

AMEER & OTHERS
(SPECIAL TRUSTEES DEVATAGAHA MOSQUE & SHRINE)
v.
SALIE AND OTHERS

COURT OF APPEAL

WIGNESWARAN, J.,

JAYAWICKREMA, J.

C.A. NO. 1/95.

WAKFS TRIBUNAL NO. W/TRIB/76.

WAKFS BOARD NO. WB/2201/94.

AUGUST 17, 1998.

SEPTEMBER 18, 1998.

OCTOBER 14, 1998.

Muslim Mosques and Charitable Trusts Act – Wakfs Act – S. 9 (D) (G), s. 29 (1), s. 54 (3) (4) – s. 55, s. 55 (A) – Regulation 37 – Appeal from order of Wakfs Tribunal – Order or Judgment – Civil Procedure Code s. 754 (2) – Violation of principles of natural justice – Tribunal considering extraneous matters – Illegality – Tribunal acting in an arbitrary manner.

The appellants sought to canvass the Order of the Wakfs Tribunal which dismissed the appeal of the appellants. It was contended by the respondents (as a preliminary objection) that the proper procedure was by way of leave to appeal first had and obtained as required under s. 55 (A) of the Wakfs Act read with regulation 37 and s. 754 (2) of the Civil Procedure Code.

The appellants contended that the Tribunal has dealt with matters which were not the subject-matter of the Appeal, and granted reliefs not prayed for and therefore acted in excess of jurisdiction.

Held:

- (1) Section 54 (4) Wakfs Act state that every regulation shall as soon as convenient after publication in the *Gazette* be brought before Parliament for approval and upon such approval shall have the same force and effect as a provision of the Act.
- (2) It is clear that regulation 37 which lays down that any party aggrieved by any final order made by Wakfs Tribunal may apply by petition to the Court of Appeal for leave to appeal against such order . . . though Gazetted

was never brought before Parliament for approval. Therefore, regulation 37 has no application.

- (3) In any event regulation 37 is *ultra vires* the enabling Act. The substantive Act provides a right of appeal under s. 55 (A) and regulations cannot be framed in respect of a matter specifically provided for in this Act.
- (4) S. 754 (1) Civil Procedure Code is applicable to a judgment whereas s. 754 (2) is applicable to Orders made in the course of any Civil Action, proceeding or matter. The present appeal is not from an order made by the Wakfs Board/Tribunal in the course of any action, proceeding or matter. It emanates from an order which is the final expression of the decision of the Wakfs/Tribunal – therefore an appeal under s. 754 (1) CPC lies.
- (5) On a perusal of the proceedings of the Wakfs Board it is clear that they have not followed the procedure laid down in the Act.

The Wakfs Tribunal, in the appeal, had made orders regarding matters which were not appealed against, the Tribunal has considered extraneous matters, they acted beyond their jurisdiction.

APPEAL from the Order of the Wakfs Tribunal.

Cases referred to:

1. *Ganhewa v. Maginona* – [1989] 2 Sri L.R. 250.
2. *Siriwardena v. Air Ceylon Ltd.* – [1984] 1 Sri L.R. 286.

Faiz Mustapha, PC with Farook Thahir and A. A. M. Illiyas for respondents-appellants.

S. Kanagasingham for applicant-respondent.

Cur. adv. vult.

December 1, 1998.

JAYAWICKREMA, J.

This is an appeal from the order of the Wakfs Tribunal dated 12. 8. 1995 dismissing the appeal of the appellants.

The appellants sought to canvass the order of the Wakfs Tribunal on the following grounds:

- (a) The Tribunal had dealt with matters which were not subject-matters of the appeal:
- (b) It had acted on matters not in evidence and therefore the order is unsupported by evidence and made in violation of the principles of natural justice:
- (c) It had granted reliefs not prayed for and therefore acted without jurisdiction:
- (d) It had granted reliefs, which in any event, it had no jurisdiction to grant.

The respondents have raised two preliminary objections in regard to the maintainability of this appeal. The Court indicated that the main appeal will be heard and the ruling on the preliminary objections will also be dealt with in the main appeal.

The two preliminary objections raised by the counsel for the respondents were:

- (a) The appeal is not properly constituted and the parties were not properly before this Court in that they have failed to come by way of leave to appeal first had and obtained as required under section 55 (a) of the Muslim Mosques and Charitable Trusts or Wakfs Act read with regulation 37 passed under the said Act and published in *Gazette* No. 342/8 of 29th March, 1985 and also the relevant provisions of the Civil Procedure Code;
- (b) The brief is incomplete, in that certain material and relevant documents that were before the Wakfs Board and subsequently before the Wakfs Tribunal, the consideration of which had been the basis of the orders of the Wakfs Board and the Wakfs Tribunal, have not come into the appeal brief.

As regards the preliminary objection (b) as to the question of incompleteness of the brief, this Court before another Bench has ruled that of the said documents sought to be added only the following documents could be added to the brief:

- (1) Letter dated 09. 05. 1994;
- (2) Letter dated 23. 08. 1994; and
- (3) Letter dated 28. 10. 1994.

From that order, the respondents sought special leave to appeal from the Supreme Court, but leave was refused. Hence, this Court has to make an order only with regard to the first preliminary objection, that is, on the question of leave to appeal.

Learned counsel for the respondent submitted that the procedure for such appeal is spelt out in section 55 (A) of the Muslim Mosques and Charitable Trusts or Wakfs Act.

Section 55 (A) reads as follows:

"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."

Learned counsel further submitted that the said provision which must be observed in preferring an appeal from the orders of Wakfs Tribunal must be read necessarily with rule 37 of the regulations published in *Gazette* No. 342/8 of 20. 03. 1985 which are complementary to that section. It was admitted that these regulations have not been presented to Parliament for approval in terms of section 54 of the said Act, but the counsel argued that they are still in force and legally binding. But, on a reading of sections 54 (3) and (4) it

is very clear that these regulations have no force of law until they are brought before Parliament for approval.

Section 54 (3) states that –

"Every regulation made by the Minister shall be published in the *Gazette* and shall come into operation on the date of such publication or on such a later date as may be specified in the regulation."

Section 54 (4) provides thus:

"Every regulation shall as soon as convenient after publication in the *Gazette* be brought before Parliament for approval and upon such approval, shall have the same force and effect as a provision in this Act. Any regulation which is not so approved shall be deemed to be rescinded from the date of its disapproval but without prejudice to anything previously done thereunder."

Thus, it is abundantly clear that although these provisions were Gazetted, they were never brought before Parliament for approval. According to the above provisions, these regulations have the same force and effect as a provision in the Act only "upon such approval". Once the Parliament approves such regulations then it will be effective from the date of the publication in the *Gazette*. However, if they are not approved by Parliament, the regulations Gazetted shall be deemed to be rescinded. Thus, it is very clear that these regulations do not have any force or effect as they have not been approved by Parliament. Therefore, regulation 37 which states that "Any party aggrieved by final order made by the Wakfs Tribunal may apply by petition to the Court of Appeal for leave to appeal against 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", has no application to this appeal.

As regards this preliminary objection, the learned President's Counsel for the appellants submitted that regulation 37 limits the right of appeal only to final orders made by the Wakfs Tribunal and this is in the teeth of section 55A which grants the right of appeal in respect of "Every order made by the Wakfs Tribunal" and makes the appellate provisions apply *mutatis mutandis*. He further contended that section 54 (1) and (2) enables regulations to be made in respect of matters "authorised or required by the Act to be prescribed". Learned President's Counsel further submitted that in the present instance, the substantive Act itself provides a right of appeal under section 55A and regulations cannot be framed in respect of a matter specifically provided for in the very Act, and cited *Gamhewa v. Maginona and Another*⁽¹⁾ where it was held that a right of appeal must be expressly conferred and cannot be implied. In *Gamhewa's* case it was held that the regulation which purported to create a right of appeal was *ultra vires* the enabling powers of the Minister. I agree with the learned President's Counsel's contention that in the present instance also, regulation 37 is similarly *ultra vires* the enabling Act. Section 55 (A) of the main Act expressly deals with the right of appeal. Moreover, the regulations have not been placed before Parliament and as such they do not have the force of law.

Learned counsel for the respondents submitted that every order made by the Wakfs Tribunal is given the characteristic of an interlocutory order as envisaged by the relevant provisions of the Civil Procedure Code by section 55 (A) of the Wakfs Act, where it is stated that "Every order made by the Tribunal shall be deemed to be an order made by a District Court". Learned counsel contended that the question will arise what is an order made by a District Court and the answer was found in section 754 (5) of the Civil Procedure Code which stated notwithstanding anything to the contrary in the Ordinance for the purposes of that chapter "judgment" meant any judgment or order having the effect of a final judgment made by any civil Court and an "order" meant final expression of any decision in any civil action, proceeding or matter which was not a judgment. The learned counsel argued that the appellants were required to follow the procedure laid

down in section 754 (2) regarding interlocutory appeals and obtain leave from this Court to appeal and this has not been followed in this case. Such failure he said was fatal.

Section 754 (5) defines the words "judgment" and "order" in the following terms: "judgment" means any judgment or order having the effect of a final judgment made by any civil Court: and "order" means the final expression of any decision in any civil action, proceeding or matter which is not a judgment.

Further, section 5 of the Civil Procedure Code which is the interpretation section defines the words "judgment" and "order" in the following terms:

"Judgment" means the statement given by the Judge of the grounds of decree or order; "order" means the formal expression of any decision of a civil Court which is not a decree.

Learned counsel for the respondents attempted to make a distinction between the provisions of sections 754 (1) and (2) of the Civil Procedure Code. Under section 754 (1) any person who shall be dissatisfied with any judgment may prefer an appeal to the Court of Appeal whereas under section 754 (2) any person who shall be dissatisfied with any order made by any original Court "in the course of any civil action, proceeding, or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained". It is very clear from the above provisions that section 754 (1) is applicable to a judgment whereas section 754 (2) is applicable to orders made in the course of any civil action, proceeding or matter to which a person is or seeks to be a party.

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.

The learned President's counsel for the appellants submitted that section 55A of the Wakfs Act catches up both "orders" and "judgments" and by virtue of this a final appeal would be attracted in respect of a judgment or final order, whereas, an interlocutory appeal would lie in respect of an order which is not a final order or judgment. 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". (*vide Siriwardena v. Air Ceylon Ltd.*)⁽²⁾

In view of the above reasons, I overrule the preliminary objections raised by the respondents.

The appellants sought to canvass the order of the Wakfs Tribunal on the following grounds:

- (a) The Tribunal has dealt with the matters which were not the subject-matter of the appeal.
- (b) It has acted on matters not in evidence and therefore the order is unsupported by evidence and made in violation of the principles of natural justice.
- (c) It has granted reliefs not prayed for and therefore acted without jurisdiction.

- (d) It has granted reliefs which in any event it has no jurisdiction to grant.

The relevant facts resulting in the order of the Wakfs Tribunal as stated by the appellants are as follows:

- (a) The appellants who are the Trustees of the Mosque received a letter dated 06. 12. 1994 (P1) from the Secretary of the Wakfs Board directing that two lists of names said to have been submitted by an association calling itself "the Devatagaha Jumma Mosque & Shrine Jamaath Association" be posted on the Mosque Notice Board for registration as members of Jamaath of the Mosque.
- (b) Attached to the letter P1 were certain decisions of the Board dated 24. 09. 1994, and 30. 10. 1994 from which the Trustees became aware that certain *ex parte* orders had been made by the Board directing the registration of these persons as members of the Jamaath.
- (c) On receipt of the said letter the Trustees appeared before the Wakfs Board on 11. 12. 1994 and submitted through counsel that the two lists had been submitted by an association of which they were totally unaware and which had no connection with the Mosque and that the order had been made *ex parte* and in violation of the principles of natural justice. The Wakfs' Board thereupon made order that "until this matter is inquired into, the action requested by letter dated 06. 12. 1994 is withdrawn" and allowed objections to be filed on or before 08. 01. 1995.
- (d) The Trustees filed objections on 08. 01. 1995 as directed by the Board, objecting to the registration of those persons as members of the Jamaath.

The learned President's counsel for the appellants submitted that the Wakfs' Board made order on 28. 01. 1995 without holding an inquiry. He further submitted that this is clear from the order itself which begins as follows: "the Wakfs Board went through the statement of objections the special trustees submitted on 08. 01. 1995". He contended that the Board only "went through the objections" and did not grant an opportunity to the Trustees to be heard in support of the objections. He further submitted that the Board went on to make order directing the Trustees to prepare a constitution for Devatagaha Jumma Mosque and to carry out the condition of constitution and prepare a Jamaath list accordingly taking into consideration the residents of certain specified areas. The learned President's counsel further contended that the matter in issue was only the registration of the persons referred to in the letter dated 06. 12. 1994 as members of the congregation and that the preparation of a constitution together with a new list of the congregation in accordance with the new constitution was not a matter that was before the Wakfs Board and as such the order is completely outside the matter in issue before the Wakfs Board. The learned President's counsel alleged that the order had been made without granting a hearing to the appellants and that the finding that the Mosque did not belong to the Nakshabandiya Sect was unsupported by evidence. Therefore, he contended that the only issue which went before the Wakfs Tribunal was whether the Board had acted in violation of the principles of natural justice by not giving a hearing and permitting the evidence to be led.

When the appeal came up for hearing before the Wakfs Tribunal all the parties were represented by counsel. The Tribunal made order on 12. 08. 1995 as follows:

- (i) That the respondents had alleged corruption and mis-management on the part of the appellants and that there was "thuggery, corruption and misappropriation of funds".
- (ii) That the Board had correctly held that the Mosque did not belong to Nakshabandiya or to any other Sect.

- (iii) The Wakfs Tribunal upheld the order of the Wakfs Board and went to make further orders as follows:
- (1) Directing "the Wakfs Board to take steps forthwith to prepare a constitution in consultation with the Jamaath the list of which is already prepared by the Wakfs' Board".
 - (2) Directing "the Wakfs Board to convene a meeting of the said Jamaath and elect the Trustees".
 - (3) Directing "the Wakfs Board to take action against the appellants according to law and recover all monies due to the Mosque" and
 - (4) Directing "the Wakfs Board to consider the feasibility of replacing the Special Trustees immediately".

The learned President's Counsel for the appellants contended that the only issue before the Wakfs Board was the registration of certain persons referred to in the letter marked P1, as members of the Jamaath. The Wakfs Board clearly erred in making its order without any hearing at all and as such the only issue before the Wakfs Tribunal was whether the Wakfs Board had erred in deciding the matter without granting a hearing. The learned President's Counsel submitted that the Wakfs Tribunal did not determine this issue by holding an inquiry and that the order had been made only upon a perusal of the administrative file and therefore the Tribunal clearly erred in dealing with matters which were not in issue before it in the appeal that came up for determination. He further contended that no evidence was led before the Wakfs Tribunal and the Tribunal itself fell into the error of determining matters without evidence and without permitting the respondents an opportunity of rebutting the adverse finding made against them as there were adverse allegations which they had been called upon to meet. He further contended that the question of misconduct by the Trustees was not a matter in issue before the

Tribunal, as the Wakfs Board itself has specifically stated that there was no allegation of misconduct against the trustees. Therefore, the learned President's counsel submitted that the finding of misconduct apart from being in violation of the principles of natural justice and unsupported by evidence, is also without jurisdiction as it is a matter totally outside the ambit of the appeal which came up before the Wakfs Tribunal, as it is a matter which can be inquired into solely by the Wakfs Board in terms of section 29 (1) of the Wakfs Act.

The learned President's Counsel further submitted that the order of the Wakfs Board and that of the Wakfs Tribunal are inconsistent and contradictory. He contended that the Board directed that the registration of the Jamaath be done in accordance with a constitution which the Trustees were directed to draft whereas the Tribunal in its order directed that the Trustees should prepare a constitution in consultation with the Jamaath "the list of which is already prepared by the Wakfs Board". He further contended that the order of the Wakfs Tribunal directing the Board to consider the feasibility of replacing the special Trustees is also totally unwarranted as this question was never before the Board or Tribunal and that the appointment of Special Trustees is a matter within the discretion of the Board and the Tribunal cannot give directions in regard to the exercise of this discretion.

When one considers the relevant provisions of the Muslim Mosques and Charitable Trusts or Wakfs Act, the documents marked and the submissions made by the respective counsel, it is abundantly clear that the Wakfs Board as well as the Tribunal had not followed the provisions of the said Act in arriving at their decisions.

Section 9B of the Act empowers the Chairman of the Board, for the purpose of the consideration and determination of any matter to summon and compel the attendance of witnesses; to compel the production of documents; and to administer any oath or affirmation to witnesses. The decision of the Board has to be by a majority of the members of the Board. (section 9)

Section 9F gives the chairman of the Tribunal the powers of a District Court for the purpose of the consideration and determination

of any matter. Under that section the Chairman is empowered:

- (a) to summon and compel the attendance of witnesses;
- (b) to compel the production of the documents; and
- (c) to administer any oath or affirmation to witnesses.

The decision of the Tribunal has to be by a majority of the members of the Tribunal (section 9D (4)). Section 9G of the said Act states that "In any proceedings under this Act, the Tribunal shall follow the procedure of a District Court and in the execution of orders and judgments, shall have all the powers of a District Court and the provisions of the Civil Procedure Code relating to the procedures and powers of execution of a District Court shall, *mutatis mutandis*, apply to and in relation to the procedures and powers of execution of the tribunal".

The procedure to be followed regarding an appeal to the Tribunal from a decision of the Board, is laid down in section 9H. By that section any person aggrieved by any order or decision made by the Board may within thirty days of such order or decision make an appeal in writing to the Tribunal for the purpose of hearing and determining any appeal made. The Tribunal shall have the powers to call for the record of any proceedings before the Board, any documents in the possession of the Board, to make such inquiries as may be necessary for the purpose of the appeal and if it thinks fit, to admit or call for any evidence, whether oral or documentary.

When one considers the above provisions of the Wakfs Act, it is clear that in the performance of the duties and functions the Board and the Tribunal should act judicially. To act judicially, the Board and the Tribunal should give a fair hearing to all the parties to the application. It is essential that the Board and the Tribunal should follow the principles of natural justice in arriving at their decisions. A proper hearing should be given to all the parties before a determination is made either by the Board or the Tribunal.

In the instant case, on a perusal of the proceedings of the Wakfs Board dated 11. 12. 1994 (P7), it is clear that they have not followed the procedure laid down in the Act. In those proceedings the Chairman states that "the Wakfs Board commenced an inquiry on those letters and made certain orders". This is highly irregular. An inquiry before the Wakfs Board should start on an application made in the prescribed manner. Charges should be formerly framed and a proper inquiry should be held regarding such charges. It has no jurisdiction to inquire on letters. In fact, in that order, it is stated that the letter dated 09. 05. 1994 does not make any complaint against the trustees. The Board itself seems not sure of the existence of an association by the name Devatagaha Jumma Mosque and Shrine Jamaath Association, as the order states that the letter is "purported to be" from the said association. The Board without inquiring into such matters had assumed that the association consisted of members of the Jamaath. Further, in that order, the Chairman states that "the people who have made these applications are not members of the Jamaath", even though the letter sent by them calls themselves as members of the Devatagaha Jumma Mosque and Shrine Jamaath Association.

When one considers the proceedings of 28. 01. 1995, it is clear that the Board has made certain orders without a proper inquiry in arriving at various decisions. The Board has only gone through the objections of the Special Trustees submitted on 08. 01. 1995. Further, the Board has rejected the objections of the Special Trustees (appellants) dated 08. 01. 1995, merely going through the objections and the administration files. Without having a proper inquiry in terms of the provisions of the Wakfs Act, they have held that this religious institution was a Jumma Mosque and Shrine belonging to the residents of the area in which the mosque is situated. The Board in arriving at its decision on 28. 01. 1995, has not followed the principles of natural justice. It seems that the Board has acted according to its whims and fancies. This is highly irregular. This being a religious institution, it is the sacred duty of the Board to make orders after a fair hearing.

According to the proceedings dated 28. 01. 1995, the Board had made order only regarding the following matters:

- (a) Devatagaha Jumma Mosque & Shrine belongs to the residents of the area;
- (b) That the Nakshabandiya Thareeka had no control over the Mosque;
- (c) That the Special Trustees must prepare a constitution for the Devatagaha Jumma Mosque & Shrine;
- (d) They must carry out the conditions of the constitution and prepare a Jamaath List accordingly.

The Board had taken all these decisions without a proper hearing.

An appeal was made against the above orders of the Board to the Wakfs Tribunal. The Tribunal on that appeal had made orders regarding matters which were not appealed against. In the appeal they have gone into extraneous matters such as "maladministration and thuggery" and goes on to state that there is ample evidence to prove such facts. How the Tribunal came to such a decision without holding a proper inquiry under the provisions of the Wakfs Act is not clear. There were no allegations against the Special Trustees before the Wakfs Board and therefore, the Wakfs Board had not come to any decision regarding the conduct of the Special Trustees. According to the judgment of the Tribunal, findings against the appellants were of a very serious nature and had been made against the Trustees without proper charges being framed against them and without a proper inquiry. According to that judgment, the Tribunal seems to have accepted the order of the Board merely on the fact that the order had been signed by the Chairman and the other members of the Board. This is clear from the following observations of the Tribunal:

"The objections raised by the appellants against the said order of the Wakfs Board dated 28. 01. 1995 is untenable. The said order is duly signed by the Chairman and the other members of the Board."

It is very clear that the Tribunal had acted beyond their jurisdiction. The Tribunal has gone into questions which were not in issue before it.

The Tribunal in its judgment states that "the Devatagaha Jumma Mosque and Shrine has a checkered history of litigations before courts of law . . . which have gone even upto the Privy Council and that there is no end to such litigation even after that". I wish to note here that it was no wonder that litigiousness appears inbuilt considering the fact that most of the parties to this dispute are eminent title-holders from Colombo 7 as their addresses reveal to whom their prestige may matter more than their religion. A religious institution must be managed by consensus and not by the dicta of egocentric interested parties. Thus, blame could be apportioned for any shortcomings in the managing of this Mosque not only on the trustees but also on all authorities entrusted with the control and management of Mosques under the Wakfs Act.

The Tribunal's finding of misconduct on the part of the Special Trustees is a violation of the principles of natural justice as it has come to a decision without any evidence but based solely on certain allegations made against the Trustees. In any event, if there had been any misconduct, it has to be inquired solely by the Wakfs Board in terms of section 29 (1) of the Wakfs Act.

In view of the above facts, we hold that the decisions of the Wakfs Board and that of the Wakfs Tribunal were made without jurisdiction and in violation of the specific provisions of the Wakfs Act. Therefore, we set aside both orders, ie order dated 28. 01. 1995 of the Wakfs Board and the judgment of the Wakfs Tribunal dated 12. 08. 1995. We hold that the Board and the Tribunal have acted in a very arbitrary manner.

The appeal is allowed with costs payable by the respondents to the appellants in a sum of Rs. 7,500.

WIGNESWARAN, J. – I agree.

Appeal allowed.