HALWAN AND OTHERS

v.

KALEELUL RAHUMAN

COURT OF APPEAL
S.N. SILVA, J.
CA APPLICATION NO. 780/88
WB NO. WB/165/86
WT NO. W TRIB/116/88
17TH MAY, 17TH JUNE, 19TH AUGUST AND
06TH SEPTEMBER 1991

Certiorari and Mandamus - Wakfs Board - Wakfs Tribunal - Muslim Mosque and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Acts 21 of 1960 and 33 of 1982 - Section 9D(1), 9G, 9H(1), 13, 14(1) - Trustees - Sheik of Beruwala - Thakkiya - "Calipha" of Malwana - Appeal and Judicial Review - Judgments and orders - Judicature Act S.23 - Article 140 of the Constitution - Rule 47 of the Supreme Court Rules.

The Muslim Mosque and Charitable Trusts or Wakfs Act provides, inter alia, for the registration of Mosques, Muslim shrines and places of religious resort. It also provides for the appointment of trustees of registered Mosques. In terms of section 14(1) it is the duty of the Wakfs Board to confirm and appoint a person or persons to be a Trustee or Trustees of a Mosque as soon as such a mosque is registered in terms of section 13. The Wakfs Board is also empowered to revoke the appointment of a Trustee and to appoint new Trustees.

An appeal lies from the decision of the Wakfs Board to the Wakfs Tribunal in terms of section 9H(1) of the Act.

The Wakfs Tribunal is established in terms of section 9D(1) of the Amendment Act No. 33 1982 where it is stated that the member of the Tribunal shall be appointed by the Judicial Service Commission. Section 9G provides that in all proceedings under the Act the Tribunal shall follow the procedure of a District Court. It is further provided that the Tribunal shall have all the powers of a District Court as provided for in the Civil Procedure Code in regard to the execution of orders and judgments.

Under section 55A introduced by the Amendment Act No. 33 of 1982 every order made by the Tribunal is deemed to be an order made by a District Court. This will attract the provisions of Section 23 of the

Judicature Act and a party dissatisfied with an order will have a right of appeal to the Appeal Court. However the provisions in relation to appeals from judgments of the District Court have not been brought in but only the provisions in relation to appeals from orders have been made applicable. 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 judgment of such court, will apply mutatis mutandis, to and in relation to an appeal from an order of the Tribunal.

Unlike in England where the basis of review by the Prerogative writs is the common while appeals are in terms of the statute in Sri Lanka both remedies are statute based. In our context it is appropriate to describe the appellate jurisdiction as the ordinary jurisdiction and review by way of writs of certiorari, prohibition and mandamus (vide section 140 of the Constitution) as the extraordinary jurisdiction.

A party dissatisfied with judgment or order, where a right of appeal is given either directly or with leave obtained has to invoke and pursue the appellate jurisdiction. When such a party seeks judicial review by way of an application for a writ, he has to establish an excuse for his failure to invoke and pursue the appellate jurisdiction. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavits and necessary documents. The same principle is applicable to instances where the law provides for a right of appeal from a decision or order of an institution or an officer, to a statutory tribunal. The reason is that such appellate procedure as established by law being the ordinary procedure should be availed of before recourse is had to the extraordinary jurisdiction by way of judicial review as provided in Article 140 of the Constitution.

When notice of appeal or a leave to application is filed, it is a first step taken to invoke the jurisdiction of the Court. It is incumbent on a petitioner to disclose this fact. Under Rule 47 where there is an averment that the jurisdiction of the Court of Appeal has not been invoked in respect of the same matter and it is false and incorrect the application can be dismissed. Hence for non-disclosure and the false and incorrect averment, the application can be dismissed.

Cases referred to :

1. *Preston v. Inland Revenue Commissioners* (1985) 2 All ER 327, 337
2. *R.V. Secretary of State* (1986) 1 All ER 713, 723, 724
3. *R.V. Epping* and *Harlow General Comrs* (1987) 3 All ER 257, 262

APPLICATION for Writs of Certiorari and Mandamus.

H.L. de Silva, P.C. with *Javid Yusuf* for Petitioners.

K. Kanag-Iswaran, P.C. with *M.S.A. Hassan* & *Farook Thahir* for 1st to 5th Respondents.

Cur. adv. vult.

November 01, 1991.
S.N. SILVA, J.

The eleven petitioners filed this application for Writs of Certiorari and Mandamus. The Writs of Certiorari are to quash the orders dated 03. 01. 1988 (P4) and 06. 04. 1988 (P5) made by the Wakfs Board and the Wakfs Tribunal respectively.

The petitioners claim to be the persons elected as Trustees of the Ulahitiwela Jumma Mosque, Malwana, by the Jamath, on 22. 12. 1985. They made an application to the Wakfs Board in terms of section 14(1) of the Muslim Mosque and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Act, Numbered 21 of 1960 and 34 of 1982. The 1st to 5th Respondents filed another application opposing the application of the petitioners for confirmation as Trustees and moving that the Board confirms as Trustees the persons nominated by a person styled the Sheik of Beruwala. There is a sharp conflict in the claims made by both parties. Whilst the petitioners state that the mosque was constructed during the period beginning in 1979 and ending in 1985, the 1st to 5th respondents state that the place of worship is in fact a Thakkiya about 80 years old constructed by the Sheik being the spiritual leader of a particular religious order. It is submitted by these Respondents that the Sheik and his successors reside in Maligahena, Beruwala and nominate the Trustees of the Thakkiya on the advise of a person styled the "Calipha" of Malwana.

The Wakfs Board inquired into the application, objections and counter application and, by its order 'P4' refused to

confirm the petitioners as the Trustees. The Board further directed that nominations be called for from the Sheik for persons to be appointed as Trustees. It appears that the main basis of the decision of the Board is that both parties admitted that upto 02. 06. 1985 the practice had been for the Trustees to be appointed by the Sheik. The petitioners appealed from that order to the Wakfs Tribunal established under section 9D of the Act. The appeal was argued before the Tribunal and both parties were represented by Counsel. Counsel for the petitioners submitted that section 14(1)(a) of the Act applies only in respect of the first appointment of Trustees upon registration. The Tribunal held against this submission and dismissed the appeal. The order of the Board was confirmed by the Tribunal.

The Petitioners filed this application on 22. 07. 1988 and it was supported for notice on 29. 07. 1988. On that day the Court directed the issue of notice. It is also recorded that "a stay order is entered in terms of paragraph 'c'. It is to be noted that the petition does not contain a prayer for interim relief and that paragraph 'C' is a prayer for costs. The Respondents appeared on 27. 10. 1988 and moved for time to file objections. On 29. 11. 1988 it was directed that the matter be listed for hearing, in January, 1988. It appears that this order was not complied with. On 22. 11. 1989 the petitioners tendered an amended petition without notice to the respondents. In the amended petition there is a prayer for a stay order in respect of the order marked 'A1' dated 04. 08. 1988 made by the Wakfs Board appointing five persons as trustees on the basis of the previous orders 'P4' and 'P5'. The motion for amendment was supported on 23. 11. 1989 and when the respondents were not present the amendment was allowed. A stay order was issued as prayed for in the prayer to the amended petition. This stay order has thereafter been extended from time to time. The respondents have filed further objections to the stay order and to the amended petition on the basis that they did not receive prior notice of it.

When this matter was argued, learned President's Counsel for 1st to 5th respondents raised a preliminary objection on the ground that the petitioners cannot seek to challenge the orders marked 'P4' and 'P5' by way of judicial review since they have a right of appeal to this Court from the order (P5) of the Tribunal. It was further submitted that the petitioners have sought to exercise that right of appeal, firstly by filing a notice of appeal dated 14. 04. 88 in the Tribunal and secondly by filing a leave to appeal application on 22. 07. 88 in this Court (CA/LA 86/88). A further ground relied upon by the respondents is that the averments in the petition and affidavit that the jurisdiction of this Court has not been previously invoked is incorrect. It is submitted that the petitioners had to make a full disclosure regarding the steps taken by them to file appeals from the impugned order and that the application should fail for a contravention of Rule 47 of the Supreme Court Rules. Learned Counsel also complained of the manner in which the amended petition was filed and interim relief on the amended petition obtained, without notice to them.

Learned President's Counsel for the petitioners submitted that the jurisdiction of this Court is not invoked by merely filing an application for leave to appeal or by serving a notice of appeal, if nothing further is done by the appellants to prosecute the appeal. It was further submitted that there is an ambiguity in the provisions of section 55A of the Act which provides for an appeal and that the petitioners cannot be faulted for not resorting to that procedure.

I have carefully considered the submissions both oral and written, addressed by learned President's Counsel regarding the preliminary objection raised by learned President's Counsel for the 1st to 5th Respondents.

The Muslim Mosque and Charitable Trusts or Wakfs Act provides inter alia, for the registration of Mosques, Muslim shrines and places of religious resort. It also provides for the appointment of Trustees of registered Mosques. In terms of

section 14(1) it is the duty of the Wakfs Board to confirm and appoint a person or persons to be a Trustee or Trustees of a Mosque as soon as such a Mosque is registered in terms of Section 13. The Wakfs Board is also empowered to revoke the appointment of a Trustee and to appoint new Trustees. The petitioners admit the jurisdiction of the Board in the matter of confirmation and appointment of Trustees. They invoked the jurisdiction of the Board in this regard by their application for confirmation as trustees. When objections were raised they participated in a protracted inquiry before the Board in regard to the matter. When the Board held against the Petitioners they appealed to the Tribunal in terms of section 9H(1) of the Act.

The Wakfs Tribunal is established in terms of section 9D(1) of the Amendment Act No. 33 of 1982 where it is stated that the members of the Tribunal shall be appointed by the Judicial Service Commission. Section 9G provides that in all proceedings under the Act the Tribunal shall follow the procedure of a District Court. It is further provided that the Tribunal shall have all the powers of a District Court as provided for in the Civil Procedure Code is regard to the execution of orders and judgments.

Section 55A also introduced by the Amendment Act No. 33 of 1982 states as follows:

"55A. 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".

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 the 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".

The submission of learned President's Counsel for the petitioners is that the words preceding the foregoing words that refer to "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 judgments and appeals from 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 altering the substantive element and the section will not 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 ambiguilty 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 section 756(2), (3), (4), (5), (6) and (7) apply exclusively in relation to applications for leave to appeal from orders of an original court. Section 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 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 judgment of such court, will apply mutatis mutandis, to and in relation to an appeal from an order of the Tribunal.

The Petitioners have in fact filed a notice of appeal in the Tribunal from the order marked 'P5'. According to the proceedings of the Tribunal (X2), on 15. 08. 1988 the Tribunal rejected this notice because a petition of appeal had not been filed within a period of 60 days. The Petitioners also filed a leave to appeal application, (CA/LA 86/88), as noted above on 22. 07. 1988 being the same date on which this application was filed. The application for leave to appeal was submitted to a Judge as required by section 756(5) of the Civil Procedure Code and an order was made that it should be supported in open court within two weeks. It appears that this application has not yet been supported for the issue of notice. Thus it is seen that the petitioners have had recourse to both types of appeals. They have failed to pursue either appeal with diligence. The leave to appeal application which appears to have been filed out of time is yet in abeyance. The question that arises for consideration is whether the Petitioners can have and maintain this application for Writs of Certiorari in view of the right of appeal they have in terms of section 55A of the Muslim Mosque and Charitable Trusts or Wakfs Act read with section 23 of the Judicature Act.

Learned President's Counsel for the Respondents has cited several recent decisions in England where it has been held that judicial review will not be granted (by way of an

application for a Writ of Certiorari) in instances where an alternative statutory remedy is available. In the case of *Preston v. Inland Revenue Commissioners*[1], Lord Templeman observed that "judicial review should not be granted where an alternative remedy is available . . . Judicial review should not be allowed to supplant the normal statutory appeal procedure." In the same case Lord Scarman (at p330) observed that it is "a proposition of great importance that a remedy by way of judicial review is not to be made available where an alternative remedy exists", and that "it will only be very rarely that courts will allow the collateral process of judicial review to be used to attack an appealable decision". In the case of *R. v. Secretary of State*[2] *at 723/724, Donaldson M.R.* observed that". . . It is well established that, in giving or refusing leave to appeal for judicial review account must be taken of alternative remedies available to the applicant. This aspect was considered by this Court very recently . . . and it was held that the jurisdiction would not be exercised when there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place . . .". In the case of *R. v. Epping and Harlow General Comrs*[3], *Donaldoson M.R.* has observed that" But it is a cardinal principle that, save in the most exceptional circumstances that jurisdiction will not be exercised where other remedies were available and have not been used".

Learned President's Counsel for the Petitioners has submitted that these observations should be understood in the context of the particular cases. He referred to the following passages appearing in Administrative Law by H.W.R. Wade, 6th Edition (1988) pages 709 and 712:

> "Such a discretionary power (i. e. declining to intervene) (brackets supplied) may make inroad upon the rule of law and must therefore be exercised with the greatest care."

"First principles dictate that there should be no rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the Court as soon as it is threatened. There is therefore no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter."

The learned author has followed the preceding passage with extracts of some of the dicta cited above. This section is preceded with the following comment by the author:

"Recently the case law has produced a crop of judicial statements which conflict with this rule just explained" (p 714).

Upon an examination of the dicta he makes the following comment:

"None of these dicta appear to recognise that appeal and review have radically different purposes; that appeal is concerned with merits while review is concerned with legality; that review is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of the Court while appeal is a statutory adjunct with no such fundamental role." (p715).

The foregoing dicta comments and observations have all been made in relation to instances where an appeal lies as a part of the administrative machinery, to a statutory tribunal and not (as in this instance) to a Superior Court. However in a later section of the same book (page 945 and 946) Professor Wade repeats the same observation (without elaboration) with regard to instances where the statute gives a right of appeal to the High Court. He has not (in this section) cited any instance where relief has been granted by way of judicial review to an

aggrieved party who has not pursued a statutory right of appeal to a Superior Court. Learned President's Counsel for the Petitioners has also not drawn my attention to any such case.

The observations of Professor Wade (appearing in the 1988 edition of his work and referred above) should be understood in the context of the basis and evolution of the two reliefs - appeal and judicial review, in England. The instruments of judicial review being the prerogative Writs of Mandamus, Certiorari and Prohibition and the ordinary remedy of damages were granted by the Kings Bench Division and available to persons who wished to dispute the legality of administrative acts of Justices of peace and of such other authorities as there were. The Crown is yet the nominal plaintiff in applications for these remedies.

The basis of this review is the Common law. Procedural innovations were made most significantly by the Supreme Court Act of 1981 which unified remedies of prerogative writs with the remedies of declaration and injunction by permitting a single application to be made for such remedies to the High Court. On the other hand, an appeal is entirely statute based. It is in this context that Professor Wade has described the remedy by way of appeal as a "statutory adjunct with no such fundamental role".

In Sri Lanka both remedies are statute based. Article 138(1) of the Constitution vests an appellant jurisdiction in this Court "for the correction of all errors in fact and in law which shall be committed by any Court of First Instance, Tribunal or other . . .". Similarly Article 140 vests in this Court "full power and authority to inspect and examine the records of any Court of First Instance or Tribunal or other institution and grant and issue, according to law, orders in the nature of Writs of Certiorari, Prohibition, Procedendo Mandamus and Quo warranto against the Judge of any Court of First Instance, or tribunal or other institution or any other person." There is

a *cursus curiae* that in granting these orders the Court will follow the applicable principles of English Law. However this practice does not alter the basis of jurisdiction which remains statutory. In this statutory scheme, where a party dissatisfied with a judgment or order has a right of appeal either directly or with leave obtained as in this instances, the appellate jurisdiction of this court extends to the correction of "all errors in fact or in law" committed by the Court, tribunal or institution that delivered the judgment or order. Therefore the observations of Professor Wade that appeal and review are two distinct procedures, appeal being concerned with merits and review being concerned with legality (as stated at p. 36, 715 and 946) are not quite appropriate in our statutory context. The appellate jurisdiction save in instances where it is restricted to questions of law will encompass the merits and the legality of the impugned order. In our context it is appropriate to describe the appellate jurisdiction as the ordinary jurisdiction and review by way of Writs of Certiorari, Prohibition and Mandamus (vide Article 140 of the Constitution) as the extraordinary jurisdiction. A party dissatisfied with a judgment or order, where a right of appeal is given either directly or with leave obtained, has to invoke and pursue the appellate jurisdiction. When such party seeks judicial review by way of an application for a Writ as provided in Article 140 of the Constitution he has to establish an excuse for his failure to invoke and pursue the appellate jurisdiction. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavits and necessary documents. In any event, where such a party has failed to invoke and pursue the appellate jurisdiction the extraordinary jurisdiction by way of review will be exercised only in exceptional circumstances such as, where the court, tribunal or other institution has acted without jurisdiction or contrary to the principles of natural justice resulting in an order that is void. The same principle is in my view applicable to instances where the law provides for a right of appeal from a decision or order of an institution or an officer, to a statutory tribunal. The

reason is that such appellate procedure as established by law being the ordinary procedure should be availed of before recourse is had to the extraordinary jurisdiction by way of judicial review as provided in Article 140 of the Constitution. The remedy by way of judicial review should not be allowed to supplant the normal statutory appeal procedure and should be available only in exceptional circumstances as noted above.

In this case the petitioners have neither pleaded nor established any excuse for not pursuing the right of appeal they had in respect of the order 'P5'. They have also failed to plead any exceptional grounds that warrant the exercise of the extraordinary jurisdiction of this Court. For that matter, they possibly cannot plead lack of jurisdiction on the part of the Board or the Tribunal, being the persons who invoked the jurisdiction of these institutions. There is also no allegation of a violation of the principles of natural justice.

The other matter to be considered is the failure of the petitioners to make disclosure of the attempts made by them to invoke the jurisdiction of this Court. As noted above they filed a notice of appeal in the Tribunal which was rejected. In addition they filed a leave to appeal application in this very court which has not been supported. These matters should necessarily be disclosed. Rule 47 of the Supreme Court Rules provides that the petition and affidavit "shall contain an averment that the jurisdiction of the Court of Appeal has not been invoked in respect of the same matter. Where such an averment is found to be false and incorrect the application may be dismissed."

The submission of learned President's Counsel for the petitioners is that a mere filing of a notice of appeal or an application for leave to appeal is not an invocation of the jurisdiction of this Court. I cannot accept this submission. The filing of a notice of appeal or a leave to appeal application are the first steps taken to invoke the jurisdiction of this Court. Therefore it was incumbent on the Petitioners to disclose these

matters in the application for judicial review. The petitioners have failed to do so and have even obtained interim relief from this Court without such disclosure. In these circumstances I am of the view that the provisions of Rule 47 should be applied against the petitioners and that this application should in any event be dismissed on that ground.

For the reasons stated above I uphold the preliminary objections raised by learned President's Counsel for the 1st to 5th respondents and dismiss this application without going into the merits. The petitioners will pay to the 1st to 5th respondents a sum of Rs. 2500/- by way of costs.

Application dismissed.