

HALWAN AND OTHERS
v.
RAHAMAN AND OTHERS

COURT OF APPEAL.
ANANDA GRERO, J.
CA REV. APPLN NO. 556/92.
WAKFS BOARD NO. 165/88.
WAKFS TRIBUNAL NO. 36.
SEPTEMBER 27th, MAY, 23rd
AND NOVEMBER 18th 1992.

Revision – Muslim Law – Wakfs Tribunal – Wakfs Board – Election by Jam'ath (congregation) – Selection or nomination by Sheik of Beruwela of Trustees – Practices, rules, regulations, etc. of Ulahitiwala Mosque (or Thakkiya) – Section 14 (1)(a) and 15A of the Muslim Mosques and Charitable Trusts or Wakfs Act – Res judicata – Excess of Jurisdiction – Regulation 42.

The petitioners made an application to the Wakfs Board under section 14 (1) of the Muslim Mosques and Charitable Trusts or Wakfs Act to confirm and appoint them as Trustees of the Ulahitiwela Jumma Mosque, Malawana, on the basis of election at a meeting of the Jam'ath (congregation) of the said Mosque held on 22.12.1985. The respondents opposed this. The Wakfs Board by its order dated 03.01.1988 declined to confirm and appoint the petitioners as Trustees of the said Mosque referred to as Ulahitiwela Thakkiya and directed the Director to write to the Sheik of Beruwela to send his nominees to be appointed as Trustees as had been done in the past.

The petitioners then appealed against the order of the Wakfs Board to the Wakfs Tribunal. The Wakfs Tribunal by its order of 6.4.1988 dismissed the appeal and confirmed the order of the Wakfs Board.

The petitioners gave notice of appeal but this was not pursued. An application for leave to appeal was filed but this was rejected as it was out of time. The petitioners also filed an application for writs of Certiorari and Mandamus against the order of the Wakfs Board and Wakfs Tribunal but this was also dismissed on 01.11.1991. Leave to appeal to the Supreme Court against the dismissal was also refused.

In the meanwhile the Wakfs Board by its letter dated 4.8.1988 appointed five of the respondents as Trustees of the Ulahitiwela Thakkiya (Mosque) for a period of three years from 26.6.88 to 25.6.91.

The Wakfs Board by its order dated 28.3.1992 refused the application of the petitioners to stay proceedings under section 15 of the Wakfs Act. The Trustees however were prevented from entering upon the duties of their office by the petitioners. The Wakfs Board further ordered the Director to apply to the Magistrate's Court of Gampaha for an order directing the Fiscal to hand over

the moveable properties of the Ulahitiwela Thakkiya to the duly appointed Trustees. The petitioners appealed against this order to the Wakfs Tribunal. The Wakfs Tribunal dismissed the appeal by its order dated 30.6.92.

On 28.12.91 the respondents were reappointed Trustees under section 14 (1)(a) of the Act for a period of three years commencing on 25.6.91 and ending on 31.12.94. Against the said appointment and the order of the Board dated 28.3.92 the petitioners appealed to the Wakfs Tribunal. By its order of 30.6.92 these appeals also were dismissed by the Wakfs Tribunal. The present proceedings in revision were filed by the petitioners against the order of 30.6.92.

Held :

1. The plain meaning of section 14 (1)(a) of the Wakfs Act is that once Trustees have been selected or nominated, then the Wakfs Board has to confirm and appoint such persons to be Trustees of the particular mosque. Before such confirmation and appointment by the Board, the Trustees should have been selected or nominated according to the practices, rules, regulations, etc. of the mosque.

According to such practices, rules, etc. so far as the Mosque or Ulahitiwela Thakkiya is concerned the Sheik of Beruwela selects or nominates the Trustees for a term of three years.

At the time the Board on 28.12.91 appointed the respondents for 3 years commencing from 25.6.1991 to 31.12.94 the period of office of the respondents had expired on 25.6.1991. Once the period expires then again the Trustees have to be selected or nominated according to the practices, rules, etc. as contemplated in section 14(1)(a) of the Act. In this Mosque or Thakkiya the Sheik of Beruwela has to select or nominate the Trustees for another period of office. When such selection or nomination is made, the Wakfs Board is entitled to confirm and appoint such persons as Trustees of the Mosque or Thakkiya in terms of section 14 (1)(a) of the Act. Just because the Trustees selected or nominated were prevented from functioning (between 26.6.88 and 25.6.1991) owing to certain actions of the petitioners, the Wakfs Board has no power to confirm and appoint the same persons as Trustees for another term of office under section 14 (1)(a) of the Act as was done on 28.12.91.

The respondents ceased to hold office by effluxion of time (i.e. from 25.6.91) and they had not obtained the Sheik's approval afresh for the period 25.6.91 to 31.12.94 at the time when the Wakfs Board appointed them to hold office as trustees of this Mosque. The Wakfs Board had no jurisdiction and no power to reappoint the said respondents as Trustees despite the fact that they had been deprived of functioning as Trustees during their legal tenure of office from 25.6.88 to 25.6.91 as there was no fresh selection or nomination by the Sheik. The Wakfs Board acted in excess of its jurisdiction and so did the Wakfs Tribunal by confirming the impugned orders in Appeal. The execution proceedings before the Magistrate's Court are outside its jurisdiction.

2. No question of *res judicata* in view of the orders made against the petitioners by the Courts arises.
3. Section 14 (1)(a) of the Wakfs Act prevails over regulation 42 published in Gazette dated 29.3.1985 which seeks to add the words " by the Jamath " to section 14 (1)(a). This section still stands in effect unchanged.
4. It is open to the Wakfs Board to appoint new trustees in accordance with the practice of this Mosque whereby the Sheik of Beruwela selects or nominates the Trustees.

APPLICATION in revision against the orders of the Wakfs Tribunal.

S. Sivarasa with M. Musjeed for petitioners.

K. Kanag-Iswaran, P.C. with M. S. A. Hassen, M. Farook Thahir, Harsha Cabraal and A. C. Abdul Latheef for 1st, 2nd, 5th, 5A and 5B respondents.

N. W. Zanoon with I. Zaheed for 3rd respondent.

Cur. adv. vult.

February 15, 1993.

ANANDA GRERO, J.

This is an application made by the petitioners-petitioners to this Court, for revision, under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka. They pray that for the averments contained in their petition and affidavit (i) to revise the order of the Wakfs Tribunal dated 30.6.92, (ii) to set aside the order of the Wakfs Board dated 30.6.92, (iii) to set aside the order of the Wakfs Board dated 28.3.92, (iv) to annul and or rescind the appointment of the respondents as Trustees for the period between 25.6.91 to 31.12.94, and (v) to grant other reliefs claimed in paragraphs (e) to (h) of the prayer to the petition.

The 1st, 2nd, 5th, 5A and 5B respondents-respondents filed their statement of objections and for the averments stated therein prayed that the application of the petitioners be dismissed.

The 3rd respondent also filed his statement of objections and sought almost the same reliefs as those of the petitioners. His Attorney-at-law, made oral submissions at the inquiry, and also tendered written submissions on his behalf.

The petitioners-petitioners state, that they made an application to the Wakfs Board on 28.1.1986 under section 14(1) of the Muslim Mosques and Charitable Trusts or Wakfs Act to confirm and appoint them as Trustees of the Ulahitiwela Jumma Mosque, Malwana on the basis that they had been elected as Trustees at a meeting held of the Jam'ath (congregation) of the said mosque on 22.12.85.

The 1st to 5th respondents-respondents also made an application to the Wakfs Board opposing the aforesaid application of the petitioners. The Wakfs Board by its order dated 3.01.88 (P3) declined to confirm and appoint the petitioners as Trustees of the aforesaid mosque (which is referred to as Ulahitiwela Thakkiya in the order) and directed the Director to write to the Sheikh of Beruwala to send his nominees to be appointed as Trustees, as has been done in the past.

The petitioners thereafter appealed against the order of the Wakfs Board to the Wakfs Tribunal, and the said Tribunal by its order dated 6.4.88 (P4) dismissed the appeal and confirmed the order of the Wakfs Board dated 3.1.88.

Against the said order of the Tribunal although the petitioners gave notice of appeal and filed an application for leave to appeal, they did not pursue the appeal and the leave to appeal application was rejected by this Court as it was out of time.

The petitioners also filed on 22.7.88 an application bearing No. 780/88 for a Writ of Certiorari and Mandamus against the Wakfs Board and Wakfs Tribunal.

Meanwhile the Wakfs Board by its letter dated 4.8.88 has appointed the 1st two and last three respondents-respondents to the application as Trustees of the Ulahitiwela Thakkiya (mosque) for a period of 3 years commencing from 26.6.88 and ending on 25.6.91 (*vide* P5).

This Court on 1.11.91 delivered its order dismissing the application of the petitioners for Writs of Certiorari and Mandamus upon a preliminary objection raised by the counsel for the 1st to 5th respondents. (*vide* P6) The petitioners applied for leave from the Court of Appeal to appeal against the said order to the Supreme Court but the leave to appeal application was refused by this Court.

The Wakfs Board by its order dated 28.3.92, refused the application of the petitioners to stay proceedings under section 15 of the Wakfs Act. (*vide* P10) The Wakfs Board further ordered the Director to make an application to the Magistrate's Court of Gampaha for an order directing the Fiscal of that Court to take delivery or possession of the moveable properties of the Ulahitiwela Thakkiya (mosque) from the respondents (i.e. the petitioners-petitioners to this application) and to hand them over to the duly appointed Trustees of the said Thakkiya.

Thereafter the petitioners appealed against the aforesaid order to the Wakfs Tribunal, and the said Tribunal made its final order dismissing the appeal and directed the petitioners to hand over forthwith all properties of the Thakkiya (mosque) in question that are held by them or by their nominees or agents. (*vide* P13). Against the said order dated 30.6.92, the petitioners-petitioners made this application for Revision to this Court. This is in short the background of this application in question.

At the inquiry before this Court, two prominent sections of the Wakfs Act became the subject of discussion. They are sections 14 (1)(a) and 15A of the said Act. Apart from the said two sections, the other sections that were referred to are sections 14 (2), 54 and 55A of the Wakfs Act.

This Court is of the view, that in order to find out whether the Wakfs Board on 28.12.91, acted within the ambit of its powers, section 14 (1)(a) of the Act is very material and important. In fact the main issue in this case, whether the Trustees have been confirmed and appointed by the Wakfs Board rests on the aforesaid section.

The said section is as follows :

As soon as may be, after a mosque has been registered under section 13, the Board –

(a) shall confirm and appoint a person or persons to be a Trustee or Trustees who is or have been selected or nominated according to the practices, rules, regulations or other arrangements in force for the administration of the mosque.

The learned counsel for the petitioners-petitioners states in his written submissions that according to this section (i.e. 14 (1)(a)) the appointment by the Board is in fact a confirmation of the nomination or selection. While agreeing with this submission, it should be stated, that the said section empowers the Board to confirm and appoint the trustees who have been selected or nominated according to the practices, rules etc, for the proper administration of the mosque concerned. The Board cannot deviate from the provision of the above section 14 (1)(a) of the Wakfs Act under any circumstances, other than those circumstances shown in section 14 (1)(b) and (c) of the Act. But such circumstances are not applicable to the instant case.

The plain meaning of section 14 (1)(a) is, that once the Trustees have been selected or nominated, then the Board has to confirm and appoint such persons to be the Trustees of the particular mosque. Before such confirmation and appointment by the Board, Trustees should have been selected or nominated according to the practices, rules, regulations, etc., of the mosque.

According to such practices, rules, etc. it appears that as far as the mosque or Ulahitiwela Thakkiya is concerned, the Sheik of Beruwela selects or nominates the Trustees for a term of three years. The order of the Wakfs Board dated 3.1.88 (P3) reveals, this fact, very well. There is evidence to show that the respondents-respondents (other than 3rd respondent-respondent Ahamed Nuhman) were so appointed as Trustees for a period from 26.6.88 to 25.6.91, i.e. for a period of three years.

The order of the Wakfs Board dated 28.12.91 (P7) reveals that the said respondents-respondents have been appointed as Trustees under section 14 (1)(a) of the Act for a period of three years commencing from 25.6.91 to 31.12.94. Against the said appointment and the order of the board dated 28.3.92 these petitioners-petitioners had appealed to the Wakfs Tribunal (*vide* P11). But their appeal was dismissed by the Tribunal by its order dated 30.6.92 (*vide* P13).

The dismissal of the afore-mentioned appeal of the petitioners-petitioners would mean, that the Tribunal was in agreement with the order of the board dated 28.12.91, marked P7. At the time the Board appointed the respondents-respondents as Trustees of the

mosque in question, their period of office has expired. In fact the Attorney-at-law who appeared for them before the Board has stated as follows :

".....that the present petitioners (i.e. the respondents-respondents) were appointed as Trustees on 26.6.88 for a period of 3 years, which period expired on 25.6.91".

Therefore it follows that the Board knew that their term of office has expired when the Board made the appointment for a period of 3 years commencing from 25.6.91 to 31.12.94 on 28.12.91.

The question that arises is, whether provisions of section 14 (1)(a) of the Act provides for such an appointment by the Board as was done on 28.12.91? As earlier stated the practice, has been that the Sheik of Beruwala, to select or nominate the Trustees to this mosque or Thakkiya for a period of three years. Once that is done then the Board is empowered under the aforesaid section to confirm and appoint such Trustees. This procedure is in conformity with the provisions of this section. The Board cannot and shall not deviate from such procedure.

The learned counsel for the respondents-respondents in his written submissions states thus :

" The fact that these respondents were not able to exercise their rights as Trustees cannot and does not detract from their status of being persons who have been nominated by Sheik according to the practices obtaining at this Thakkiya, within the ambit and scope of section 14 (1)(a).

Therefore it is respectfully submitted that there was no legal impediment to the confirmation and appointment of these respondents within the meaning of section 14 (1)(a) of the Wakfs Act ".

No doubt the respondents-respondents were not able to function as Trustees due to certain actions taken by the petitioners. Whatever may be the reason the fact remains, that the term of office of the respondents-respondents expired on 25.6.91.

According to section 14 (2)(a) of the Act, only a person appointed as a Trustee shall officiate as Trustee for such period as provided for by the practices, rules, regulations, or other arrangements in force for the administration of the mosque. The practice has been for the Sheik of Beruwala to select or nominate the Trustees for a term of three years. Therefore the provisions of the aforesaid section permit the trustees to function for a period of three years. Once such period expires then again the Trustees have to be selected or nominated according to the practices, rules, etc., as contemplated in section 14 (1)(a) of the Act. In this mosque or Thakkiya, it appears that the Sheik of Beruwala has to select or nominate the Trustees for another period of office. When such selection or nomination is made, then there is no doubt that the Wakfs Board is entitled to confirm and appoint such persons as Trustees of the mosque or Thakkiya in terms of section 14 (1)(a) of the Act. But this Court rejects the view, that just because the Trustees so selected or nominated by the Sheik of Beruwala were prevented from functioning as Trustees due to certain actions of the petitioners-petitioners the Wakfs Board has the power to confirm and appoint the same persons as Trustees for another term of office under section 14 (1)(a) of the Act as was done in this case on 28.12.91. Although the learned counsel for the respondents-respondents states that there is no impediment for such confirmation and appointment of the said respondents as Trustees under the provisions of section 14 (1)(a) of the Act, I am unable to agree with his contention. The said section has not empowered the Board to confirm and appoint persons whose term of office has expired, although they were not able to function as Trustees for no fault on their part.

The learned counsel for the respondents-respondents further submits that there is no restriction in the Act from extending a period of office of those qualified as Trustees (*vide* para 26 of the written submissions). If the intention of the legislature was to extend the period of office of those persons qualified as Trustees by the Board, it would have specifically stated so in the Act itself. But nothing to that effect has been incorporated in this Act.

Can this Court take advantage of the omission (*i.e.* for not having stated that the term of office of trustees could be extended or not by the Board) and say that the Board is empowered to extend the period of office of those who qualified as Trustees of the mosque?

Bindra's Interpretation of Statutes (7th edition) at page 358 states :

"The Courts by supplying the omissions in an Act of legislature would be travelling far afield, and it would be open to serious objection when the Courts deviate from their real function of construction and enter upon legislation which is obviously not their real function and outside their purview. The Courts cannot say to themselves that through oversight the Legislature has failed to provide for a particular situation, and, therefore what was not done by the Legislature may be done by the Court. This does not lie within the judicial field. *The general rule in all such cases is.....to give effect to the presumed intention of the Legislature and to carry out what appears to be the general policy of the Law*".

It appears that the intention of the Legislature is that the Board itself cannot extend the period of office of persons who have been selected or nominated according to the practices, rules, etc. (in this case the practice is selection or nomination by the Sheik of Beruwela) to continue for another term. What the Board is entitled to do is to confirm and appoint such persons once they are selected or nominated according to the practices of the mosque, as stated in section 14 (1)(a) of the Act. Therefore I am unable to agree with the aforementioned contention of the learned counsel for the respondents-respondents.

The order made by the Wakfs Tribunal on 30.6.92 (P13) was the result of an appeal made by the petitioners-petitioners dated 23.4.92 seeking to set aside the order of the Wakfs Board dated 28.3.92 (P10), and to make fresh appointment of Trustees in accordance with law and taking into account the wishes of the members of the Jamath of the mosque in question. The Tribunal dismissed the said appeal. One of the reasons for the dismissal of the appeal appears to be that the Trustees (i.e. the respondents-respondents) were kept out and not allowed to function by reason of the applications, and appeals, filed by the petitioners-petitioners. It is no doubt true ; but as the learned counsel for the 3rd respondent-respondent states that the fact remains that the respondents-respondents have ceased to hold office by effluxion of time, i.e. from 25.6.91 and they have not obtained the Sheik's approval afresh for the period 25.6.91 to 31.12.94, at the time when the Wakfs Board appointed them to hold office as Trustees of this mosque.

P7 reveals that one Mr. Abdul Latiff, Attorney-at-law for the respondents-respondents (petitioners before the Board) had requested the Board that an order be made extending their period of office as Trustees. The Board had taken into consideration the said request also, and decided to appoint them for another period of three years commencing from 25.6.91 to 31.12.94. Nowhere in this order (P7) is it stated that the Board confirmed and appointed them (respondents-respondents) as they were the persons selected to nominate according to the practices, rules, etc. of the mosque concerned ; i.e. to say those who have been selected or nominated by the Sheik of Beruwela. The learned counsel for the 3rd respondent-respondent in his written submissions draws the attention of Court to this fact. He says that the other respondents, (i.e. other than the 3rd respondent) cannot seek to maintain that Wakfs Board, had the jurisdiction and power to reappoint the said respondents as Trustees on an order made pursuant to a request made by Mr. A. C. M. Latiff an Attorney-at-law by reason of the fact that they had been deprived of functioning as Trustees, during their legal tenure of office, i.e. 25.6.88 to 25.6.91. Even the learned counsel for the petitioners-petitioners submits, that Wakfs Board had no power under 14 (1)(a) to appoint the said respondents as trustees for the said period after the expiry of their term of appointment on 25.6.91, as they have not been selected or nominated by the Sheik for the said period. He further says such appointment made by the Board is therefore in excess of its jurisdiction, since the Board is only empowered under the section (14) (1)(a) to confirm and appoint persons selected or nominated according to the practices of the mosque.

I fully agree with the contentions made by them, and reiterate that the Wakfs Board had acted beyond the scope of the provisions of the Act, and more particularly against the provisions of section 14 (1)(a) of the Act. Such an act done by the Board has been approved by the Wakfs Tribunal when it dismissed the appeal of the petitioners-petitioners. Although the learned counsel for the respondents-respondents submits that the order of the Wakfs Tribunal of 30.6.92 is *intra vires* its competence, valid in law and should be upheld, I cannot agree with this submission. When in fact, the Board had acted beyond its powers conferred by the Act, could it be said that the Tribunal was correct when it upheld the order of the Board? I am of the view that both the Board and the Tribunal had acted erroneously and against the provisions of section 14 (1)(a) of the Act.

The learned counsel for the petitioners-petitioners states that the exercise of the power of appointment of Trustees by the Wakfs Board which has been confirmed in appeal by the Wakfs Tribunal and is sought to be enforced by execution proceedings before the Magistrate's Court is in excess of its jurisdiction. Therefore he submits that this an exceptional circumstance, is warranting the exercise of the revisionary powers of this Court.

Upon the perusal of section 15A of the Act it manifests that proceedings in the relevant Magistrate's Court could be initiated by way of an application in order to hand over the possession of property of the mosque to the Trustees when the Board has appointed Trustees. *This appointment must be done in terms of the provisions of section 14 (1) of the Act : and in the instant case what is applicable is section 14 (1)(a) of the Act.*

As earlier stated the Board had acted beyond its powers ; and the Tribunal confirmed such illegal appointment. Under such circumstances it cannot be held that proceedings can be lawfully taken in the Magistrate's Court to compel the petitioners-petitioners to hand over possession of the properties to the so called " Trustees " of the mosque, as contemplated in section 15A of the Act. In the aforesaid circumstances this Court is of the view that exceptional circumstances do exist to exercise the revisionary powers of this Court.

On the question of *Res Judicata* this Court considered the submissions made by respective Counsel appearing for the parties to this application. The issue whether the Wakfs Board on 28.12.91 had acted within the purview of section 14 (1)(a) of the Act is very central to the question of deciding this application before this Court. As a result of the decision of the Board (P7), the subsequent steps were taken under section 15A (2) of the Act and thereafter proceedings before the Board were initiated and the Board made its order on 28.3.92 (*vide* 10). Against this order an appeal was made by the petitioners-petitioners to the Wakfs Tribunal. The Tribunal by its order dated 30.6.92 (P13) dismissed the said appeal. After the order of the Tribunal, steps have been taken under section 15A (3) of the Wakfs Act. Thereafter the present application for revision was made by the petitioners. Thus it could be seen that the order dated 28.12.91 which was not an issue in CA 780/88 and SCLA 29/91 is

the main issue which gave rise to subsequent proceedings before the Tribunal and thereafter in the Magistrate's Court of Gampaha. As far as the aforesaid matters are concerned, the question of *Res Judicata* does not arise, and therefore this Court is not precluded from deciding matters arising out of P7, to P13, and also regarding the proceedings initiated before the Magistrate's Court of Gampaha.

After a careful consideration of all the material facts and submissions placed before this Court, I am of the view that out of the reliefs claimed by the petitioners, this Court is able to grant the reliefs (a) to (d) and (f) of the prayer to the petition.

In so far as prayer (e) is concerned, this Court is of the view that upon consideration of all the available material facts before this Court, the selection or nomination of Trustees to this mosque has been by the Sheik of Beruwela as a practice for a considerable period of time and therefore it is not proper for this Court at this stage to interfere with such practice and to make any other order directing that fresh appointment of Trustees should be made taking into consideration the wishes of the members of the Jamath of the mosque. No doubt according to regulation 42 of the Gazette dated 29.3.85, the words " by the Jamath " are added to section 14 (1)(a) of the principal Act. As a result there appears to be a conflict between the provisions of section 14 (1)(a) of the Act and the aforesaid regulation 42. After the said regulation has been published in the Gazette, section 14 (1)(a) has not been amended to include the words " by the Jamath ". The result is the provisions of section 14 (1)(a) stand unchanged. This Court is of the view that when there is a conflict between the provisions of a Statute and the provisions of a regulation published in a Gazette, the former prevails over the latter. Hence, section 14 (1)(a) of the Wakfs Act, prevails over regulation 42 of the said Gazette. For these reasons the relief prayed for in paragraph (e) of the prayer to the petitioner is hereby not granted by this Court.

As herein before mentioned there are exceptional circumstances, which warrant the exercise of the extraordinary powers of this Court. Hence I hereby grant reliefs claimed in paragraphs (a) to (d) and (f) of the prayer to the petition. Therefore the resulting position is, that neither the petitioners-petitioners nor the respondents-respondents be regarded as the duly appointed Trustees of this

mosque. The mosque will not have its duly appointed Trustees for a short period. But this can be remedied by resorting to section 14 (1) of the Act. As it appears to this Court, that the practice of this mosque has been, that Sheik of Beruwela to select or nominate the Trustees, this Court is of the view that such practice may henceforth be carried out by him (Sheik of Beruwela). Thereafter the Wakfs Board is entitled to act in terms of section 14 (1)(a) of the Act.

For the reasons stated above, acting in revision, I grant the aforesaid reliefs claimed by the petitioners-petitioners in their petition, but I make no order with regard to costs.

Application allowed.
