

1963

Present : Herat, J.

M. M. H. M. A. CADER and others, Petitioners, and COMMISSIONER FOR MOSQUES AND MUSLIM CHARITABLE TRUSTS and others,
Respondents

S. C. 55/63—Application for a Writ in the nature of Mandamus under Section 42 of the Courts Ordinance

Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956, as amended by Act No. 21 of 1962—Sections 2 (1), 5 (1), 9(1) (2) (3), 14 (1), 14 (1) (A)—Appointment of trustees of mosques—Duty of Wakfs Board to exercise discretion personally—Mandamus.

In selecting a person or persons for appointment as trustee or trustees of a mosque under section 14 of the Muslim Mosques and Charitable Trusts or Wakfs Act, the discretion of the Wakfs Board has to be exercised personally and cannot be abdicated by the Board in favour of anyone else, however competent, honourable or efficient that person may be as regards the matter.

Any appointment made by the Board as the result of selection by someone else is only a colourable appointment and is not an appointment at all. In such a case, section 14 (1) (A) of Act No. 21 of 1962 is not a bar to compel the Board, by writ of *mandamus*, to appoint a trustee or trustees according to law.

APPPLICATION for a writ of *mandamus* against the Commissioner for Mosques and Muslim Charitable Trusts and the Wakfs Board.

H. V. Perera, Q.C., with Izadeen Mohamed, A. C. M. Uvais and M. T. M. Sivardeen, for the Petitioners.

M. Kanagasundaram, Crown Counsel, for the 1st Respondent.

R. L. N. de Zoysa, for the 2nd Respondent.

Colvin R. de Silva, with A. Wijesekera, for 3, 4, 5, 6, 7 and 9th Respondents.

M. H. Amit, for the 8th Respondent.

C. Ranganathan, with M. S. M. Nazeem, for the 10th to 28th and 30th Respondents.

A. R. Mansoor, for the 29th Respondent.

Cur. adv. vult.

October 11, 1963. HERAT, J.—

This application for a Writ of Mandamus involves the interpretation of certain provisions of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956, as amended by Muslim Mosques and Charitable Trusts or Wakfs (Amendment) Act No. 21 of 1962.

By Section 2 (1) of the 1956 Act, hereinafter called the principal Act, there is provision for the appointment of a Commissioner. Section 2 (1) of the principal Act is as follows :—“ There may be appointed for the purposes of this Act a Commissioner for Mosques and Muslim Charitable Trusts or Wakfs and such number of Deputy Commissioners for Mosques and Muslim Charitable Trusts or Wakfs and other officers and servants as may be necessary. Such Commissioner, Deputy Commissioners and other officers and servants shall be servants of the Crown in respect of the Government of Ceylon.

(2) A person who is not a Muslim shall not be appointed as the Commissioner or as a Deputy Commissioner.”

Section 5 (1) of the principal Act is as follows :—“ There shall be established for the purposes of this Act a board which shall be called the Mosques and Muslim Charitable Trusts or Wakfs Board and which shall consist of the Commissioner and seven other members appointed by the Minister.”

Section 9 (1) (2) & (3) of the principal Act provides as follows :—

(1) “ The Commissioner shall preside at every meeting of the board at which he is present. If the Commissioner is absent from any meeting of the board, the members present at the meeting shall elect one of them to preside at the meeting.

(2) The quorum for a meeting of the board shall be three members.

(3) The Commissioner shall not be entitled to vote at a meeting of the Board, unless there is an equality of votes.”

The Act provides for the registration of Mosques and other Muslim Charitable Trusts or Wakfs and by Section 14 as amended by the Amending Act No. 21 of 1962 provides as follows :—

14 (1) “ As soon as may be, after a mosque has been registered under Section 13, the board shall appoint a person or persons from among Muslims to be a trustee or trustees of that mosque and issue to every person so appointed as a trustee an instrument of appointment. In selecting a person or persons for appointment as a trustee or trustees of a mosque the Board shall have regard to the following matters :—

- (a) the terms of any trust instrument relating to that mosque ;
- (b) the religious law and custom of the sect of the Muslim community concerned ;
- (c) the local custom with reference to that mosque ; and
- (d) the practice and other arrangements in force for the administration of the mosque.”

Section 14 (1) (A) is as follows :—

“The Board may at any time after the appointment of a person as trustee of a mosque revoke his appointment if it is satisfied that such appointment was made by reason of a mistake of law or of fact.

Where the Board decides to revoke the appointment of any person as a trustee it shall by notice in writing addressed to such person—

- (i) inform him of the revocation of his appointment as trustee, and
- (ii) require him to return to the Board the instrument of appointment issued to him,

and upon receipt of such notice such person shall comply with such requirement.”

This application relates to the Kalmunaikudy Jumma Mosque and it is common ground that after prolonged investigations and correspondence that mosque was registered under the provisions of the afore-said Act of 1956. The 1st respondent to the present petition is the Commissioner appointed under the provisions of Section 2 (1) of the principal Act and is the President of the Mosque and Muslim Charitable Trusts or Wakfs Board referred to above by virtue of his office. The 3rd to 9th respondents are members of the said Board which I shall refer to as the Wakfs Board.

After the registration of the Kalmunaikudy Jumma Mosque it became the public duty of the members of the Wakfs Board, under Section 14 of the principal Act as amended by the Amending Act, to exercise a statutory duty laid upon them by the said Section to appoint a trustee or trustees for that mosque and in the language of that Section to select a person or persons for appointment as such trustee or trustees.

In my opinion this was a duty which they themselves had to perform. No doubt the members of the Wakfs Board had a discretion in selecting the trustee or trustees, the only requirement laid down being that the selection should be from among Muslims, but that discretion had to be exercised by the members of the Board personally.

In exercising that discretion they could not abdicate their judgment in favour of anyone else however competent, honourable or efficient that person may be as regards the matter. If the selection was made and the consequent appointment followed as a result of the judgment exercised by someone else other than the Wakfs Board then such selection and appointment is no appointment in law. It is, to use the phrase often used in matters of this nature, a colourable selection and a colourable appointment and in law it is no selection and no appointment.

In my opinion, when one peruses the affidavits filed in this case, this is what appears to have been done. The Wakfs Board having spent a long time in dealing with the question of the registration of the mosque ultimately wrote to three gentlemen, who are prominent Muslims of the area, asking for their assistance in the matter of the appointment of

trustees. One of those gentlemen was the 21st respondent, Mr. M. C. Ahamed, Member of Parliament. The assistance and help expected did not materialise and the interviews called for did not in fact take place but the 21st respondent forwarded a list of names including himself as choice individuals for appointment as trustees of the mosque in question. The Wakfs Board appointed these persons and these trustees so appointed are the 10th to 29th respondents. The 2nd respondent is the same as the 1st respondent, the Commissioner, but for the sake of caution he has been made respondent twice over, once in his official capacity as Commissioner and again in his capacity as Chairman of the Wakfs Board.

The petitioners are some of the members "Jamna' ath" of the mosque in question, namely some of the persons who ordinarily worship or participate in the religious rites and ceremonies of that mosque. Their case is that the so called appointment of the 10th to 29th respondents as trustees by the Wakfs Board is only a colourable appointment and is no appointment in law. They say that the members of the Wakfs Board have failed to carry out their public statutory duty to appoint trustees to the Kalmunaikudy Mosque and they ask this Court to issue a Writ of Mandamus ordering the Board to carry out that duty.

I have perused the affidavits filed in these proceedings and also carefully read the correspondence placed before me and I am satisfied that the members of the Wakfs Board did not bring their own minds to bear upon the question of suitability of the candidates for appointment to the high office of trustees of the mosque. The law required them to appoint not mere hewers of wood and drawers of water but persons of high integrity who would be called upon to perform fiduciary duties which trustees are called upon to perform. They had no business to surrender their judgment to anybody else. What the members of the Wakfs Board appear to have done in this case is, simply as I said earlier, to abdicate their duty of exercising judgment and discretion in favour of the 21st respondent, Mr. Ahamed, Member of Parliament, and appointing himself and the other respondent trustees as trustees. This is merely a colourable appointment and in my opinion no appointment at all.

It has been argued that this application for Mandamus does not lie because of the provisions of the new Section 14 (1) (A) but this new sub-section (1) (A) to Section 14 contemplates a real appointment made by the Wakfs Board but contaminated by reason of a mistake of fact or law. In the present case there is no appointment at all, hence this is not an instance where the statute itself provides for an alternate remedy. I therefore come to the conclusion that the Writ of Mandamus should issue.

I hold that the so called appointment of the 10th to 29th respondents as trustees is only colourable and no appointment and that the Wakfs Board, namely the 2nd to 9th respondents, have failed to carry out their public statutory duty of appointing a trustee or trustees to the Kalmunaikudy Jumma Mosque.

I direct that a Writ of Mandamus be issued on the 2nd to 9th respondents directing and ordering them to carry out their public statutory duty under Section 14 of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 as amended by Act No. 21 of 1962 to appoint a trustee or trustees to the Kalmunaikudy Jumma Mosque according to law.

There remains the question of costs. I order no costs against the 1st and 2nd respondents, who are really one and the same person, namely the Commissioner. The 8th respondent, who is a member of the Wakfs Board, dissociated himself with the actions of the fellow members of his Board from the very commencement and I do not think that costs should be ordered against him. I order the 3rd to 9th respondents, except the 8th, to jointly and severally pay to the petitioners one set of costs which I fix at 250 guineas. The 29th respondent also dissociated himself with any claim to be a trustee and I do not think it fair that the 29th respondent should be ordered to pay any costs. I order the 10th to 28th respondents jointly and severally to pay another and separate set of costs to the petitioners which I fix at 250 guineas.

Application allowed.

