

RASSOOL AND OTHERS
v.
CADER, DIRECTOR FOR MOSQUES AND MUSLIM
CHARITABLE TRUSTS AND OTHERS

SUPREME COURT
H. A. G. DE SILVA, J.
FERNANDO, J. AND
KULATUNGA, J.
SC APPLICATION NO. 85/88
MARCH 20, 1989.

Fundamental Rights – Articles 12 (1), 12 (2) and 14 (1)(a) of the Constitution – Suspension from office of Special Trustee of Mosque – Wakfs Act, No. 51 of 1956, ss. 14 and 29 – Burden, standard and degree of proof.

Held :

(1) Neither the Wakfs Board nor the Director for Mosques and Muslim Charitable Trusts (1st respondent), as the delegate of the Board or otherwise has power under s. 29 of the Wakfs Act or any other provision to remove or suspend a Trustee *ex parte* or without an inquiry. An *ex parte* suspension is without jurisdiction and in excess of the statutory powers of the 1st respondent. It is not a mere procedural irregularity.

(2) In regard to discrimination owing to political activities the burden of proof lies on the petitioners who allege it. Although the standard of proof is preponderance of probability, yet the degree of probability required depends on the nature of the allegations.

(3) In applications under Article 126, the state and the officer who infringes fundamental rights are jointly and severally liable.

Cases referred to :

1. *Royappa v. State of Tamil Nadu* AIR 1974 SC 555.
2. *Saman v. Leeladasa* – [1989] 1 Sri L. R. 1.

APPLICATION for infringement of fundamental rights.

Faiz Mustapha, P.C. with Amarasiri Panditharatne, M. M. Abdul Kalam and M. R. M. Salam for petitioners.

Asoka de Silva, Deputy Solicitor-General for the 1st, 2nd and 6th respondents.

Cur. adv. vult.

March 21, 1989.

FERNANDO, J.

The petitioners complain that their fundamental rights under Articles 12 (1), 12 (2) and 14 (1) (a) have been violated by the 1st respondent (who was then the Director for Mosques and Muslim Charitable Trusts) who suspended them from the office of Special Trustee of a Mosque ; he acted, they allege, on the directions of the 2nd respondent (who was then the Minister of Muslim Religious and Cultural Affairs). The 1st respondent appointed the 3rd to 5th respondents as Interim Trustees in their place, but no relief was claimed against them, and they neither appeared nor were represented, in these proceedings. The 6th respondent is the Attorney-General, who, the petitioners expressly state, was made a party only for the purpose of giving notice of this application, no specific relief being prayed for against him.

In terms of section 14 of the Wakfs Act, No. 51 of 1956, as amended, the Wakfs Board had appointed the three petitioners as Special Trustees of the Jamiul Azhar Bazaar Jumma Mosque of Kurunegala, for the period 15.2.87 to 14.2.88. In January 1988, in consequence of the request of the Jamaath (congregation) of the Mosque, S. H. M. Kamil (an " authorised officer " under the Wakfs Act) recommended an extension of three months from 14.2.88, but the Wakfs Board reappointed the petitioners for a further period of one year. On 9.3.88 the 1st petitioner was nominated as a candidate, by the Sri Lanka Muslim Congress, for the North-Western Provincial Council ; that election was held on 28.4.88.

It is also common ground that the 1st petitioner, supported by the other two Petitioners, actively engaged in political activities in connection with that election ; during a period allocated to his Party on Rupavahini, on 22.4.88, the 1st petitioner condemned the policies of the United National Party and specially criticised the actions of the 2nd respondent. The disputed question of fact in this case is whether, as the learned Deputy Solicitor-General contends, the Petitioners' political activities were conducted *within the Mosque premises*, which would have been both improper and illegal.

A petition dated 15.4.88 was submitted by Kamil to the Wakfs Board on 21.4.88, averring that the petitioners had initially been appointed for certain specific purposes which they had failed to

fulfil ; that although he had requested an extension of three months for the purpose of enabling them to perform those functions, the Board had reappointed them for one year ; that they had failed to perform those functions ; and praying that they be removed. The statutory instrument of appointment issued to the petitioners do not mention such purposes, and there is no evidence that the petitioners were so advised, even orally ; while the learned Deputy Solicitor-General submitted that the statute does not prohibit the specification of functions, or the limitation of authority, of Trustees, he was unable to draw our attention to any provision empowering the Board to do so. For the purposes of this application, I am of the view that both appointments were not subject to any condition, qualification or restriction. Further, even assuming that their appointment had lawfully been subjected to such a condition, yet, as they had been given one year to perform those tasks, Kamil could hardly complain of the non-performance of those duties after the lapse of just two months.

The powers, duties and functions of the Wakfs Board had been delegated to the 1st respondent, in terms of section 9A of the Wakfs Act, and there is no dispute as to the legality and propriety of that delegation. Accordingly, the aforesaid petition was dealt with by the 1st respondent on 25.4.88. It is clear from his order that the 1st respondent did not accept the matters stated in the petition as a ground for removal or suspension. However, in the course of Kamil's submissions to the 1st respondent he alleged that the 1st petitioner (and no mention is made of the other petitioners) " has used the said Mosque for political purposes ; he had also convened several political meetings at the Mosque contrary to the Muslim Shariah Law ". Neither then nor at any stage of the proceedings in this Court were any details or particulars of the allegations made against the 1st petitioner furnished : what political purposes? on what days, and at what times, was the Mosque used for such purposes, or for such meetings? At no stage was any such allegation made against the other two petitioners. The 1st respondent was obviously aware that the material placed before him did not warrant any action, other than the initiation of an investigation, for he correctly observed –

" I am of the opinion that before removal or suspension of a trustee..... there should be an inquiry and allegations proved and parties noticed before me to give evidence. In this instant case no such proof is available to me. Therefore it is unsafe to take a decision in the absence of the accused party..... or a proper inquiry held by the Authorised Officer. "

Learned Deputy Solicitor-General was compelled to concede that neither the Wakfs Board nor the 1st respondent (as the delegate of the Board or otherwise) had the power under section 29 of the Wakfs Act, or any other provision, to remove or suspend a Trustee *ex parte* or without an inquiry ; it was not his contention that the statutory conferment of the power to suspend, after an *inter partes* inquiry, included, or necessarily implied, the grant of a power of suspension, *ex parte*, pending inquiry. The 1st respondent's further order –

" However, in view of the seriousness of the allegations made concerning political activities in the Mosque and the present context of elections, it would be in the interest of all concerned that the present set of Special Trustees stands suspended for a period of three (3) months "

is therefore without jurisdiction and in excess of his statutory powers ; it is not a mere procedural irregularity.

While this alone may entitle the petitioners to relief in writ proceedings, in this application it is necessary to establish the denial of the equal protection of the law or discrimination on the ground of political opinion. For this purpose, learned President's Counsel submitted –

firstly, that the 1st respondent did not take action against a Trustee of another Mosque who was a candidate nominated by the United National Party for the Sabaragamuwa Provincial Council at the same time ;

secondly, that the 1st respondent acted on the instructions of the 2nd Respondent " to remove all Trustees who are engaged in political activities against the ruling United National Party " ; and

thirdly, that the 1st respondent suspended the petitioners on account of their political activities and opinion.

In regard to the first submission, the averment in the 1st respondent's affidavit that he had not received any complaint or petition in regard to the conduct of such Trustee has not been controverted by the petitioners, and in those circumstances the allegation of unequal treatment cannot be sustained. A violation of Article 12 (1) has not been established.

In regard to the second submission, it is clear from the petition that the petitioners were politically opposed to the ruling United National Party ; that they were particularly hostile to the 2nd respondent is apparent from the petition and from the submissions made to us. Three matters have been set out in the petition in regard to the 2nd respondent's involvement. It is averred that it was the 2nd respondent who appointed and reappointed the petitioners as Trustees ; but this is legally and factually untenable, as such appointments are made by the Wakfs Board, and at the hearing before us learned President's Counsel conceded that this averment was erroneous. It is also alleged in the petition that the petitioners were " threatened by the agents of the United National Party " and that the 1st petitioner was informed by the agents of that Party that " he will be thrown out of the post of Special Trustee " ; in the absence of any details whatsoever, I cannot but accept the 2nd respondent's affidavit that he is unaware of such threats. Finally, it is specifically averred that the 1st respondent acted on the 2nd respondent's instructions " to remove all Trustees who are engaged in political activities *against the ruling United National Party* " ; but the only material adduced in support is a newspaper report of a statement said to have been made by Kamil on 28.4.88 to the effect that Trustees will be removed if they allow political campaigns *within the Mosque premises*, and that he had been instructed by the 2nd respondent to take action in this regard. This document does not suggest that instructions were given to take action in respect of those engaged in political activities against the 2nd respondent's Party ; only that the instructions, if any, given by him related to persons misusing the Mosque premises. I accordingly hold that the petitioners have failed to establish any complicity on the part of the 2nd respondent, and therefore dismiss the application as against the 2nd respondent without costs.

In regard to the third submission, there is no direct evidence that the 1st respondent had any political animosity towards the petitioners. However, learned President's Counsel seeks to draw that inference from the cumulative effect of several factors. Firstly, he submits that the 1st respondent's conduct in suspending the petitioners was *ultra vires* and that bad faith must therefore be inferred. Secondly, the 1st respondent's order was made solely on the basis of Kamil's " submission " ; the actual submission does not appear to have been recorded, for if it had been recorded I have no doubt that it would have been produced in these proceedings. It would appear that Kamil did not make that submission of his own personal knowledge ; and that he did not refer to specific instances with any degree of particularity, or to the sources of his knowledge. In the circumstances, it is submitted that the suspension was perverse, and unreasonable, warranting the inference of bad faith. Thirdly, the 1st respondent made an order of suspension against the 2nd and 3rd petitioners although no allegation whatsoever had been made against them. Fourthly, since Kamil's petition dated 15.4.88 does not refer to political activities, it is manifest that Kamil had no information or knowledge of any such activities upto that date ; that petition was submitted to the Wakfs Board on 21.4.88, and it would be reasonable to infer that if Kamil had received any such information between 15.4.88 and 21.4.88, the petition would have been suitably amended ; on Friday 22.4.88, says Counsel, the 1st petitioner gave strong expression to his political views on Rupavahini, and on Monday 25.4.88 for the first time the allegation was made that the Mosque premises were used for political activities ; it may therefore be inferred that Kamil was motivated by that telecast. Being the eve of the election the 1st Respondent, if acting *bona fide*, would obviously have asked Kamil why there was no mention of these matters in his petition ; he would have been put on his guard, and would have acted with extreme caution. Fifthly, since Kamil was the 1st respondent's subordinate, it is extremely unlikely that the action taken by Kamil was completely independent of the 1st respondent.

The burden of proof lies on the petitioners to establish that the 1st respondent discriminated against them on account of their political views and activities. The matters relied on by learned President's Counsel, taken in isolation, may not have sufficed to discharge that burden. Although the required standard of proof is by a preponderance of probability, yet the degree of probability depends on the nature of the allegations, for :

".....allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility..... if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore the anxiety of the Court should be all the greater to insist on a high degree of proof because otherwise functioning efficiently would become difficult in a democracy." (*Royappa v. State of Tamil Nadu* ⁽¹⁾).

The 1st respondent took no action against the Trustee of another Mosque because, he says, he did not receive any complaints or petitions in that regard. This seems to suggest that he took action against the petitioners because he did receive complaints or petitions regarding the petitioners; but no such complaint has been produced, no mention has been made of any oral complaint, and there is no affidavit from Kamil. There is no averment as to the specific matters mentioned by Kamil in his "submissions". Clearly, the 1st respondent acted against the petitioners because of their political activities; the 1st respondent seeks to justify his conduct on the basis that these activities took place *within the Mosque premises*; the onus was on the 1st respondent to establish that fact, or at least that he reasonably believed this. There is not even a "submission" in that respect in the case of the 2nd and 3rd petitioners, and their suspension was thus wholly without justification. In regard to the 1st petitioner, apart from Kamil's "submission"—merely a bare, general assertion—there is nothing to indicate that the 1st respondent acted because there was in fact a serious allegation to that effect, demanding urgent *ex parte* action, "in the interest of all concerned". A seven-day suspension would have been more than adequate if the 1st respondent was concerned about the pending election. I therefore hold that the 1st respondent suspended the petitioners on account of their political opinions and activities, and since it has not been established, that the 1st respondent had even a reasonable suspicion that such activities were *within the Mosque premises*, the petitioners are entitled to a declaration that the 1st Respondent violated the fundamental right of the petitioners under Article 12 (2). The evidence does not establish any distinct violation of Article 14 (1) (a).

The question arises whether any relief should be granted against the State. Although relief can be granted against the State, where the Attorney-General has been made a party, yet the petitioners have categorically stated that no specific relief is sought against the Attorney-General. I therefore do not award any relief as against the State.

If it is held that the State alone is liable for the violation of the petitioners' fundamental rights by the 1st respondent, the petitioners cannot be granted any relief in this application, apart from a bare declaration; in my view, however, in applications under Article 126 it is not only the State which is liable : both the State as well as the officer who infringes a petitioner's fundamental rights are jointly and severally liable. I have set out my reasons for this opinion in *Saman v. Leeladasa* ⁽²⁾. To hold that the State alone is liable would encourage, rather than deter, the infringement of fundamental rights by public officers ; a public officer may be tempted to infringe the fundamental rights of a citizen, even by contravening specific directions given to him by his superiors, in the belief that he would be immune from personal liability in an application of this nature. Accordingly, even though no relief has been sought, or awarded, against the State, I hold that the petitioners are entitled to relief as against the 1st respondent for the infringement of their fundamental right. The suspension was communicated and became effective only on 29.4.88, after the Provincial Council election, and hence did not affect that election. However, although there is no evidence as to the extent of the damage to the petitioners' reputation, the suspension would inevitably have caused such damage.

I award the petitioners the following reliefs :-

- (a) a declaration that the fundamental right of the petitioners under Article 12 (2) has been violated by the 1st Respondent, by reason of discrimination on the ground of political opinion ;
- (b) compensation to the 1st petitioner in a sum of Rs. 5,000, and to the 2nd and 3rd petitioners sum of Rs. 2,500 each, payable by the 1st respondent ; and

(c) one set of costs, fixed at Rs. 2,500, payable by the 1st respondent.

H. A. G. DE SILVA, J. – I agree.

KULATUNGA, J. – I agree.

Petition granted as per order.
