under the section. His Lordship observed at pages 55 to 56 of the judgment.

> "This section contains two main elements. The first is substantive in nature. It deems *every order* made by the Tribunal to be an *order* made by a District Court. This will attract the provisions of section 23 of he Judicature Act and a party dissatisfied with an *order* will have a right of appeal to this court. The second element is procedural in nature and it states that the provisions of the Civil Procedure Code "shall *mutatis mutandis* apply to and in relation to *orders* of the Tribunal."
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> The submission of learned President's Counsel for the petitioners is that the words preceding the foregoing words that refer to the "the provisions of the Civil Procedure Code

governing appeals from orders and judgments of a District Court" have the effect of introducing provisions in relation to both types of appeals, namely, appeals from judgment and appeals form orders as found in the Civil Procedure Code. This submission ignores the basic division in the content of the section.The substantive element deems every order of the Tribunal to be an order of a District Court. the procedural element cannot have the effect of introducing both appellate procedures with regard to orders of a Tribunal. Statutory provisions should be interpreted so as to remove possible ambiguity and not to introduce or advance an ambiguity. The words relied upon by learned President's Counsel should be considered in the light of the provisions of the Civil Procedure Code that are made applicable and in the context of the remaining portions of the section and not in isolation.

On an examination of the provisions of the Civil Procedure Code with regard to appeals it is seen that section 754(2) and sections 756 (2), (3), (4), (5), (6), and (7) apply exclusively in relation to applications for leave to appeal from orders of an original court. Sections 754 (1), (3) and (4) 755, 756 (1) and 757 apply exclusively in relation to appeals from judgments of the original court. The other provisions are applicable in relation to both types of appeals. For instance, section 758 (1) with regard to the contents of a petition is applicable to both types of appeals. The provisions from section 765 to 767 with regard to appeals notwithstanding lapse of time apply to both types of appeals. Similarly the provisions with regard to hearing of appeals in Chapter 61 are applicable to both types of appeals. These provisions are thus applicable to orders and judgments of an original court.

The effect of the words "*mutatis mutandis*" appearing in section 55A and referred to above is to make the relevant provisions of the Civil Procedure Code applicable with due alteration of detail. What is relevant has to be determined by the substantive element of the section which deems every order of the Tribunal to be an order of the District Court. Therefore the provisions of the Civil Procedure Code that relate exclusively to appeals from any order of an original court and the common

provisions with regard to appeals from any order and any judgement of such court, will apply *mutatis mutandis*, to and in relation to an appeal from an order of the Tribunal."

I am inclined to agree with the reasoning adopted by this Court in *Halwan and Others* v *Kaleelul Rahuman* as it is manifest from section 55A that every order made by the Wakfs Tribunal is deemed to be an *order* made (as opposed to a *judgment* pronounced) by a District Court, and I find that the said reasoning is also consistent with Regulation 37. I therefore hold that the procedure adopted in this case by the petitioner-appellants for the making of his appeal is correct, and that the application filed by them is not misconceived in law.

The petitioner-appellants seek leave to appeal from this Court against the order of he Wakfs Tribunal dated 2nd August 2003 dismissing the application filed by them with a view of revising the order of the Wakfs Board dated 11th November 2001 on the ground that the Wakfs Tribunal has only an appellate jurisdiction under section 9(H)(1) of the Muslim Mosques and Charitable Trusts or Wakfs Act,and that it had no revisionary jurisdiction. The Wakfs Tribunal has in its order referred to two earlier decisions to the same effect in *Dahlan* v *Mahroof* [3] (Colombo Grand Mosque case) and *Aalim* v *Faik* [4] (Thalapitiya Mosque case). In these cases the Wakfs Tribunal was invited to exercise powers in revision on the basis that regulation 44(1) of the Muslim Mosques and Charitable Trusts and Wakfs regulations of 1982 expressly recognizes the revisionary jurisdiction of the Wakfs Tribunal. Regulation 44(1) is quoted below:-

"Enforcement – (1) Any order of the Tribunal in Appeal or *by way of Revision* or any order of the Board relating to the recovery of any movable or immovable property shall, in the first instance be executed in the manner provided for , by and under section 15A of the Act and he sub-sections thereto." (Italics added).

Learned Counsel for the petitioner-appellants relied heavily on the aforesaid regulation to buttress the argument that the Wakfs Tribunal was possessed of a revisionary jurisdiction. Learned Counsel for the respondent-respondent submitted that there is no

provision in the Muslim Mosques and Charitable Trusts or Wakfs Act whch has sought to confer on the Wakfs Tribunal a revisionary jurisdiction. When faced with similar arguments in *Dahlan* v *Mahroof* (Colombo Grand Mosque case) the Wakfs Tribunal observed in the course of its order in that case that "any substantive power possessed by the Tribunal cannot be enlarged by a regulation, because that would be *ultra vires* the Act" (*Dahlan's* case (*supra*) at 3 to 4). I am in total agreeement with the aforesaid proposition of law.

Learned Counsel for the petitioner-appellant has emphasized that the Mulsim Mosques and Charitable Trusts and Wakfs regulations of 1982, and in particular regulation 44(1) thereof, has been approved by Parliament on 14th September 1997 as envisaged by section 54(4) of the Muslim Mosques and Charitable Trusts or Wakfs Act, and that as provided expressly in the aforesaid section, upon such approval the said regulations "shall have the same force and effect as a provision of this Act."Although Learned Counsel for the petitioner-appellants sought to cure the invalidity of the regulation in question in this manner, I cannot accede to the proposition that any subordinate legislation enacted in excess of powers conferred by an Act of Parliament can be given legal validity through the process of subsequent adoption by Parliament. As Weeramantry, J. observed in *K. Rambanda* v *River Valleys Development Board* (5) at 37 and 38, in the context of certain regulations placed before Parliament and approved by it in terms of section 39(2) of the Industrial Disputes Act–

> "It is indeed the undoubted right of a member to voice his opposition to any regulation proposed, but it is doubtful that such a regulation can obtain the same full consideration as that given to a bill. Hence while in theory Parliament still reigns as the supreme law giver, a large volume of the law by which the subject is governed can well be passed into form not by the power of Parliament considered will but by the drive of executive urgency.
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> Against such a background, to view section 39(2) as a cloak of validity which may be thrown around rules which in fact are *ultra vires* would be to erode rather than protect the supreme authority of Parliament. Regulations clearly outside the scope

of the enabling powers and passing unnoticed in the heat and pressure of parliamentary business may then survive unquestioned and unquestionable; and functionaries manifestly exceeding their powers would thereby be able to arrogate to themselves a *de facto* legislative authority which *de jure* belongs to Parliament alone. For the foregoing reasons I cannot subscribe to the view that the mere passage of a regulation through Parliament gives it the *imprimature* of the legislature in such a way as to remove it from the purview of the courts through the operation of section 39(2)."

The Constitution of Sri Lanka has provided various safeguards including a system of pre-enactment judicial review with a view of strengthening the Sovereignty of the People and protecting their democratic rights. The suggestion that any subordinate legislation enacted in excess of powers conferred by an Act of Parliament can be given legal vlidity through the process of subsequent adoption by Parliament overlooks these Constitutional safeguards.

Article 138(1) of the Constitution of Sri Lanka provides that–

"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance,tribunal or other institution and sole and exclusive cognizance,by way of appeal, revision and *restitutio in integrum,* of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:"

In terms of the aforesaid Article, the Court of Appeal has *exclusive cognizance* by way of revision of all causes, suits, actions, prosecutions, matters and things of which any court of first instance, tribunal or other institution may have taken cognizance. It is clear from the opening words of Article 138(1) of the Constitution that a Court or Tribunal may be conferred a revisionary jurisdiction only by provision of the Constitution or of any other law. An example of a Constitutional conferment of revisionary jurisdidction is found in Article 154P (3) of the Constitution, whereby the High Court of the

Province has been given a revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts wiithin the Province. An example of a conferment of revisionary jurisdiction by an ordinary Act of Parliament is found in sections 43 and 44 of he Muslim Marriage and Divorce Act No. 13 of 1951, as subsequently amended, whereby the Board of Quazis has the power to revise orders made by Quazi Courts. It is however, not possible in view of Article 138(1) of the Constitution to confer a revisionary jurisdiction through subordinate legislation, and in particular where a regulation purported to have been made under a parent Act is found to be *ultra -vires* the provisions of the parent Act. This is so even if the Court invited to exercise revisionary jurisdiction is the apex Court in our judicial hierarchy. In *Ganeshanathan* v *Goonewardene*[6], the Supreme Court held that it had no power to act in revision. In that case, Ganeshanathan sought relief from the Supreme Court in the exercise of the revisionary and inherent powers of the Court. His complaint was that another Bench of the Court had, to his detriment, acted *per incuriam* for the several reasons set out in his application. Samarakoon, CJ referred to the various provisions of the Constitution conferring jurisdiction on the Supreme Court and observed as follows at pages 327 and 328 of his judgement–

> "None of the provisions expressly conferring jurisdiction which I have cited above gave this Court a jurisdiction to revise its own decisions. Nor has the Legislature acting in terms of Article 118 (g) conferred such a jurisdiction by law.... I hold that this Supreme Court has no jurisdiction to act in revision in cases decided by Itself."

Justices Sharvananda, Wimalaratne, Colin Thome, and Wanasundara agreed with the decision of the Chief Justice and that Ganeshanathan's application should be refused as the Supreme Court did not enjoy a revisionary jurisdiction. Although Ranasinghe, J. and Rodrigo, J.dissented, they sought to grant relief prayed for by Ganeshanathan, not in the exercise of the revisionary jurisdiction of the Court, which was held by the majority of the Judges to be non-exisent, but in the exercise of the Court's extraordinary inherent jurisdiction. In regard to the revisionary jurisdiction of the Supreme

Court, Ranasinghe, J. commented at page 357 of his judgement that–

> "The Supreme Court, as constituted under the 1978 Constitution is not vested with the revisionary powers as exercised by the Supreme Court under the Courts Ordinance. The Supreme Court's Appellate jurisdiction is set out in Articles 127 and 128 of the 1978 Constitution. The jurisdiction of the Court of Appeal is set out in Article 138 of the 1978 Constitution and this Article confers on the Court of Appeal "sole and exclusive cognizance, by way of appeal,revision and *resitutio in integrum* of all causes,suits, actions, prosecutions,matters and things of which such court of First Instance, Tribunal or other institution may have taken cognizance".

It is therefore manifest that the Wakfs Tribunal has no jurisdiction to act in revision,and that the Tribunal acted properly in refusing to exercise jurisdiction in this case.

While the above reasons are sufficient to conclude this matter, I wish to observe that in this case the petitioner-appellants were seeking to set aside an order made by the Wakfs Board under section 15A(2) of the Muslim Mosques and Charitable Trusts or Wakfs Act which is declared in section 15A(7) of the said Act to be "final and conclusive". While this provision may not have precluded the petitioner-appellants, if they so desired, from appealing from the said order to the Wakfs Tribunal under section 9H(1) of the Act, it would certainly stand in the way of the Wakfs Tribunal reviewing the said impugned decision of the Wakfs Board, particularly in view of section 22 of the Interpretation Ordinance, No.21 of 1901, as subsequently amended. Furthermore, the petitioner-appellants have filed this application in the Wakfs Tribunal after the lapse of a period of more than one year from the date of the order of the Wakfs Board without giving any explanation regarding their failure to appeal against the order in question.

For the foregoing reasons, Court refuses leave to appeal and dismisses the application. There shall be no order for costs in all the circumstances of this case.

SRISKANDARAJAH, J. - I agree

Application dismissed.