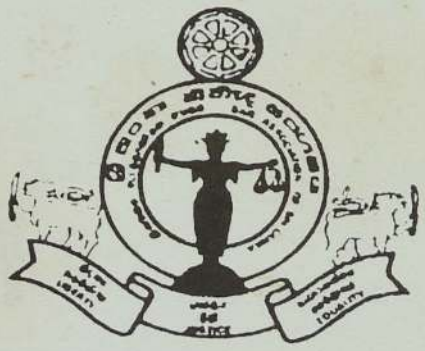
AL-AMEEN LAW REPORT

Vol : II

2004

.H.G. AMEEN



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Vol : II

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Editor :

A.H.G. Ameen

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AL-AMEEN LAW REPORT

VOL: II - 2004

Containing cases decided under Muslim Law by the Wakfs Tribunal and M.C., DC, CA and Supreme Court of the Democratic Socialist Republic of Sri Lanka.

Editor:

A.H.G. AMEEN

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PREFACE

The Maiden volume of the Al-Ameen Law Report was launched just one year back and it carried forty-nine decided cases and orders made by the Wakfs Tribunal with appeals from it to the Court of Appeal and the Supreme Court and also other matters relating to matrimony of muslims.

The volume II of the Law Report, Al-hamdu lillah, consisting of thirty - eight decided cases is being launched without any financial assistance for this publication. Infact I have made several attempts soliciting Muslims Institutions to help in my effort but I am yet to receive assistance for my publications.

With financial constraints that I publish this Law Report as I do not receive any financial assistance from any institution. However I have in hand material on Muslim Law for publication which require funds. Therefore I look forward for financial assistance from benefactors who are concerned in the development of Muslim Law in Sri Lanka for my future publications.

The Muslim Law Reporting I have ventured upon can only grow with the assistance of the Legal fraternity and as such I look forward from the legal fraternity for copies of decided cases under Muslim Law sent to me for my next publication of Al-Ameen Law Report Vol. III.

I wish to place on record my appreciation to the Consulting Editors and Mr.M.Sarook the Secretary to the Wakfs Tribunal.

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Cases referred:

1. Karunatne Vs Commissioner of Co-operative Development 79 NLR,193
2. Jamila Umma Vs Mohamed 50 NLR 15
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4. Dissanayake Vs Siyane Adhikari Co-operative Stores Union 60 NLR 140
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6. R Vs Paddington valuation office P.Peacheay Property Corporation Ltd. 1966 1 QB 380

7. Gunesekera Vs Weerakoon 73NLR 262

8. Hendrick Appuhamy Vs John Appuhamy 69NLR29

9. Carron Vs The Land Reform Commission SC 55/84 – SC minutes of 22/7/1985.

Held: Preliminary objections rejected. Main application to be listed for hearing.

BEFORE: S.N.Silva,J.

COUNSEL: M.S.M.Hassen with I.Waffa for the Petitioners.
Faiz Musthapha,P.C. with Ikram Mohamed, Farook Thahir, N.M. Saheed and M.S.M.Suhaid for 1st to 5th Respondents.

ARGUED ON:28TH November 1988 and 29th November 1988.

DECIDED ON : 20th January, 1989.

ORDER on Preliminary objection.

S.N.Silva, J :

The petitioners are members of the 'Jamaath' or congregation of the Weligama Muhiyadeen Grand Mosque. This Mosque being over 250 years old is registered under the provisions of the Muslim Mosques and Charitable Trusts or Wakfs Act No: 51 of 1956 amended by Acts Nos.21 of 1962 and 33 of 1982. The mosque serves mainly persons of two areas, Galbokka and New Street. The persons of these two areas, constituted two congregations using distinct wings, of the mosque. The two wings were separately administered.

The Petitioners being members of the Galbokka congregation have sought Writs of Certiorari and Prohibition, in respect of certain decisions made by the Respondents. The 1st to 6th Respondents are members of the Wakfs Board established in terms of section 5(1) of the said Act. The 7th Respondent is the special trustee appointed by the Wakfs Board to administer the mosque. The first relief sought by the Petitioners is to quash the decision made by the Wakfs Board to appoint the 7th Respondent as the special trustee. The second relief sought by the Petitioners is to quash the decision of the Board granting permission to the 7th Respondent to demolish sections of the three storeyed structure that had been constructed and used by the Galbokka congregation for several years and to construct a new mosque.

At the commencement of the hearing of this applications Counsel for the 1st to 6th Respondents raised the following preliminary objections:

(1) That the application is not properly constituted in that, two members of the Wakfs Board who were parties to the decision of the Board made on 3-1-1988, to appoint the 7th Respondent as special trustee, have not been made Respondent to the application. It was conceded that the other five members of the Board that made the decision have been made Respondents. It was also conceded that all the members of the Board that made the second decision sought to be quashed, have been made Respondents;

(2) That the Petitioners are precluded from obtaining relief by way of a Writ of Certiorari because they had an alternative remedy in respect of the impugned decisions of the Wakfs Board i.e. an appeal to the Tribunal, provided for in section 9(H)(1) of the Act.

In support of the first objection stated above, Counsel relied on the judgment of the Supreme Court in the case of Karunaratne vs. Commissioner of Co-operative Development 79 N.L.R. Vol.II p.193. In that case, the Petitioner applied for a Writ of Certiorari to quash a decision made in an appeal against an award made by an Arbitrator in terms of section 58 of the Co-operative Societies Law No.5 of 1972. An objection was taken that the Deputy Commissioner of Co-operative Development who in fact heard the appeal and made the impugned order was not a Respondent to the application. Ismail,J with two Judges agreeing held that the Deputy Commissioner was a necessary party and that the failure to add him as a Respondent was a "fatal irregularity". In arriving at this decision Ismail,J followed the dicta in three previous cases decided by the Supreme Court to wit; Jamila Umma vs. Mohamed 50 N.L.R. 15, Soyza Vs. de Silva 52 N.L.R. 309 and Dissanayake vs. Siyane Adhikari Co-operative Stores Union 60 N.L.R.140.

In each of these cases the person whose decision or award was sough to be quashed had not been made a party respondent, instead wrong parties were brought before Court. The Supreme Court held in each case that the person who made the decision or award is a necessary party and the failure to name that person as a party respondent will result in a dismissal of the application.

The case now before me involves a somewhat different question. The decisions sought to be quashed have been made by the Wakfs Board. The Board is constituted in terms of section 5(1) of the Muslim and Charitable Trusts or Wakfs Act No:51 of 1956 as amended. It consists of the Director, who is a public officer and seven members appointed by the Minister. In terms of section 7 the term of office of a member is three years but section 5(4) empowers the Minister to remove a member from

office at any stage. The Chairman of the Board is appointed by the Minister and in terms of section 9(2) the quorum for a meeting of the Board is three members. The Board has not been incorporated by law and as such cannot be sued in its name. Therefore, a person challenging a decision of the Board should ordinarily name as respondents its members. The question to be decided is whether the failure to name some of the members of the Board as Respondents should per se result in a dismissal of the application.

To seek an answer to this question, it is necessary at first to identify the rationale underlying the foregoing dicta of the Supreme Court. The requirement that the maker of a decision should be made party to a proceeding where the validity of the decision is challenged, is based on the premise that the maker should be afforded an opportunity of defending his decision. Thus the requirement is rooted in the audi alteram partem rule, being a principle of natural justice. A decision of the Board is the collective decision of its members or of the majority of the members as provided in section 9(3) of the Act. Therefore, it seems unreasonable to impose as mandatory a procedural requirement that every member of the Board that made the decision sought to be quashed, should be made a respondent to the application. Indeed, such a requirement could cause severe hardship to a Petitioner considering that, in terms of the provisions referred above, the composition of the Board can change from time to time. Counsel for the Petitioner contended that every member of the Board that made the decision should be named as a respondent. If not, he submit that, a Petitioner could selectively name as Respondents only the members who held views favourable to him and omit the others. That event, the Petitioner's application will fail on the substantive ground of mala fides and not upon the failure to comply with procedural requirement that necessary parties shall be before court. Considering that the decision of the Board is collective

decision of its members or of a majority of them, as distinct from an individual decision of each of the members, I held that, there is sufficient compliance with procedural requirements, if a substantial number of the members of the Board that made the decision, are named as respondents to the application. Further, an application to quash a decision of an unincorporated body of persons should not fail on the mere ground that some of the members of that body are not named as Respondents to the application. If any such member is not named as a respondent, it would be open to any of the parties before court to make an appropriate application for the addition of that member as a party. The Court will then consider whether the presence of that member is necessary to completely and effectively decide upon the application before it. I have to note that in the case of Ramasamy vs. Ceylon State Mortgage Bank 78 N.L.R. 510 which involved an application to quash a determination made by the Bank under section 70(B) (6) of the Finance Act No: 33 of 1968, the Supreme Court allowed an application to add as a respondent, the Minister who made the vesting order persuant to the impugned determination, upon an application made four years after the filing of the petition.

The second objection is that the Petitioners are precluded from obtaining relief in this application because they had an alternative remedy by way of an appeal to the Tribunal against the impugned orders of the Board. Section 9(H) of the Act gives to any person aggrieved by an order or decision of the Board a right to appeal within 30 days to the Tribunal constituted in terms of section 9 D of the Act. Counsel for the Petitioner submitted that the Tribunal which consists of members appointed by the Judicial Service Commission is vested with a wide appellate jurisdiction and that the Petitioners should have availed of that remedy without invoking the extraordinary remedy by way of a Writ of Certiorari.

According to the averments of the Petition both orders have been made by the Board ultra vires and in contravention of the principles of natural justice. Thus the case for the Petitioners is that the impugned decision are null and void on the basis of either or both of the said grounds. In, Judicial Review of Administrative Action by S.A. de Smith (4th Edition p.425), dealing with the effect of alternative remedies as precluding relief by way of certiorari, it is stated as follows:

"(ii) If an applicant claims to be aggrieved by a decision made without jurisdiction or in breach of the rules of natural justice, that he has not taken advantage of a statutory right of appeal should normally be regarded as irrelevant."

The learned author has cited in support of the said preposition the decision of the Court of Appeal in the case of R vs. Paddington Valuation Officer ex. P. Peachery Property Corporation Ltd.(1966) 1 QB p.380. In that case it was held that where the applicants were attacking the basic validity of the whole valuation list as distinct from challenging the correctness of an individual valuation, the remedy by way of a Writ of Certiorari was more appropriate than by way of an appeal provided for under the statute.

Counsel for the Respondents relied upon the decision of the Supreme Court in the case Gunasekera vs. Weerakoon 73 N.L.R.262. In that case the Supreme Court dismissed an application for a Writ of Certiorari to quash an award made by an acquiring officer under the Land Acquisition Act inter alia on the ground that the Petitioner had an alternative remedy by way of an appeal to the Board of Review which he had availed of. It is clear from the judgment, that the Petitioner had participated at the inquiry the Acquiring Officer and that his substantive claim was

for an enhancement of the quantum of compensation awarded by the Acquiring Officer.There was no challenge on the vires of the Acquiring Officer to make the award nor was there a plea of nullity based on a non compliance with the principles of natural justice. Thus, it is seen that in Gunasekera vs. Weerakoon the Supreme Court dealt with a situation where only the correctness of the award was challenged by an application for a Writ of Certiorari. In such situation, the Supreme Court correctly held that the Petitioner should pursue the statutory appeal which he had availed of. Therefore, the decision in Gunasekera vs. Weerakoon is not an authority for the proposition that where a petitioner applies for a Writ Certiorari on the ground that the impugned order is null and void, that the application should be dismissed only on the ground that the Petitioner has not availed of a right of appeal provided for in the statute.

Counsel for the Respondents also relied on the judgment of the Supreme Court in the case of Hendrick Appuhamy vs. John Appuhamy 69 N.L.R. 29. In that case the Supreme Court held that a landlord of a paddy field cannot maintain an action in the District Court for the ejectment of his tenant cultivator. It was held that the Paddy Lands Act No: 1 of 1958 provides a specific remedy to a landlord who finds that a tenant has infringed the rights given to him by the Act and that the remedy thus made available was intended to substitute the remedy at common law. The Muslim Mosques and Charitable Trusts or Wakfs Act does not vest any right in the Petitioners. Further there is no provision in the Act which is intended to oust the jurisdiction vested in this Court by Article 140 of the Constitution. Therefore, the decision in Hendrick Apppuhamy vs. John Appuhamy has no application to the facts of this case.

For the reasons stated above, I hold that the Petitioners who apply for Writ of Certiorari to quash decisions that are said to be ultra vires and void cannot be precluded from obtaining the reliefs sought solely on the ground that they have not availed of the right of appeal provided in the Act. In this connection I wish to cite the following observations of Sharvananda,C.J made in the case of Carron vs. the Land Reform Commission-S.C. 55/84 – S.C. minutes of 22.7.1985:

"An order or decision which is a nullity is something which the person affected by it is entitled ex debite justitice to have set aside."

The preliminary objections raised by the Petitioners are rejected and I direct that the main application be listed for hearing in due course.

Sgd

Judge of the Court of Appeal.

Mustakeem
vs.
Chairman Wakfs Board

C.A. No: 808/88

BEFORE: *P.R.P.Perera J.,(P./ C.A.) & Wijeratna J.*

COUNSEL: *M.S.A.Hassan with Miss Sheila Jayathilaka for the Petitioners:*
Faiz Musthapha P.C., with Ikram Mohamed and N.M.Saheed and M.S.M. Suhaid for the 1st-6th Respondents:
Farook Thahir for the 7th Respondent

ARGUED ON: 01.11.'89

DECIDED ON: 26.02.90

Judgement

Perera J. (P. / C. A)

This is an application by the petitioners for issue of a Mandate in the nature of a Writ of Certiorari to quash two orders made by the 1st – 6th Respondent constituting the Wakfs Board, namely:

1. an order dated 3. 1.'88, appointing the 7th respondent as the special trustee of the Weligama Muhayideen Grand Mosque from 3.1. '88 up to 2 .1.'89 (Vide 'X 3') .

2. an order dated 21.5.'88 granting permission to the 7th respondent to demolish the existing Mosque and to construct a new Mosque in the same premises. (Vide 'X5').

The Petitioners are the members of the Jamaath of the Weligama Muhyadeen Grand Mosque. The 1st respondent is the Chairman and 2nd , 6th respondents are members of the Wakfs Board established under section (5) of the Wakfs Act. The 7th respondent is a special trustee of the said Mosque appointed by the Wakfs Board.

It is common ground that this Mosque serves the spiritual and religious needs of the Muslim congregations of Galbokka and New Street which are two distinct congregations. Admittedly, these two factions were irreconcilable, and this factionalism and rivalry is demonstrated by the distinct and separate arrangements made by both factions who conducted religious services in seperate portions of the Mosque.

On 1. 12. '81, Wakfs Board had appointed two trustees representing each group. Their period of office had expired on 31.12.'82, and the said two trustees functioned in the capacity of Persons. In – Charge. Thereafter, on 3.1.'88, the Wakfs Board appointed the 7th respondent as a special trustee of the said Mosque for the period 3.1.'88 to 2.1.'89.

The petitioners state that prior to making of the decision to appoint the 7th respondent as the special trustee of this Mosque, the members of the Galbokka congregation were neither informed nor consulted. The respondent being neither a registered member of the Jammath of this Mosque, nor a worshipper at the said Mosque, this appointment has been made in violation of custom, tradition and contrary to Statutory provisions contained in the

Wakfs Act. It is petitioners' complaint that the appointment of the 7th respondent was made without hearing the petitioners or other members of the Galbokka congregation and in disregard of ancient and long standing customs, tradition, usage and practice of the Mosque, and that such appiointment was made contrary to the obligation which binds the Wakfs Board to act fairly. In the above circumstances, Counsel for the petitioner contended that the appointment of the 7th respondent as special trustee is invalid and void in law in as much as there was a violation of statutory provisions and age old customs which had hardened into a rule of law. Counsel urged that having regard to the matters set out above the order of the 1st to 6th respondents dated 3.1.'88, appointing the 7th respondent as special trustee of this Mosque from 3.1.'88 – 2.1.'89 must necessarily be quashed.

Counsel also submitted that the Galbokka congregation had demolished the old wing of the Mosque and constructed a new three storeyed building to accommodate the devotees of the Galbokka congregation at a cost of over one million rupees. The 7th respondent on 21. 5.'88, made an application to the Wakfs Board to demolish this three storeyed building constructed by the petitioners and the Galbokka congregation. On this application, the 1st - 6th respondents (members of the Wakfs Board) made its order dated 21.5.'88, authorizing the 7th respondent to demolish the said building as it was unsuitable and to construct a Mosque in the same premises. (Vide 'X4' & 'X5').

Counsel for the petitioner complained that the 1st – 6th respondents had made this order ('X5) without notice to the petitioners and to the members of the Galbokka congregation and without affording them an opportunity of being heard before the said order was made although the members of the Galbokka congregation were directly affected by such order. Counsel

contended that neither the 1st to 6th respondents who constituted the Wakfs Board nor the 7th respondent were empowered under the provisions of the Wakfs Act, to demolish the Mosque arbitrarily or even to construct a new Mosque. It was Counsel's submission that in any event the 7th respondent as special trustee was only authorized to manage the affairs relating to administration of the Mosque and not to construct a new one. Counsel contended therefore that the order dated 21.5.'88 (Vide 'X') made by the 1st to the 6th respondents authorizing the 7th respondent to demolish a portion of the mosque was an order made in excess of jurisdiction and was not permissible under the provision of the Wakfs Act.

As regards the order of the Wakfs Board dated 3.1.'88 'X 3), appointing the 7th respondent as the special trustee the gravamen of the petitioner's complaint is that neither they nor any other member of the Galbokka congregation were afforded an opportunity of being heard prior to such appointment. Thus the 1st – 6th respondents had acted contrary to the obligation to act fairly and in contravention of the principles of natural justice, in particular the Audi Alteram Partem rule, and should be quashed by way of Writ.

According to the statement of objections filed by the 7th respondent, about 20 years prior to his appointment as special trustee of this Mosque, the Galbokka Group, had demolished one wing of the said Mosque, and later constructed an incomplete three storeyed structure at the same premises, while' on or about 4.12.'87, while the new Street congregation, with the consent and concurrence of the Galbokka congregation, including the two Persons-in-charge, demolished the other wing of the building with a view to constructing the other half of the said building and make the said Mosque, a single building unit. Subsequent to the

said demolition a dispute had arisen between the two sections of the Jamaath as it was found that the proposed structure could not be connected to the remaining portion, as that portion could not take the load. Thereupon, one Mr. Kamil, an authorized officer of the Wakfs department after investigation into the said dispute, and the conduct of the affairs of the said Mosque, made an application dated 31.12.'87, to the Wakfs Board, and sought the appointment of the 7th respondent as the special trustee of the said Mosque. The report and application of the authorized officer, is produced by the 7th respondent, marked '7 R 4'. An "Authorised Officer" is wenvisaged in section (20) (A) (1) & (2) of the Muslim Mosque and Charitable Trust or Wakfs Act.

Upon a consideration of the said application the 1st to the 6th respondents (the Wakfs Board) appointed the 7th respondent as Special Trustee and also resolved to direct the 7th respondent to take certain steps which the Board considered necessary in the interest of the Mosque without prejudice to the powers and authority otherwise vested in him as special trustee (Vide 'X3').

On a perusal of section 14 (1) (a) and 14 (1) (b) of the Wakfs Act, it is clear that the Wakfs Board should normally appoint a person from the congregation in accoudance with the custom of the Mosque. Section 14 (1) (c) however confers a residuary power of the Wakfs Board in certain circumstances to appoint a Special Trustee for a "particular period" (i.e.a fixed term). In the present case as there was a dead lock between the two rival factions the Board appointed the 7th respondent for a limited period of one year. It is clear from the material available that the first to sixth respondents (the Wakfs Board) have acted on the application of the Authorised Officer, who in turn submitted his report after consulting both groups, including the Galbokka faction to which the present petitioners belonged. Therefore the Board, had before

them through the instrumentality of the report of the Authorised Officer, the views of both factions of the congregation.

Counsel for the first to sixth respondents contended that having regard to the exigencies of the situation, and the prevailing dead-lock between the rival factions of the congregation, it was not possible for the Board, to consult every member of the congregation and that it was competent for the Board, to obtain information, in any way they thought best prior to making the appointment. It was Counsel's contention that it is settled law today that the "audi alteram partem" rule is a flexible principle and that the whole statutory and factual context must be considered in applying this rule. (Vide Wade on Administrative Law 5th Edition at page 474.)

In support of this proposition Counsel relied, on a judgment of the Privy Council, where their Lordships observed as follows :-

"The question whether the requirement of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point. As Tucker L.J.(as he then was) said in Russell vs. Duke of Norfolk, 'there are in my view no words which are of universal application to every kind of inquiry, and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, and the subject matter which is being dealt with and so forth."
Vide University of Ceylon vs. Fernando
61 N.L.R. 505 at 512 – 513.

Counsel also cited an observation of Lord Morris in Wiseman vs. Borneman 1969 3 A.E.R. 274 as follows :-

" We often speak of the rules of natural justice. But there is nothing rigid or mechanical about it. What they comprehend has been analysed and described in many authorities. But this analysis must bring into relief rather their sport and the inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice it has been said is only fairplay in action."

This view has been reiterated in Rex vs. Wareham Magistrates Court ex-parte Seldon 1988 1 A.E.R. 746 at 753.

In the present case, it is clear that the Wakfs Board (i.e. the first to sixth respondents) had acted on the information obtained through the Authorised Officer who is a statutory fuctionary recognized by section 20 of the Wakfs Act and who submitted the report (7 R 4). I am therefore of the opinion that the Board at the stage they appointed the 7th respondent as special trustee of the mosque, had before them through the instrumentality of the report of the Authorised Officer the views of every section of the congregation. Applying the principles set out in the cases cited above, I am firmly of the view that this satisfied the test of consultation with the representatives of the petitioners as laid down in the said cases. The application of the petitioners to quash the order of the 1st to the 6th respondents dated 3.1.88 appointing the 7th respondent as special trustee of the mosque from 3.1.88 to 2.1.89 must therefore necessarily fail.

I have now to consider whether on the material placed before this court there is sufficient justification to quash the order of the first to the sixth respondents dated 21.5.88 granting

permission to the 7th respondent to demolish the existing mosque and construct a mosque at the same premises. The petitioners have sought to have this order quashed also on the basis that neither they nor any other member of the Galbokka congregation were afforded an opportunity of being heard before that order was made.

According to the 7th respondent on 16.2.88 there was a meeting of the Committee appointed for the re-construction of the mosque held at the Department of Muslim Religious and Cultural Affairs (Wakf) Division presided over by the 7th respondent, at which representatives of both factions of the congregation were present. Vide 7 R 5. The representatives of the Galbokka congregation included Hussain Hadjiar, who was the leader of that faction having been one of the two trustees appointed in 1981, and Mohamed Jaleel who is the present 5th petitioner. It was resolved at this meeting to settle the dispute regarding the re-construction of the mosque which had arisen by reason of the demolition of the New Street section of the mosque by entrusting to the 7th respondent the task of procuring the services of an architect to draw up a plan for "the construction of a new mosque retaining as much as possible of the existing three stores." Vide 7 R 5. According to the 7th respondent in pursuance of that mandate, he had contacted M.J.Rahim, Chartered Architect, and Dr.A.N.S. Kulasinghe a well known authority on this subject. Mr.Rahim, having inspected the site, had reported that "it would be essential to re-design the building, and demolish the existing structure as the present planning was totally inadequate in all these aspects." Vide 7 R 6. Further Dr.Kulasinghe had recommended that the entire structure be demolished. He has expressed the opinion that the structure was hazardous as it showed inability to withstand it's own weight, leave alone a mass congregation." Vide paragraph 9 of Dr.Kulasinghe's report 7 R 7.

These reports were considered at a meeting held on 14.3.88, presided over by the special trustee (the 7th respondent). Hussain Hadjiar – a representative from the Galbokka congregation and the 5th petitioner had been present at this meeting. Vide 7 R 8. After the consideration of these reports the Galbokka faction of the congregation had agreed to the demolition of their portion of mosque. Vide the minutes of the meeting held on 14.3.88 7 R 8.

In view of Dr.Kulasinghe's report '7 R 7' which strongly recommended the demolition of the existing structure the 7th respondent made an application to the Wakfs Board on 19.5.88 seeking permission to demolish the mosque. The Wakfs Board having considered this application made it's order dated 21.5.88 permitting him to effect the demolition. Vide proceedings marked 'X4' and the order 'X5' filed with the petition in the present application. The petitioners have sought to have this order marked 'X5' quashed in these proceedings.

Having regard to the totality of the evidence placed before court, I am unable to hold that the petitioners who represent the Galbokka congregation were not consulted before the order to demolish the mosque (X5) was made by the 1st to 6th respondents.

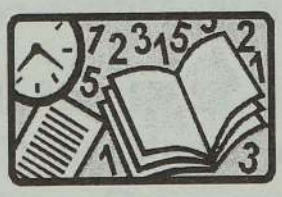
In this context, one has to bear in mind that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and other circumstances. I find support for this view in the decision of the Privy Council in Duraiyappah vs. Fernando 1967 to A.C. 337 at 349 (the judgement of Lord Upjohn).

Upon a consideration of the material placed before this court, I am of the opinion that there is no basis for the petitioners allegation that the decision to demolish the mosque was not made bona fide.

I might also add that there is merit in the submission of counsel for the 1st to 6th respondents that the orders sought to be impugned have exhausted themselves. The period of the 7th respondent's appointment is from 31.1. 88 upto 2.1.89. Counsel for the 7th Respondents stated from the Bar that the 7th respondent has been re-appointed thereafter. Quashing the order marked X3 at this stage is in my view in any event of no consequence. Further the material placed before court the 2nd impugned order X5 granting the 7th respondent permission to demolish the remaining oration of the mosque has also been accomplished.

For the reasons set out above, I hold that the application of the petitioners must fail and accordingly the petitioners' application is dismissed with costs fixed at Rs. 525/=

President
Court of Appeal



Mustakeem
vs
Chairman, Wakfs Board

CA/L (SC) 05/88 –
C.A.Application No:808/88

BEFORE : *P.R.P.PERERA, J.*

COUNSEL : *Dr. H.W. Jayawardene, Q.C., with Harsha Ameresekere for Petitioner-Appellant*
F.Musthapha,P.C., with Mahanama de Silva, M.S.M. Suhaid and A. Panditharatne for 1st-6th Respondents.
S.Mahenthiran for 7th Respondent.

DECIDED ON: 20.03.90

PERERA J:

This is an application for Leave to Appeal to the Supreme Court from the judgment of this Court in case No:808/88. I have heard Dr.Jayawardene, Q.C., in support of this application. Dr.Jayawardene submits that the matters set out in paragraph 10 of the petition constitute substantial questions of law. In paragraph 11 of the petition the petitioner states that there is a fit matter for review by the Supreme Court and that this appeal involves a question of public and or general importance that will have far reaching effects on the Muslim community in this country.

Article 123(1) of the Constitution of the Republic of Sri Lanka provides that the Court of Appeal may grant Leave to Appeal the Supreme Court from any final order or judgment of the Court of Appeal in any matter or proceedings

whether Civil or Criminal which involves a substantial question of Law, at the instance of any aggrieved party to such matter or proceedings. None of the matters set out in paragraph 10 of the petition were canvassed at the hearing of the present Application. The only basis upon which the petitioner's sought to have the orders set aside was on the ground that the petitioners had not been granted an opportunity of being heard before such orders were made by the respondents. On this matter this Court has come to a firm finding that the petitioners have in infact been afforded an adequate hearing in the special circumstances of this case. As I have stated earlier the matters set out in paragraph 10 of the petition have not been canvassed in this Court at the hearing of this appeal and could therefore not be relevant in deciding the question whether Leave to Appeal should be granted. In my view there is no substantial question of Law which arises for determination as required by Article 128(1) of the constitution. The application for Leave to Appeal to the Supreme Court is therefore refused with costs fixed at Rs.1050/=

JUDGE OF THE COURT OF APPEAL

Latiff
vs
Dahlan

WT/16

Shakir Ismail
M.A.Q.M.Ghazzali
M.S.A.Saheed

WB/165/86

Ulahitiwala Mosque, Malwana - Is section 14(1)(C) limited to first appointment of trustees?

Section 13, 14(1)(a), 14(1)(c), 15(1), 15(2), 29 of the Wakfs Act
Mehdi Hussain with M.Y.M. Nizar Attorneys - at -Law for the Appellants.
Farook Thahir with M.A.M.Samsudeen and N.M. Saheed Attorneys-at-law for the Respondents.

ORDER
06.04.1988

This is an appeal from an order dated 3rd January, 1988 made by the Wakfs Board in case No: WB/165/86 upholding the application before it that the Board should cancel the appointment of the Respondents - Appellants as Trustees of Ulahitiwela Mosque Malwana and appoint instead the persons who will be norminated by the Sheik of Beruwela under Section 14 (1) (a) of the Wakfs Act.

The main thrust of the arguments of Mr. Mehdi Husssain, Counsel for the Respondents- Appellants who challenged this order, was that Section 14 (1) (a) was limited to the first appointment of

trustees after registration of a Mosque under the Wakfs Act and this Section could not be invoked in respect of second or subsequent appointments.

That the matter in issue related to a subsequent appointment was not in dispute.

Mr. Hussain stressed that the words in Section 14 (1) (a) "as soon as may be, after a Mosque has been registered under section 13" by its very terms was confined to a particular and specific instance of appointment of trustees the very first appointment.

Thereafter analyzing the evidence at the inquiry before the Board, Mr. Hussain stated that Mr. M.R.M. Hathim the Secretary of the Jamaath of the Mosque had stated in his evidence that " since June 1985, two of the Trustees namely Hassan Hajiar and H.L. Mohamed refused so participate in the affairs of the Mosque and that only the third Trustee M.A. Faleel was functioning."

He Submitted that Mr. Hathim's evidence that "at the inquiry held at the Ministry that the two Trustees Hassan Hajiar and H.L.Mohamed had voluntarily resigned from Trusteeship" was also not challenged.

Mr.Hussain also referred to the statement of witness Halwan at the inquiry before the Board who stated that " the two Trustees other than Faleel did not function and had vacated their posts" was also challenged.

Mr. Hussain therefore submitted that two vacancies had occurred in the office of Trustees and that the Board should have proceeded under Section 15 (2) to appoint Trustees in their places.

Mr. Hussain added that Section 15 (1) was not exhaustive of the circumstances under which a Trustee could vacate office and referred to two examples of a Trustee being affected by the physical illness such as paralysis or who is absent from Sri Lanka for a long period and who therefore also vacated office.

Mr. Farook Thahir in the course of his submissions stated that the words "as soon as may be" in Section 14 (1) was not mandatory but only referred to a reasonable period of time, otherwise he said if such appointments were not made forthwith, it could be argued that no appointments could be made at all, if it is sought to be made after an undue lapse of time. He added that section 14 (1) covered all appointments from time to time except when vacancies occur, when the Board had to act under section 15 (2).

In refuting the arguments of Mr. Hussain, Mr. Thahir stated that Section 15 (1) was exhaustive and even covered the two instances referred to by Mr. Hussain in that the Board is vested with the power under Section 15 (1) (g) to remove such Trustees after an inquiry under Section 29. He referred to the provision in that Section 29 to "the inability of the Trustee to perform his duties" which enabled the Board on being so satisfied to remove him from office.

In any event Mr. Thahir stated that there was specific provision in the Act in respect of the mode of resignation viz " by writing under his hand to the director" Section 15 (1) (R) and that hereby evidence of witnesses that Messrs Hassan Hadjiar and Mohamed had not functioned or that witnesses heard that these two Trustees had resigned did not amount to their vacation of office. He therefore added that there was no vacancy in the office of Trustee and the Board could not have acted under Section 15 (2).

In conclusion, Mr. Thahir stated that the Board had to act under Section 14(1) (a) and confirm and appoint the persons nominated according to practices viz by the Sheikh of Beruwela. The only discretion the Board had in such instance, was to satisfy itself that such was past practice as held by the Privy Counsel in 71 NLR 101 (Dewatagaha Mosque case).

We have considered carefully the submissions of both Counsel and we are of the opinion that the two Sections 14 (1) and 15 (2) cover the totality of the instances where the Board could be called upon to appoint Trustees to Mosques. The former Section 14 (1) deals with normal instances and the latter section 15 (2) deals with contingent instances.

That Section 14 (1) (c) was intended to cover not only appointment of Trustees in the first instances but also such recurring appointments is made clear by the words used in Section 15(2) which has not lost sight of the principles made mandatory in Section 14 (1) though not made mandatory in Section 15(2): Understandably So, since the appointment under Section 15(2) is of a temporary, interim and contingent nature. This interpretation of the two sections is supported by the time limt placed on appointment under Section 15 (2) when no such limitation is placed on appointments under Section 14 (1) (a).

If the principle laid down in Section 14 (1) (a) were to apply only to first appointments of Trustees its repetition though not mandatory but merely as a directive was not necessary in Section 15 (2).

If we accept Mr. Hussain's argument that Section 14(1) deals only with first appointment of trustees on registration of a Mosque then since Section 15 (2) deals only with filling vacancies

on vacation of office in the last case referred to in Section 15 (1) by a Trustee, the resulting position would be that the Wakfs Act does not provide for fresh appointment of Trustees to Mosque on expiry of the term of office specified in their first appointment, since there is no other section in the Act which vests in the Board, the power to appoint or prescribes the manner of appointment of, Trustees. We are unable to agree with him on this interpretation of Section 14 (1) (a).

We therefore hold that Section 14 (1) (a) is not limited to the first appointment of Trustees after registration of a Mosque.

We also hold that there was no evidence before the Board that Messrs Hassan Hajiar and Mohamed had vacated office as Trustees and accordingly the Board acted correctly in not acting under Section 15 (2) and that the Board in conforming to the mandatory provisions of Section 14 (1) (a) had not abdicated its duty in favour of the Sheikh.

We accordingly dismiss the appeal of the Respondents-Appellants and confirm the order dated 3rd January, 1988 make by the Wakfs Board in case No: WB/165/86

We make no order as to costs.

Signed
Members

Marikkar
vs.
Mohideen

Wakfs Tribunal
Case No:WT/123/2000

M.S.A.Saheed
A.H.G.Ameen
A.M.I.Saheed

WB/3470/2000

Nintavur Jumma Mosque, Nintavur-
Removal of Trustee from office – Arbitral Award under the Co-operatives Societies Ordinance.- Fine ordered by the Magistrate long before he became a trustee – Section 29(1) contemplate an act of a Trustee in respect of mosque property – No evidence of misappropriation of mosque funds.

Section 29, 15(1) of the Wakfs Act discussed

Held: order of the Magistrate imposing fine long before he became a trustee is not a ground for removal.

ORDER
27.10.2001

M.S.A.Saheed:

This is an appeal coming from the order of the Wakfs Board dated 25.06.2000, on an application made by the Appellants, against the Respondent, under Section 29 of the Wakfs Act, seeking to remove him from the office of trustee of Nintavur Jumma Mosque.

It is a common ground in this case that both the Appellants and the Respondent have been appointed as trustees of this Mosque under the same instrument of appointment dated 12.10.1999 for a period of 3 years.

Appellants in their application dated 17.01.2000, made to the Wakfs Board, has made the following allegations against the Respondent.

(1) That the Respondent has been ordered to pay a sum of Rs.89,112/77 as a fine by the learned Magistrate of the Magistrate Court of Kalmunai in case No: 53971, which was confirmed by the Supreme Court in case No: 642/75 on an appeal made by the Respondent against the order of the learned Magistrate. The judgement of the Supreme Court has been produced marked 'X[1]'. On perusal of this judgement I find that this sum of money has been ordered to be paid by the Respondent to Nintavur division 3, Multipurpose Co-operative Society Ltd., on an Arbitral Award which was referred to the said Magistrate's Court for enforcement, under the Co-operative Societies Ordinance.

(2) That the Respondent as the President made use of Mosque money of about Rs.30,000/= in the year 1999,without the approval of the Board of Trustees to construct two rooms for shops, which was not completed and thereby caused loss and damage to the Mosque.

(3) That the Respondent without the approval of the Board of Trustees, effected ceiling to the roof of the 1st floor of the Mosque at a cost of Rs.300,000/= which was defective and thereby caused a loss and damage to the Mosque.

These were the allegations made against the Respondent for his removal from office under Section 29 of the Wakfs Act. Appellants maintained the position that since the Respondent was ordered to pay the aforesaid sum of money as a fine in the aforesaid cases, it amounted to moral turpitude under Section 15(1) (b) of the Wakfs Act which warranted his removal from office.

When this application was taken up for inquiry before the Board on 25.06.2000, the learned Counsel for the Appellants stated that he is not calling the Appellants or any others in support of the application and moved the Board to make an order on the document filed ('X') the judgement of Supreme Court referred to above. No evidence was led in proof of the 2nd and 3rd allegations referred to above, which involved misuse of Mosque money. Although the Respondent was present at this inquiry he opted not to file any answer or objection to the application.

The Wakfs Board having heard the Appellants made its order the same day dismissing the application, of the Appellants on the ground that Section 29 of the Wakfs Act permits a trustee to be removed from office, if he has committed misfeasance, breach of trust or neglect of duty in respect of any Mosque property whereas the matter dealt with by the arbitrator against the Respondent was in respect of the property of Nintavur Division 3, Multipurpose Co-operative Society. The Board also stated in its order that no evidence whatsoever has been led in respect of other allegations referred to in the application and the fine imposed is not for an offence involving moral turpitude in terms of Section 15(1)(b) of the Wakfs Act. Further the Respondent was not convicted of an offence, as such. This appeal comes from the said order of the Wakfs Board. The proceedings of the Board has been produced marked 'X2'.

On the face of these facts in this appeal, this Tribunal now has to consider whether the alleged conduct of the Respondent referred

to above disentitled him to hold the office of trustee and thereby make him liable to be removed from that office in terms of Section 29 of the Wakfs Act and whether such conduct amount to a moral turpitude in terms of Section 15 (1) (b) of the Act, which cause the vacation of that office.

The impact of these two Sections has to be considered on the alleged conduct of the Respondent as the trustee of this Mosque, and see whether the Appellants have established a Prima Facie Case against the Respondent for his removal from office.

We may first consider section 29 of the Act which enumerates the following misdeeds on the part of a trustee, on proof of which he is liable to be removed in terms of sub-Section (2) of that Section.

(a) misfeasance, breach of trust, or neglect of duty committed by a trustee of that Mosque in respect of any property vested in that trustee or

(b) any failure on the part of a trustee of that Mosque to comply with the provisions of this Act or

(c) the inability of a trustee of that Mosque to perform the duties imposed by or under this Act or

(d) failure to administer officially the general affairs of that Mosque.

Now we may see whether any of those misdeeds are established by the Appellants as against the Respondent. Appellants chiefly rely on the order made by the learned Magistrate of the Magistrate's Court of Kalmunai, which was affirmed by the Supreme Court ('X[1]'),which directed the Respondent to pay the amount stated therein, to Nintavur Division 3, Multipurpose Co-operative Society, which was decreed in an Arbitral Award under the Co-operative Societies Ordinance. This act of the Respondent is committed in

respect of the property of the Nintavur 3, Multipurpose Co-operative Society and not of the Nintavur Mosque property. Section 29(1) of the Act so stated above contemplates an act of a trustee in respect of the Mosque property. Thus it is my considered view that the Respondent has not committed any misfeasance and or breach of trust or neglect of duty in respect of Nintavur Mosque property of which he has been appointed as a trustee. Appellants have failed to prove any misconduct of this nature on the part of the Respondent in respect of Mosque property. Therefore, I am of the view that he cannot be removed from office on this allegation.

The Appellants also have made an allegation against the Respondent that he misused the Mosque funds without the approval of the approval of the Board of Trustees in constructing 2 rooms for the shops, doing a roof ceiling, and thereby causing financial loss to the Mosque. But, no evidence has been led in proof of these allegations. Therefore, once again I have to state that Respondent cannot be removed from office on these unproved allegations.

The Appellants also rely on Section 15(1)(b) of the Wakfs Act for the removal of the Respondent from his office, which speaks of a conviction of an offence involving moral turpitude, by a Court of competent jurisdiction. They refer to the order of the Magistrate's Court of Kalmunai, which was affirmed by the Supreme Court, in which the Respondent was ordered to pay a sum of Rs.89,112/77, to Nintavur 3, Multipurpose Co-operative Society, in an enforcement proceedings of an Arbitral Award. Since this payment was ordered as a fine, the Appellants equate it to a conviction of an offence, involving moral turpitude on the part of the Respondent. On a very careful scrutiny of Section 15(1) of the Wakfs Act, I find that it enumerates some instances from (a) to (g), in which a trustee will vacate his office after his appointment (a) speaks of death, (b) conviction of an offence involving moral turpitude, (c) Adjudged to be of unsound mind, (d) Adjudged to be an insolvent, (e)

Resignation of office, (f) Holding the office of trustee of another Mosque at the same time, (g) Removal from office under Section 29.

It is my considered view that these are all instances that are supposed to occur after a person is appointed as a trustee. In such circumstances the trustee vacates or cease to hold office. In the present case the Respondent has been ordered to pay the said, sum of money by the learned Magistrate on 25.07.1975 long before his appointment as a trustee (vide 'X[1]'). He has been appointed as trustee by instrument dated 12.10.1999. Thus even assuming that this order of the learned Magistrate constitutes a conviction of an offence, it cannot be considered as a ground for the removal of the Respondent from the office because it has taken place prior to his appointment as a trustee of this Mosque. Section 15(1) of the Wakfs Act in my view contemplates situations after the appointment of a person as a trustee.There is no evidence in this case that Respondent has been convicted of an offence amounting to moral turpitude after he was appointed as a trustee. Thus the said order of the learned Magistrate is not a valid ground for the removal of the Respondent from his office because it has been made long before his appointment as a trustee.

In the circumstances I dismiss the appeal for the reasons stated above.

M.S.A.Saheed

Chairman

We agree: A.H.G.Ameen - Member

A.M.I.Saheed - Member

Hussain
vs.
Authorised Officer
Wakfs Division

Wakfs Tribunal
WT/7/87

A.Shakir Ismail
-Chairman
M.A.Q.M.Gazzali
M.S.A.Saheed

Wakfs Board
Case No.WB/82/86.

Should the Maradana Mosque be registered under the Wakfs Act – Maradana mosque by itself not an Incorporated body – Only the Board of Trustees an Incorporated body.

Held: Order of the Wakfs Board upheld Maradana Mosque should be registered under the Wakfs Act.

Farook Thahir, Attorney-at-Law instructed by M.N.Saheed for the Appellants.

M.Markhani, Attorney-at-Law instructed by M.M.A.Kalam Attorney-at-Law for the Respondent.

ORDER
06.11.1987

This is an appeal under section 9H(1) of the Muslim Mosques and Charitable Trusts Act No. 51 of 1956 as amended by Act No.21 of 1962 and Act No.33 of 1982 made by the Managing Trustee and Secretary of the Board of Trustees of the Maradana Jumma Mosque against the order of the Wakfs Board dated 13.02.87 directing the Maradana Mosque to be registered under the Wakfs Act.

Both Counsel for the Appellants as well as the Respondent made extensive submissions in regard to various aspects of the Wakfs Act, but it was generally accepted that the matter for decision for this Tribunal was whether in view of the decision of the Supreme Court in case No.47 of 1980 (U.L.M.M.Sheriff Vs. The Board of Trustees of the Maradana Mosque and others), the amendment to the Wakfs Act by Act No. 33 of 1982 covered the Maradana Mosque.

Counsel for the Appellants referred us to several text books on interpretation of statute and drew our particular attention to Maxwell on the Interpretation of Statute where he has stated that when a subsequent Act of a general nature seeks to amend a previous special Act "special intention" of the subsequent Act, to do so must be made very clear. The Supreme Court in its order in Case No.47 of 1980 states "I am of the opinion that the words contained in Section 57B of the Act are not sufficient to rebut the strong presumption raised by the doctrine "generalia specialibus non-derogant". Maradana Mosque continues to be governed by the Maradana Mosque Ordinance of 1924.

The amending Act No.33 of 1982 in its preamble begins with the words "an Act to provide for the registration of Mosques, Muslim Shrines and Places of Religious Resort whether incorporated or not'. From these words we find no difficulty in arriving at the conclusion that the legislature intended to cover the Maradana Mosque within the scope of Mosques required to be registered under the Ordinance.

A submission made by Counsel for the Respondent which struck us impressively was that at the date of this amending legislation by Act No.33 of 1982, there was no Mosque other than the Maradana Mosque which was governed by an Act of Parliament. Hence he submitted the intention of the legislature to include the Maradana Mosque within the scope of the amendment was very clear.

On the other hand Mr.Thahir submitted that the Maradana Mosque by itself was not an incorporated body. It was only the Board of Trustees who governed and administered the Mosque that was an incorporated body. Hence he said the amendment though admitting that the legislature intended to cover the Maradana Mosque had not stated their intention in valid and legal form in the amending Act.

If we agree with Mr.Thahir, then the resultant position would be, on the one hand there is a Mosque simpliciter, and on the other hand there is an incorporated body called the Board of Trustees of the Maradana Mosque. The amending Act does not seek to register the Board of Trustees of the Mosque but only the Mosque, and then if the words incorporated or not are to be excluded or not acted upon, in this instance, the Maradana Mosque will be covered within the meaning of all Mosques.

We have also examined the Act incorporating the Board of Trustees and find no prohibition in the Act against registration. We are of the opinion that a Mosque, which is a place of religious worship for any Muslim, cannot change its character as such just because the administration and maintenance of the Mosque is governed by a set of rules formulated by a group of persons or by an Act of Parliament. It will always from its inception continue as a Mosque dedicated to Allah and open for worship by all Muslims.

In view of the above reasons we are unable to hold that the Maradana Mosque just because its maintenance and administration is governed by an Act of Parliament, that the Mosque should not be registered with the Director of Muslim Religious and Cultural Affairs.

The registration of this Mosque does not conflict with the provisions of the Maradana Mosque Ordinance.

Mr.Thahir also attacked the order on the ground that the Wakfs Board was a judicial body performing judicial functions but its members were not appointed by the Judicial Service Commission, but by a Minister.

Against this Mr.Markhani referred us to 50 NLR 25 at page 37 wherein it was held that "the same body could exercise both judicial and arbitrary powers" and that "ultra vires powers could be severed from intravires powers".

In this instance the Board was exercising an arbitral power.

From the above the intention of the Legislature is clear that the Amending Act No.33 of 1982 was meant to include the

Maradana Mosque also and that the amendment falls in line with the reasoning in the judgement in S.C. 47/80 that the words in the section should be sufficient to rebut the strong presumption raised by the doctrine "generalia specialibus non-derogant".

We therefore uphold the order of the Wakfs Board and dismiss the appeal.

Mr. Thahir in the course of his submissions also stated that "it was desirable but not advisable" to register the Mosque.

He feared that the consequences would be that the Trustees would receive directions which would be in conflict with the provisions of the Maradana Mosque Ordinance. However this matter was not in issue before this Tribunal and we therefore do not express our views on this matter.

Signed
members

Jainulabdeen
vs
Faiz

Wakfs Tribunal
No: W/TRIB/105/98

M.S.A.Saheed
A.H.G.Ameen
A.M.I.Saheed

WB/3006/97

Mohideen Jumma Masjid- Colombo 12.
Preliminary objection – Wakfs Board makes order on 1.11.1997 on a complaint made to hold the Jamaath meeting and elect the trustees – on a further complaint made on 21.03.1998 Board affirms the earlier order – which is the final order? Interlocutory/Final order – order of 1.11.1997 received on 3.12.1997.

Section 9(H) (1) of the Act.

Held. 1. Preliminary objection upheld
Appeal filed out of time.

2. order inter - partes, as such the question of communication of the order does not arise.

Farook Thahir,Attorney at Law for the Appellant
M.H.A.Rahim and A.A.Cardos Attorneys-at-Law for the Respondent.

ORDER
19.12.1998
M.S.A.Saheed

This appeal dated 26.03.1998, comes from the orders dated 1.11.1997 and 21.03.1998 made by the Wakfs Board in respect of Mohideen Jumma Masjid Abdul Hameed Street, Colombo 12.

These orders have been made by the Board consequent to a complaint dated 30.10.1997 made by the respondent against the appellants-trustees. Although it is dated as such the Board seal on this complaint bears the date 07.10.1997. Thus the date 30.10.1997 on this complaint may be a clerical error, or it would have been filed on the latter date although pre-dated. On perusal of this complaint I can see that there are allegation of mismanagement of mosque affairs by the appellants, who have been appointed as trustees of this mosque for a period of 3 years from 5.1.1995, which comes to an end on 04.01.1998.

An inquiry has been held by the Board on this complaint and an order has been made on 01.11.1997 in the presence of the parties. On perusal of this order I find that the Board has not inquired into the allegations made against the appellants but decided to hold election for the selection of trustees, giving necessary directions to the appellants to hold the election. Both parties have been present at the inquiry on 1.11.1997 and therefore it is an inter parte proceedings between the parties. However since the appellants failed to comply with this order another complain has been made against them on 2.1.1998 alleging that they failed to hold election as directed by the Board, and on this complaint the Board has called this case on 21.03.1998 and stated that its order dated 1.11.1997 stands. Both parties have been present on this date.

The position of the appellants is that the Board failed to serve copies of these complaints on them and hold a proper inquiry into the allegations made against them. Subsequently they have

appeared before the Board on 22.2.1998 and made an application. The Board has called this case on 21.03.1998 with notice to parties and merely confirmed its order dated 1.11.1997 once again directing the appellants to hold the election stipulating the period for the preparation of Jamath Register and to hold the election.

It is true that the Board on these dates has failed to inquire into the allegations made against the appellants but it is a matter of merits to be considered in the course of the argument of the main case. But here we have been invited to answer only the preliminary issue whether the appeal has been tendered within time or not.

Appellants have come before this Tribunal challenging the aforesaid orders of the Board dated 1.11.1997 and 21.3.1998. When this matter was taken up for argument the counsel for the respondent took up a preliminary objection that this appeal has to be dismissed in limine without going into the merits of it on the ground that it is not filed within the time limit of one month as prescribed in section 9(H) (1) of the Wakfs Act. He states that the impugned order has been made on 1.11.1997 and this appeal has been filed on 26.3.1998. He further contends that the alleged order of the Board on 21.3.1998 is not a proper order but only a confirmation of its order dated 1.11.1997. In this sense he says that there is only one order in this case and that is the order dated 1.11.1997.

As opposed to this contention the counsel for the appellants states that the order dated 1.11.1997 is an interlocutory order and the final order has been made on 21.3.1998 and on this basis he says the appellants have come before this Tribunal in time as far as this final order is concerned. He has drawn a distinction between these orders as interlocutory and final order for the purpose of this appeal. However the Learned Counsel has failed to notice that on 21.3.1998 the Board has only confirmed its earlier order dated 1.11.1998 by stating that the Board's order of 1st November 1997 stands. It only reiterates the same direction to hold the election as was directed in the earlier order. In my view it is not a new order as

such. Hence I cannot agree with the counsel for the appellants that the Board has made a final order on 21.3,1998 in this connection. The only order made in this case is the order dated 1.11.1997. The appellants have filed their appeal papers on 26.3.1998 in this Tribunal far exceeding the one month's time period prescribed in section 9 (H) (1) of the Wakfs Act. Thus the appeal is lodged out of time and therefore it cannot be maintained in law.

At this stage a comment needs to be made on the submission made by the counsel for the appellants that the appellants received the order dated 1.11.1997 by post on 3.12.1997. It is a common ground in this case that this order has been made in the presence of both parties and therefore the appellants cannot complain that they are unaware of this order. If they were interested in filing an appeal they could have filed it in time within 30 days of such order. Section 9 (H) (1) of the Wakfs Act states any aggrieved party may appeal against any order or decision of the Board within 30 days of such order and not from the date of receipt of such order. Thus in my view the contention of the counsel for the appellants that the appellants received the order of 1.11.1997 on 3.12.1997 cannot hold good in law.

Thus I dismiss the appeal in this case for the reasons stated above, upholding the preliminary objection taken up by the counsel for the respondents.

M.S.A.Saheed
-Chairman

we agree

A.H.G.Ameen
-member

A.M.I.Saheed
-member

Koya Thangal,
vs.
Badurdeen

Wakfs Tribunal
No: WT/130/2001

M.S.A.Saheed
A.H.G.Ameen
A.M.I.Saheed

Wakfs Board
Nos. 1999/93
1999A/93
1972/93

Mohideen Thakkiya Mosque at Katankudy. - What is the mode of selection of Trustees at this mosque? - Is it by the spiritual leader or by the Jamaath? - Registration of a mosque.

Section : 13 of the Wakfs Act

Held : 1. Election of Trustees by the members of the Jamaath (Affirmed the order of the Wakfs Board).

2. Religious activities of the Quadiriya Thareeka shall go on as long as followers of this Thareeka worship in this mosque.

Appearance:-

M.A.Q.M.Gazzali with M.C.M. Nawas Attorneys-at-Law for the Respondents-Appellants.

A.A.M.Marleen PC with M.Ishar Attorneys-at-Law for the Petitioners-Respondents.

ORDER

July 19, 2003

A.H.G.AMEEN: -

This is an appeal preferred by the Respondents-Appellants abovenamed (Hereinafter referred to as the APPELLANTS) against the order of the Wakfs Board made on 29.07.2001. The Appellants were appointed trustees of the Mohideen Thakkiya mosque at Kattankudy by the Instrument of appointment dated 12.10.1993 document marked P 23 on the recommendation of the Sheikh koya Thangal and this appointment was challenged by the Petitioners - Respondents abovenamed (Hereinafter referred to as the RESPONDENTS).

The issue for decision in this case is as to the mode of selecting trustees to this Mosque. The Appellants state that the practice of selecting trustees to this mosque has been on the recommendation of the spiritual leader, Sheikh Koya Thangal whereas the Respondents state that it is by the members of the Jamaath of the mosque.

The Appellants state that this mosque was registered in November, 1958 and the Sheikh Koya Thangal recommended trustees from and out of the Administrative Committee till 1984 in which year the Respondents made a false claim to be the "Jamaath" and moved the Wakfs Board to appoint special trustees and subsequently trustees were elected by the Jamaath in 1985 and in 1990. But I find the application for registration of the mosque has been made by the members of the said committee.

Further they state that in 1993 the Wakfs Board accepted the selection of nominees by the Sheikh Koya Thangal which was challenged by the Respondents.

The Respondents state that the Wakfs Board acted on the recommendation of Koya Thangal only in 1993 and sequel to this which the said letter of appointment was issued to the Appellants.

I find that there had been a practice of selecting trustees by the committee of marikkars in the presence of Sheikh Koya Thangal. The Sheikh recommends the appointment of members to the "marikkars" committee which is termed by the Appellants as "Administrative Committee". The constitution or Bye-laws as it is captioned in document marked R9(e) refers to the "body of administrators" But makes no reference of the recommendation of the trustees by the Sheikh to the Wakfs Board. This document would have been prepared after 1958 as the application for registration of the mosque makes no reference to it in column 8(b) of the application. I also find that columns 9(c) "whether appointed by Jamaath. If not by whom?" and 9(d), "If not appointed as above, how and under what authority is he functioning as trustee?" left unfilled. The question arises as to whether the Sheikh recommended the names of trustees to be appointed by the Wakfs Board.

The Appellants state that "The question of appointment of trustees arose only since November 1958,in which year the mosque was registered with the Wakfs Board in complience with Section 13 of the Wakfs Act. Untill then the Mosque had the practice of selecting an Administrative Committee in which the 'Jamaath" had a clear participation. However, for the purpose of

the Wakfs Act,which came to be applicable to this Mosque from after 30.11.1958, "Trustees" were recommended by the Sheikh Thangal from and out of such Administrative Committee or even independently,as it was done at the time of application for registration. (R2 & P1). This practice continued upto 1984,or thereabout,when the Petitioners-Respondents falsely claiming to be the "Jamaath" had wrongfully and fraudulently prevailed upon the Wakfs Board to usurp the posts of trustees of the mosque".

There is no evidence of Śheikh Koya Thangal recommending names by himself. It has been done by a committee, which is the Committee of marikkars. The Board in its order has said that the Sheikh while registering the mosque has failed to state that he was the appointing authority or the person recommending the trustees.

The Appellants have failed to satisfy the Tribunal that the Sheikh recommended the names of Trustees for the said mosque till 1984. Further the Applicants have failed to satisfy the Tribunal the eventualities from 1984 to 1993 that prevented the Sheikh or his representative to recommend the names of Trustees during the period 1984 to 1993.

The Respondents have tendered documents in a proper sequence but the Appellants have failed to tender the documents before the Tribunal and the Tribunal was in a difficulty to identify the documents as some documents carry more than one marking. Several opportunities were given to the Appellants to identify the documents marked by them but they have failed.

The Appellants state that there had been "Unrest and troubled conditions" prevailing in the East during the 80's and

90's". But I find that there had been breach of peace among the worshippers of this mosque due to petitions sent against the Sheikh Koya Thangal. It was due to this situation, the Wakfs Board had appointed Special trustees by the Instrument of Appointment of trustees dated 24/05/1984 for the period 21.05.1984 to 20.11.1990 to curb the situation. But the Appellants state that "It was in or about 1984 the Respondent operating under a fictitious name made false representation to the Wakfs Board and persuaded the Board to appoint special trustees."

It is noteworthy that trustees were appointed by the Wakfs Board on the strength of meetings held to elect trustees after 1984. The question arises what did the Appellants do till 1993. The Appellants could have made an appeal to the Tribunal against the order of the Wakfs Board in appointing trustees by election, which they failed to do. The Wakf Board had appointed trustees on the basis of election held on or about 18.11.1984 for the period 07.04.1985 to 31.12.1987. Affidavit filed by the Respondents state that a meeting of the Jamaath, consisting of 205 members met on 16.12.1987 and elected trustees. Thereafter the Wakf Board had appointed trustees on election held at the meeting of the members of Jamaath on 03.06.1990 for a period of three years from 30.09.1990 to 29.09.1993.

The Appellants do not describe the situations during this period by saying "Unrest and troubled situation" Is it the ethnic violence? Nay during this period there had been agitation against the Sheikh. There had been several occasions after 1984 where trustees appointed by the Wakfs Board by the members of the Jamaath. The Appellants could have moved the Wakf Tribunal at the earliest opportunity after 1984 against the mode of electing trustees by the Jamaath on the basis that the Sheikh only

recommends and that any other mode of selecting/electing trustees to the said mosque is null and void.The Appellants failed to do and the first opportunity the Repondents got in 1993 against the recommendation by the Sheikh they made an application. Even if there had been a practice of Sheikh recommending names of, which is not so in this case, this practice has broken during the period 1984 to 1993 a period of about ten years and no action taken by the Appellants.

Undoubtedly,the Sheikh has taken a deep interest to fullfil the rituals and religions activities of the Quadiriya Thareeka in this mosque. As the Wakf Board points out in its order the said religions activities should be permitted to go on in this mosque, as long as the followers of this Thareeka worship in this mosque.

The Tribunal directed the Wakf Board in W/Trib/ 91 and W/Trib/93 in its order of 22.02.1997 by consent for the Board to re-hear the case recording evidence of witnesses and make an order. Accordingly the Board has made a comprehensive order perusing the administrative file, recording evidence of several witnesses and receiving a large number of documents. However,the Wakfs Board had referred to the document P3 in Tamil in making its order and stated that it was a meeting of the Jamaath to elect Trustees but this document does not refer to the election of trustees.

The order of the Wakf Board in this case is on an unanimous decision though there is dissenment on the question of delivering the order on the same day or to postpone it. However, adequate reasons have been adduced as to why the order could not have been postponed.

Therefore I do not propose to interfere with the order of the Wakf Board. I affirm the order of the Wakf Board and dismiss the appeal.

A.H.G.AMEEN
-member

We agree

M.S.A.Saheed
-member

A.M.I.Saheed
-Chairman

Kais
vs
Muzamil

Wakf Tribunal
No: W/TRIB/55

M.S.A.Saheed
A.M.I.Saheed

WB/1884/93

Masjidul Nabavi Jumma Mosque, Welipenna.
Theological Question – should the Friday Jumma Sermon delivered from the pullpit only in Arabic? –Wakfs Board decided that the sermon could be delivered in both Arabic and Tamil from the pullpit – Director's Report called – Practice over 100 yrs in mosque all over the country is to deliver sermon in both Arabic and Tamil from the pullpit –

Held: The order made by the Tribunal earlier in setting aside the order of the Board to deliver sermon in both Arabic and Tamil from the pullpit stand unchanged.

Farook Thahir with A.A.Latiff Attorneys-at-law for Appellants
A.A.M. Marleen Attorney-at-law for the Respondents.

ORDER
18.04.1998
M.S.A.Saheed

The dispute in this case has arisen between the parties with regard to the delivery of Friday Sermons from the pulpit of this

Mosque. Some members of the congregation are of the view that it has to be delivered only in Arabic from the pulpit whereas the others take up the view that it may be delivered both in Tamil and Arabic. This is in fact a Theological question, to be determined according to the religious tenets in Islam.

Parties have gone before the Wakfs Board on this issue and the Board has in its order dated 5.9.1998 stated that the sermon in Tamil and recital in Arabic may be delivered from the pulpit. The aggrieved party by this order has come to the Tribunal on an appeal and this Tribunal by its order dated 25.09.1993 set aside this order of the Wakfs Board on the ground that the issue is purely a theological question and therefore the Wakfs Board has no jurisdiction to pronounce an order on this issue. However, the Tribunal in the same order has commissioned the Director to go to this mosque and make a report on the ground situation as to the practice and views of the members of the Jamath on this issue to enable the Tribiunal to give an advice to the parties acting in an advisory capacity on the findings of the Director.

Accordingly a report has been sent to this tribunal by the Director on 25.10.1993, and therefore parties have been noticed to appear before this Tribunal for the purpose envisaged by the tribunal in its aforesaid order and since then this case has been called without a consensus being reached between the parties on this issue.

In the meantime views of religious scholars have been sought from both parties in support of their views of by this tribunal on the consent of parties. Moulavi Burhanudeen in his letter dated 20.09.1993 addressed to this tribunal has expressed the view that the sermon should not be delivered in Tamil form the pulpit, while the All Ceylon Jammiyyathul Ulema (a Council of Muslim Theologians) has expressed a contrary view that the sermon may

be delivered in Tamil. Both of them have cited authorities for their views. Now again it has become an issue that which of these conflicting views has to be adopted to advice the parties over this matter.

9797

Thus I revert to the order of this tribunal delivered on 25.09.1993 to act in terms of this order on this matter. According to this order the tribunal can only advise the parties on the findings of the Director. The Director in his report states that the practice of delivering the Jummah Sermon from the pulpit only in Arabic was an introduction by a former trustee Alhaj Pakeer 2 or 3 years ago, and prior to this period the practice had been to deliver the Jummah Sermon from the pulpit both in Tamil and Arabic, which had been extended over a period of 100 years. The report also stated that this is the practice being observed in most of the mosque in the Island.

I am also inclined to endorse this age old practice which is not repugnant to Islamic principles, and therefore acting in an advisory capacity at this stage I offer my advice accordingly to the parties in this case. Since the hands of this tribunal are tied up in law in varying its own order dated 25.09.1993 on this issue, I make no further order in this connection. Thus the earlier order of this Tribunal will stand unchanged.

Muhinudeen
vs.
Nawaz Gaffoor

Wakfs Tribunal
No: W/TRIB/70

M.S.A.Saheed
A.M.I.Saheed

Wakfs Board No:1905/93

Colombo Fort Jummah Mosque – Constitution to a mosque – can a mosque be only for members of the Shafie sect? Articles of a constitution to a mosque discussed.

Held: 1. Members of the Shafie Sect shall be the Trustees of this mosque.

2. No restriction be placed on a muslim to pray in this mosque.

N.M. Saheed Attorney-at-law for the Appellant
Farook Thahir Attorney-at-law for 1-7 Respondents
A.A.M.Marleen,Attorney-at-law9-13th Respondents

ORDER -
02.03.1996
M.S.A.Saheed

This is an appeal coming from the order of the Wakfs Board dated 8.10.94 rejecting the application made by the appellants to amend Article 4, 6 and 8 of the Constitution of the Fort Jummah

Mosque. On a perusal of the record relevant to this Constitution I find that this Constitution has been drafted by a team consisting of 3 members, namely Dr. M.S. Jaldeen, Al Alim A.R.M Zarook and Alhaj U.L.M. Halideen, Director/MRCA on a decision taken by the Board on 30.10.93. There is no dispute as to the composition of this constitutional committee. It is of importance to note that the Board on this date specifically referred to the fact that this Committee in drafting this Constitution shall pay particular attention to the definition of the jamath and consider that this mosque be considered as a Cultural Centre for the Muslims in the heart of the city of Colobmo. There is no dispute as to this decision as well. Accordingly the Constitution has been drafted by this Committee, whereupon the appellants have raised objections before the Board to Articles 4, 6 and 8 of this Constitution on the ground that they are unislamic. Since their objections were overruled by the Board they have come before this Tribunal by way of appeal.

The disputed articles now may be considered to see whether they are obnoxious to the accepted norms and principles. Article 4 (1) of this Constitution refers to the Quranic injunction in selection of trustees. Article 4(2) of this Constitution states that the minimum age limit of the trustees shall be 40 years, and Article 4(3) states that such a trustee shall be a person who belongs to the Shafi Sect in Islam. The appellants in their petition of appeal raise their objections only on the third clause in this Article, namely that trustees should belong to the Shafie Sect in Islam. In this connection the Counsel for the 1 to 7 respondents draws attention of this Tribunal to the application made to the Board on 27.12.1996 for registration of this mosque. In Column 6 of this application this mosque is referred to as a mosque belonging to the Shafie Sect. In this connection I would like to refer to Section 14 (1) (a) of the Wakf Act which states that the Board shall appoint trustee who

have been selected or nominated according to the practices, rules, regulations or other arrangements in force in the administration of the mosque. Thus I feel that since this mosque has been referred to as one which is patronized by the Shafie Sect of Muslims it can be inferred that the practice of selection of trustees to this mosque has been from among persons of this Sect. As submitted by the Counsel for the 9 to 13 respondents we find a Hanafie mosque in the city belonging to the Hanafie Sect in Islam. Therefore there is no wrong in laying down a condition to select trustees of this mosque from persons belonging to the Shafie Sect, and in doing so recognition is given to the practice that prevailed so far in this mosque. Thus I cannot agree with the contention of the counsel for the appellants in this connection. Since Articles 4(1) and 4(2) of this Constitution are not the subject matter of this appeal there is no necessity to make comments on these provisions.

Next remains the consideration of article 6 of this Constitution. It lays down 5 qualifications to become a member of this mosque and the persons seeking membership of this mosque has to satisfy one of these conditions according to this articles, namely (1) Muslim owners of immovable property within the area, (2) Proprietors of business establishments in this area, (3) Muslim partners of firms in this area, (4) Muslim Directors of Ltd. Companies in this area, and (5) Muslim institutions and organizations in this area. Condition No. 5 relates to institutions and not to persons. A member of a jamath can only be a natural person and not an institution or an organization. Thus condition 5 becomes meaningless in this sense. On the other hand on consideration of section 58 of the Wakfs Act it becomes clear that a jamath means the person who ordinarily worships or participates in the religious or customary rights or ceremonies of the mosque. Everyone who conforms to these requirements is entitled to become

a member of the jamaath of a mosque. It does not lay down any other conditions for a person to become a member of the jamaath. Article 6 of the draft Constitution in my view lays down a very stringent qualification for a person to become a member of the jamaath of this mosque. According to this Article a poor Muslim who does not possess any of these qualifications but still residing within the mosque area will be shut out from the membership, which is very unreasonable and unfounded. It is true as submitted by the Counsel for the 9 to 13 respondents that any Muslim has the right to walk into any mosque for prayers and other religious practices etc. but at the same time it does not mean that he has the preferential right to enjoy the benefits of being a member of the jamaath in a mosque. According to this article a person residing within the area of this mosque but fails to possess any one of the qualifications referred to above will not be able to become a member of the jamaath of this mosque, which in fact denies his religious right. In this connection I feel that this article needs an amendment by the deletion of this clause. However the question arises whether the appellants can make an application to the Board to amend this article. They have impugned only articles 4, 6 and 8 of this constitution and accepted and admitted the remaining articles. In this connection Counsel for the 9 to 13 respondents draws attention of this Tribunal to article 19 of this Constitution which provides a machinery for the amendment of the Constitution by convening a meeting of the jamaath and adopting a resolution passed by a 2/3rd majority for the same. The appellants have failed to make avail of this remedy. Thus in my view they must first seek remedy under this article to amend this clause and then proceed to the Board or Tribunal as the case may be if they are still dissatisfied with any order in that regard.

Next remains to consider article 8 of this Constitution. It only states that the annual subscription by the members shall be Rs.1200/= which can be paid by them monthly or quarterly or annually. This may be excessive as far as poor persons are concerned. However, it also may be amended by resorting to the remedy provided for in article 19 of this constitution. Thus there is no merit in this appeal and accordingly I dismiss this appeal.

Aboosally
vs.
Sariffdeen

Wakfs Tribunal
No: W/Trib/5

Shakir Ismail
M.A.Q.M.Gazzali

Wakfs Board No: WB/123/86

Payment of Cost Ordered-
Horapola Jumma Mosque, Kekirawa.
Appellants absent and unrepresented.
Appellants to pay jointly and severally a sum of Rs. 1500/= as cost to the respondents.

Argued on :- 29th October, 1986,

Present :- Mr. A.shakir Ismail, Chairman.

Mr. M.A.Q.M.Ghazzali, Member.

Appellants absent and not represented by Counsel.
Respondents present and represented by Mr.M.H.M.Ashraff, Attorney-at-Law.

ORDER

We have heard Mr.Ashraff and we make Order dismissing the petition of the Appellants and direct the Secretary to return the record with a copy of this Order to the Wakfs Board.

We Order the Appellants to pay jointly and severally a sum of Rs.1500/= as costs in this Tribunal to the Respondents.

Order delivered in open Court on this 29th day of October, 1986.

Signed
members

Uthumalebbe
vs
Musthapha

Wakfs Tribunal
No: WT/134/2002

M.S.A.Saheed
A.H.G.Ameen
A.M.I. Saheed

Wakfs Board
No: WB/3861/2002
WB/3895/2002

Mavadipalli Mohideen Jummah Mosque,Karaitivu
Settlement brought by the Wakfs Board when the matter was pending before the Wakfs Tribunal - orders made by the Board for settlement set aside.

M.Yoosuf Nazar appears for the Petitioners. Farook Thahir, Attorney-at-Law with A.H.Aroos, Attorney-at-Law appears for all the Respondents.

ORDER
31.08.2002
M.S.A.Saheed

Mr.Farook Thahir, Attorney-at-Law who appears for the Respondents makes his submissions as follows:-

On 24.03.2002 the Respondents who are members of the Jamaath made an application to the Wakfs Board against the present Appellants who are administering the Mohideen Jumma Mosque, Mavadipalli as Persons-in-charge. In their Petition dated 24.03.2002, they have asked for certain relief. One of the reliefs is for the appointment of Special Trustees. After this application was filed, the Wakfs Board without an inquiry and without notice to the parties had appointed Special Trustees on 12.05.2002. From that Order, the Appellants appealed to the Wakfs Tribunal. Petition of Appeal to the Wakfs Tribunal dated 24.05.2002. When the appeal was pending before the Wakfs Tribunal the Wakfs Board has met on 14.07.2002 and made certain further Orders with regard to the holding of an election. I submit both Orders are wrong and the Appellants also agreed to both Orders should be set aside and direct the Wakfs Board to hold a fresh inquiry, according to Law.

Mr. Yoosuf Nazar, Attorney-at-Law who appears for the Petitioners makes his submissions as follows:-

The Respondents admit that the Spepcial Trustees appointed by the Board without hearing the Respondents is bad in law. Thereafter the Respondents made an appeal to your honours Tribunal against that Order dated 12.05.2002 to set aside to vary the Order. The question before your honours Tribunal is only whether that Order made on the 12.05.2002 is bad in law or not, your honours Tribunal's jurisdiction is invoked for the limited purposes of analyzing that Order. The subsequent settlement by the Board on 14.07.2002 while pending an appeal on certain questions regarding the rest of the relief, the said settlement entered by both parties with due legal representation. Therefore, if the present Respondents seek to set aside the settlement that should be by a separate Petition

and the Petitioners should invoke their jurisdiction in a separate case since this appeal was brought against the Order dated 12.05.2002, in respect of the appointment of Special Trustees. The Wakfs Tribunal asked the following question;-

You said that you made an appeal against the Order of the wakfs Board in appointing Special Trustees. If so, how could you go for a settlement before the Board when your appeal was pending before the Tribunal.

Mr. Yoosuf Nazar, Attorney-at-Law states that the Wakfs Board should not have gone in to this matter by way of settlement on 14.07.2002 when the matter was pending before the Tribunal.

Order

We heard submissions from both Counsels. Both Counsels agreed that the Orders made by the Board in this regard should be set aside.

We find that when the appeal against the Order of appointing Special Trustees was before the Tribunal, the Wakfs Board unlawfully has pursued the matter and had brought about a settlement between the parties, which is unwarranted.

We set aside the Order made on 12.05.2002 and the settlement made on 14.07.2002 with regard to above matter. We direct the Wakfs Board to hold fresh inquiry expeditiously, according to the law.

We also order that the status-quo to prevail at the time (on 24.03.2002) the application made by the Respondents before the Wakfs Board

M.S.A.Saheed
Chairman

We agree

A.H.G.Ameen
(member)

A.M.I.Saheed
(member)

Nijamudeen
vs
Anverdeen

WT/39

M.A.Q.M. Ghazzali
M.S.A. Saheed
Yaseen Omar

WB/1424/90

Chilaw Moor Street, Mosque – Consent order – Can the Board vary its own order?

Held: Orders made subsequent to the consent order set aside.

Cases referred:

Amaradasa Vs Land Reform Commission 1979 NLR Part I Page 505.

J.B.Textiles Industries Ltd. Vs Minister of Finance and Planning 1981 SLR 238,

Swaris Vs Perera 41 NLR 562,

Ceylon Carriers Ltd. Vs Peiris 2 SLR 119.

Farook Thahir with Ashroff Rumi Attorneys-at-Law for the Appellants.
A.A.M. Marleen with M.Nalawangsa Attorneys-at-Law for the Respondents.

ORDER
07.01.1993
M.S.A.Saheed

This is an appeal preferred by the Appellants seeking to set aside the orders of the Wakfs Board dated 14.6.92 and 30.8.92. Both these orders relate back to the original order of the Board dated 1.3.92. This was made on the consent of both the appellants and the respondents embodying terms and conditions for the election of 7 trustees for this mosque by a secret ballot. This consent order has been made at an inquiry into the application No. WB/ 1424/91 made by the appellants against the respondents on the mismanagement of the mosque affairs. The eight conditions in this consent order is that each member of the Jamaath shall exercise 3 votes at the election. It has been later varied by the Board ex-mero-motu without notice to the parties by order dated 22.4.92 to the effect that each member shall have 7 votes instead of 3, thus equaling the number of votes to the number of trustees to be elected. The variation of this order is the subject matter of this appeal.

Representations have been made to the Board by the appellants agitating against the variation of this consent order. In spite of this protest the Board has met again on 14.6.1992 without notice to the parties, confirmed its earlier order dated 22.4.1992 and further said that it could vary an order made by it if it is found to be inequitable and bring about injustice to a section of the congregation. However on further representations made to the Board by the appellants on this matter the Board has ultimately summoned both parties on notice for an inquiry held on 30.8.1992. At this inquiry both parties were represented by their Counsels and were heard in their submissions. The Board having heard the parties has again made an order on this day confirming its previous order dated 14.6.1992, which in turn confirms its earlier order dated

22.4.1992, which in turn varied the consent order dated 1.3.1992. Thus in this matter the Board has made 2 confirmation orders on 14.6.1992 and 30.8.1992 approving the variation order dated 22.4.1992. This appeal seeks to set aside these 2 confirmation orders. This Tribunal in this appeal has to determine the legality of these impugned orders.

Counsel on behalf of the appellants submits that the Board has no jurisdiction or power to vary its own order, and if it wishes to do so it has to be done with notice to the parties and on hearing them. The appellants also state that the Board has acted in violation of the principles of natural justice without affording the parties an opportunity of being heard. However Counsel on behalf of the respondents submits that the parties have been heard on 30.8.1992 on this matter and therefore it is incorrect to say that the order made on this day is made in violation of the principles of natural justice. In answer to this question Counsel for the appellants submits that when the Board sat on 30.8.92 it had already pre-judged the issue by its order dated 22.4.1992. He further submits that any order made without hearing parties is a nullity, and it cannot be validated by subsequent hearings. In support of this contention Counsel for the appellants cited authourities in Amaradasa Vs. Land Reform Commission 1979 NLR, Pt. I, page 505 which was followed in J.B.Textiles Industries Ltd. Vs. Minister of Finance and Planning, 1981, SLR 238. There is substance in this submission of the Counsel for the appellants. By the time the Board made its order on 30.8.1992 on notice to the parties it had already varied the order by its previous order dated 22.4.1992. The Board could have or rather should have summoned the parties by notice before making its crucial order dated 22.4.1992, and has failed to do so. It amounts to violation of the principles of natural justice. It is no use to summon the parties to a meeting on 30.8.1992 once the damage has already been caused.

The Board also has by its order dated 14.6.1992 confirmed the variation order dated 22.4.1992 ex-mero-motu without notice to the parties. Here again, the Board has violated the principles of natural justice, and on this ground it cannot hold good in law.

The next question to be answered in this is whether the Board can vary its own order. The Board when making the order on 14.6.1992 has found excuse by citing 3 previous instances where the Board has acted in the same manner, but in the circumstances the orders of the Board may not have been canvassed in a higher forum as to their legality. Thus it cannot be a precedent or a licence to the Board to act in this manner without a legal foundation. The Board has also expressed its view that it has the discretion to vary its own order, but there are no provisions in the scheme of the Wakfs Act to exercise such discretion. No man can sit in judgment of his own conduct. This Board cannot be permitted to vary its own order in this manner which in fact has to be done by a higher forum.

The consent order as submitted by Counsel for the appellants is analogous to a consent decree. Once it is entered it cannot be altered or varied ex-mero-motu without notice to the parties. Authorities cited by the Counsel substantiate this argument. Swaris Vs. Perera 41 NLR 562, Ceylon Carriers Ltd. Vs. Peiris 2 SLR 119 go on to say that it can be set aside on grounds of fraud, misrepresentation or mistake with notice to the parties on an application to do so. The Board in this case has varied the consent order concerned without such a notice, and therefore acted in excess of its jurisdiction. The impugned orders of 14.6.1992 and 30.8.1992 are only based to give a green light to the variation order dated 22.4.1991 which was already made in violation of law.

Thus the variation order dated 22.4.1992 and the subsequent orders dated 14.6.1992 and 30.8.1992 are hereby set aside keeping in force the consent order made on 1.3.1992 in this case.

Sgd.

M.A.Q.M.Ghazzali M.S.A.Saheed

Yaseen Omar

The Appellants claim to be members of the Jamaath of the Moor Street Jummah Mosque, Chilaw and filed this application to set aside the orders of the Wakfs Board dated 14th June 1992 and 30th August 1992 and to restore the consent order of the Wakfs Board dated 1st March 1992.

The 1st to 7th Respondents are the former Trustees of the Mosque whose period of office expired in July 1991 and since then are functioning as Persons-in-Charge of the Mosque.

The Wakfs Board held an inquiry on various complaints by the Appellants. However the parties arrived at a settlement and a consent order was made binding all the parties. Thereafter the Wakfs Board made two other Orders on 14th June 1992 and 30th August 1992.

The Respondents state that the Wakfs Board by its order of 14th June 1992 had acted ex mero motu as neither the Appellants nor the Respondents were represented at this meeting of the Wakfs Board. However the Respondent state that it was not so when the second order was made on 30th August, 1992.

The order dated 1st March, 1992 was a consent order voluntarily agreed to among all the parties. The consent order was approved by the Wakfs Board. Once a consent order was recorded, entered and approved the Wakfs Board is functus thereafter and the powers of the Board cease at that point of time and it can neither vary, revise or alter terms on its own as it did on 4th June, 1992 except with the consent of the parties. In this case the Wakfs Board in varying or altering the consent order without the consent of all the parties acted without jurisdiction, such an order is null and void. The Board had no jurisdiction to alter the terms of settlements ex sua motu. Thereafter it attempted again to vary, change or revise the consent order on 30th August, 1992.

However this variation or change was not with the consent of all the parties and the parties did not agree or accept the alteration imposed upon them on 30.08.1992. The consent order of 1st March 1992 was lawful and final. The Wakfs Board had no further power to deal with the questions all over again. The Wakfs Board and the parties are bound by the consent order which was a lawful compromise entered into on 1st March, 1992. I set aside the subsequent order of the Wakfs Board dated 30.08.1992 without costs and affirm the consent order made on 1.03.1992. The parties are bound by such order. I trust there will be a finality to this consent order and that no further application will be made canvassing the correctness or validity of the consent order dated 1.3.1992.

sgd
Yaseen Omar

Halwan
vs.
Rahman.

WT/36

M.S.A. Saheed
Yaseen Omar

WB/165/86

Election of Trustees to the Ulahitiwela Thakkiya – Appeal before the Court of Appeal and the Writ application filed rejected – Can the execution proceedings be stayed just because an appeal before the Supreme Court filed without a stay order from it.

Sections 9E,9G,14,15 of the Wakfs Act

Held : Director to make an application before the Magistrate Court of Gampaha for an order directing the Fiscal of the Court to take delivery of possession of the movable properties from the Respondents to the duly appointed Trustees of the mosque.

A.A.M. Marleen Attorney-at-law for the Appellant
Farook Thahir with Abdul Latiff Attorneys-at-Law for 1st and 2nd Respondents.

M.S.A. Hassan Attorney-at-Law for 3A, 5B, Respondents.
N.W.Samoon Attorney-at-Law for 3rd Respondent

ORDER
30.06.1990.

This case arose as a result of an objection to an election of trustees to the UlahittIwela Thakiya purported to have been elected by the jamaath at a meeting held on 22nd December, 1985 in contravention of accepted practice where the Calipha of the particular thareeqa nominates the trustees. After protracted inquiry the Board upheld the objection and by order dated 3rd January, 1988 decided that the purported election was null and void. The Respondents (those who were purported to have been elected them) preferred an appeal to the WaqfS Tribunal which by order dated 6th April, 1988 affirmed the decision of the Board referred to earlier. Thereafter, being aggrieved with this order the Respondents filed Notice of Appeal as provided under the law but failed and neglected to file their Petition of Appeal, an imperative requirement, if they are proceeding to obtain a judgement on the merits of the case.

In the meanwhile the Respondents also filed a revision application challenging the orders of both the Tribunal and the Board by way of the prerogative writs of Certiorari and Mandamus (Court of Appeal Application No: 780/88). The Court of Appeal dismissed this application on the ground, inter alia, that the Respondent/Petitioners had failed to exhaust the remedy available to them by way of appeal.

In accordance with the orders made by the WaqfS Tribunal and this Board the Calipha had nominated five persons to be trustees of the Thakiya, three of whom were the Petitioners to this application and which nominations were thereafter confirmed by the Board.

No sooner the Court of Appeal had dismissed the Respondent petitioners application No: 780/88 aforesaid the persons nominated by the Calipha and appointed by the Board, motioned that the movable properties in the possession of the Respondents be restored to them (those duly appointed as trustees by the Board) by way of an ' enforcement order' under Section 15 of the Wakfs Act. The Board, as a matter of caution and also with a view to grant an opportunity to the Respondents, issued notice on them in the first instance under Section 15 (2). In reply, to that notice, counsel representing them appeared before the Board and made submissions that the Board should not or is under law not entitled to grant the relief sought.

The Petitioners, who were also represented by counsel opposed this submission.

The Petitioners submission,were,interalia, as follows:-

(a) that the Respondents have failed and neglected to pursue their rights under the procedure for appeals by not filing their Petition of Appeal and have thus abandoned their right of appeal;

(b) that the Respondents had moved the Court of Appeal by way of an application praying for prerogative writs of Certiorari and Mandamus which had been unsuccessful as it stands dismissed, and therefore,

(c) the Petitioner's are entitled to the relief prayed for and that execution procedures under Section 15(3) should necessarily follow.

The Respondent's counsel submitted, interalia, as follows:-

(1) that they have moved the Court of Appeal for Leave to Appeal to the Supreme Court and as the matter is pending before Court to stay all further proceedings before the Board i.e not allow execution procedures prayed for by the Petitioners;

(2) that the dismissal of the application by the Court of Appeal was not on merits of the matters in dispute between them but on a preliminary objection as to their right to quash the Tribunal's and Board's orders by way of the said prerogative writs,and;

(3) that in any event the Board cannot grant the relief under Section 15(3) and, if at all, execution procedures are laid down under Section 9 G which is a prerogative of the Wakfs Tribunal and therefore the Petitioners should move not the Board but the Tribunal.

The Board after careful consideration of the facts, circumstances and the law, is of opinion that if the Respondents were eager to obtain a judgement as the merits of the case,they should have followed up their remedies by way of appeal. If the appeal had been decided against them, Leave to Appeal from that decision to the highest tribunal of the land, the Supreme Court, is understandable. But they had abandoned that relief. Their application to quash the Tribunal's, and that of the Board by way of the prerogative writs was, to say the least, to delay and stultify the attempts of the lawfully appointed trustees to obtain effectual control and management of the place of religious worship of which they have been duly appointed as trustees. In this they have been successful for several years up-to-date.

In any event in the Respondent's application for leave to Appeal they have neither prayed for a stay order nor have the stay order been granted by court.

The other question is whether the Board is entitled to grant relief under Section 15 (3) of the Wakfs Act. A careful reading of Part 111 of the Act commencing from section 14 leads to the conclusion that Section 15 has been included to make the transfer of the control and administration of a Registered Mosque effectual where new trustees are appointed and the earlier incumbents in office possess any properties of such Mosque but fail to hand over the control and custody of such properties. This is the factual situation in the instant case. The argument that execution procedures analogous to that of the District Court is via the Wakfs Tribunal as per Section 9 G is untenable for three reasons. Firstly, the Wakfs Tribunal, in the exercise of its general powers under Section 9 E (1) read with Section 9 E(2) to (4),can hear and determine matters as a court of original jurisdiction. In which case, its procedures and powers, including that of powers of execution, in terms of Section 9 G, shall be that of a District Court and in accordance with the provisions of the Civil Procedure Code. Secondly, the petition originally made in 1986 before the Wakfs Board was not one where the petitioners had made seeking the Board's approval or the Director's certificate under Section 9 E (2) to (4) invoking the original jurisdiction of the Wakfs Tribunal. In which case upon determination of the matters in dispute, they could have under Section 9 G sought that Tribunal's powers of execution of such order or judgement. In this case however, the application was made to the Board under Section 14 (1) and thereafter moved the Tribunal by way of appeal, in which case, Section 9 G clearly does not apply. Lastly, if the contention that Section 9 G applies is accepted, it would be a situation analogous to a application for writ, after determination of an appeal by an appellate body from

an order of judgement made by the original court, for example moving the Court of Appeal after determination of the appeal, for writ of execution from a judgement entered into by the District Court and which was the subject of an appeal.

For the reasons stated, the Respondent's application to stay proceedings under Section 15 is disallowed. The Board has already given notice in terms of Section 15 (2). The Petitioners are now entitled to relief under Section 15 (3). The Director is, thereafter, directed to make application to the Magistrate Court of Gampaha for an order directing the Fiscal of that Court to take delivery of possession of the moveable properties of the Ulahittiwela Thakiya (and listed in the Notice dated 3rd January, 1992 sent on the Board's direction) from the Respondents possession and hand them over to the duly appointed trustees of the said Thakkiya.

Halwan
Vs
Rahman

Wakfs Tribunal
No: W/TRIB/36

M.A.Q.M.Ghazzali
M.S.A.Saheed
Yaseen Omar

Wakfs Board
No: WB/165/86

Ulahitiwela Thakkiya, Malwana – Caliph for Malwana appointed by the Sheikh of Beruwela – Board concirms the nominee of caliph is trustee – Tribunal upholds the order of the Board – CA 780/88 dismissed – SCLA 29/91 dismissed – Sheikh who appointed the caliph died.

Held: Appeal dismissed Petitioners hand over forthwith all properties to the Respondents.

ORDER – Interim
8.6.1992

The Petitioners-Appellants on the basis of their election as Trustees made at a meeting of the Jama'ath on 22.11.85 made an application to the Wakfs Board in terms of Section 14(1) of the Wakfs Act to confirm and appoint the Petitioners as Trustees.

The 1st to the 5th Respondents also made an application to the Wakfs Board opposing the application of the Petitioners for

confirmation as Trustees and moving that the Board confirms as trustees the persons nominated by S.L.Mohamed, the caliph of Malwana who in turn had been appointed by A.S.Mohamed the Sheikh of Beruwela.

After Inquiry the Wakfs Board made Order on 3.1.88 refusing to confirm the appointment of the Petitioners as trustees and upholding the submissions of the Respondents and confirmed the persons nominated by S.L.Mohamed, the Caliph of Malwana (who in turn had been appointed by A.S.Mohamed the Sheikh of Beruwela) as Trustees.

The Petitioners lodged an appeal to the Wakfs Tribunal against the Order of the Wakfs Board made on 3.1.88 and this Tribunal after hearing the parties upheld and affirmed the Order of the Wakfs Board.

The Petitioners then made an application to the Court of Appeal bearing No: 780/88 seeking a writ of Certiorari against the Orders of the Wakfs Board and Wakfs Tribunal. This application was dismissed. Thereupon, the Petitioners sought by application No: CALA 29/91 dated 15.11.91 for leave from the Court of Appeal to the Supreme Court against the judgement of the Court of Appeal, but this Application was dismissed.

The Petition of Appeal before us states in para 10(iii):

> *"...Since the Court of appeal issued an interim Order staying all further proceedings before the Wakfs Tribunal and the Wakfs Board and since the Petitioner have now sought to challenge the Order of the Court of appeal made in C.A, Appn No: 780/88 in the Supreme Court, it is respectfully submitted that the Wakfs Board should atleast await the result of the application seeking leave to appeal before any further orders are made by the Wakfs Board."*

In view of the leave to appeal to the Supreme Court being refused the question of stay does not arise.

The Counsel for the Petitioners-Appellants now seeks an order for stay of proceedings on the basis that the Sheikh who recommended originally the Respondents for appointment as Trustees, died on 12.4.92 and the re-appointment of the Respondents as Trustees after the judgement of the Court of Appeal, the Sheikh was not consulted nor was his recommendation sought.

This position cannot be sustained.

We have to give effect to the order of the Wakfs Board which has been affirmed by the Court of Appeal. That order confirms as Trustees the Respondents as Trustees of Ulahitiwela Mosque Malwana.

Since the Respondents had not been allowed by the Petitioners-Appellants to function as Trustees their period of office should commence forthwith.

The Application for stay is refused.

However on the insistence of Counsel for notice on the Respondents to enable the Petitioners to state their Appeal morefully notice is allowed subject to the condition, that during the pendency, that is until the final disposal of this application the Respondents to function as Trustees.

Yaseen Omar
- member

I agree
M.A.Q.M.Ghazzali
-Chairman

ORDER
30.06.1992

In terms of the interim order made by this Tribunal on 8th June 1992, the respondents took notice and their submissions were on the basis that:

(1) The Order of the Wakfs Board made under section 15 directing the petitioners to hand over or deliver possession of such property as was specified in the notice, is a decision of the Board and is final and conclusive and shall not be called in question in any court.

(2) The appointment of trustees for the period 25.06.1991 to 31.12.1994, set out in the petitioners' petition of appeal under para 10(iv) that it was a "re-appointment" of the trustees, was not so but in fact it was a continuing appointment of the same trustees who were kept out and not allowed to function by reason of the applications and appeals filed by the petitioners. The petitioners' application to the Wakfs Board, the Wakfs Tribunal, the Court of Appeal and the leave sought to appeal to the Supreme Court all having been refused caused the delays. The petitioners having now come back to this tribunal once again with the present appeal which the respondents state is untenable in law.

(3) The continuing appointment of the respondents as trustees were the nominees of the Sheikh of Beruwala. If the petitioners had any objections to the continuing appointments the proper course of action if at all was to invoke the provision of the Wakfs Act under section 14 before the Wakfs Board.

We have carefully considered the submissions of both the petitioners and the respondents and are of the view that the petitioners' submissions are not tenable and misconceived. In our view there is substance in the submissions of the respondents and we accept them.

We are of the opinion that the petitioners have frivolously filed this application with a view to cause further delay in handing over and giving possession of the properties of the Ulahitiwela Mosque. Malwana to the respondents which they have held on to for so long. We find that there is no merit in the petitioners'submissions and the properties of which belong to the said Mosque they are in wrongful possession. The Petitioners are continuing in the wrongful possession of the properties of the Mosque. We are inclined to think that the petitioners are taking up all kinds of untenable grounds in order to continue to be in wrongful possession as long as they could.

The 3rd respondent has been made a party to these proceedings by the petitioners to serve their own purpose and prolong these proceedings. The 3rd Respondent is acting in collusion with the petitioners. We do not make any order in his favour.

We accordingly dismiss this appeal.

We direct that the petitioners hand over forthwith all properties of the Ulahitiwela Mosque, Malwana that are held by them or by their nominees or agents.

Yaseen Omar
Member

I agree
M.S.A.Saheed
Member

Azeez
vs
Bary

WT/37 and WT/38

M.A.Q.M.Ghazzali
M.S.A. Saheed
Y.Omar

WB/1226/90

Shrine of Sheikh Hassen Bin Usman Magdoomy, Dharga Town – Complaints against its Trustees – Special Trustees appointed by Mistake.

Section: 14

Case referred:
Harley Vs Chelliah 58 CLW page 75

Held: Appointment of Special Trustees stand and the Board to make fresh appointment once their period is over.

S.J.Mohideen Attorney-at-Law for the 1st Appellant
M.S.A.Hassen Attorney-at-Law for the 2nd Appellant
A.A.M.Marleen Attorney-at-Law for the Respondents.

ORDER
08.02.1993

This is an appeal against the order of the Wakfs Board of 24th April 1992. The Appellants were appoionted on 3rd April 1991 for two years as Special Trustees of the Shrine of Sheikh Hassen Bin Usman Magdoomy at Dharga Town. Their period of office was to end on 29th March 1993.

The Wakfs Board having received complaints on the appointments of Appellants as Special Trustees inquired into the allegations. At this inquiry the Appellants and the Respondents were present. An order was made on 24th April 1992 revoking their appointment as Special Trustees. The Wakfs Board acting under Section 14(1) of Act No.33 of 1982 revoked the appointment of Special Trustees on the ground that these appointments were made by mistake. The Wakfs Board by the aforesaid order appointed Al-Haj A.M.M. Yoosuf, M. Shiraz Aththas and Al-Haj A.S.M. Fowzy for a period of three months commencing from 24th April 1992.

The Appellants appealed against the order. However the Appellants did not make these three persons as parties to the application before it. There was a preliminary objection taken by the learned Counsel for the Respondents that this appeal be rejected in limine and sought an order in this issue.

The majority of this Tribunal held it was not necessary to make them parties. I disagreed and held in my Order of 23rd July 1992 that it is necessary for the proper constitution of an appeal that all parties to the action who may be prejudicially affected by the result of the appeal should be made parties.

Since the preliminary objection was rejected by the majority, the main appeal was taken for inquiry.

Learned Counsel for the 2nd, 3rd and 4th Appellants contended that :

" A significant feature of this order is that the signature of the Acting Chairman or that of the other members who agreed with him does not appear in the order. In the circumstances the validity of the order is questionable. The order that is not signed therefore has no force or effect in law-Harley vs Chelliah – 58 CLW page 75".

I uphold the contention above mentioned of the Appellants and declare that the order is bad in law. I set aside the order of the Wakfs Board dated 24th April 1992 and allow the Appeal. The original appointments of the Appellants as Special Trustees for the period ending 29th March 1993 will therefore stand. Since I uphold the contention above mentioned of the Appellants it is not necessary for me to deal with the grounds of Appeal set out in the Petition of Appeal.

I direct the Wakfs Board to make in accordance with law fresh appointments when the period of the Appellants as Special Trustees expires on 29th March 1993.

In view of the above order it is not necessary to make a further and separate order in respect of the relief prayed for in the Plaint in Application No:W/TRIB/38. The order in Application No:W/TRIB/37 will apply to the Application No.W/TRIB/38. I direct the Registrar/Secretary of this Tribunal to file a copy of this order in Application No.W/TRIB/38.

Sgd

M.A.Q.M.Ghazzali, M.S.A.Saheed, Yaseen Omar

Azeez
Vs
Bary

Wakfs Tribunal
No: W/TRIB/37

M.A.Q.M.Ghazzali
M.S.A.Saheed
Yaseen Omar

Wakfs Board
No: WB/1226/90

Sheikh Hassan Bin Usmanul Magdoomy Shrine, Dharga Town – Appointment of Trustees in contrary to the past practices of the Shrine – Appointment of Special Trustees.

Section: 14(1)(1A), 14(1)(1C)

Held : Discretion of Administrative body or Tribunal cannot be absolute or unfettered.

Order of the Board revoking the appointment of Special Trustees set aside.

S.J. Mohideen Attorney-at-Law for the 1st Appellant.
M.S.A.Hassan Attorney-at-Law for the 2nd Appellant.
A.A.M.Marleen Attorney-at-Law for the Respondent.

Cases referred:
Ferdinands vs de Silva CALR 1986 Vol 2 page 87
Breen vs Amalgamated Engineering Union 1987 2QB 175, 190
Nakuda Ali vs Jayaratne 195 AC 66

ORDER
11.02.1993
M.S.A.Saheed

This appeal has been made against the order made by the Wakfs Board on 24.4.1992, revoking the appointments of the Respondents-Appellants, as special trustees of the Shrine of Sheik Hassan Bin Usmanul Magdoomy at Darga Town. Appellants have been appointed as special trustees of the said shrine, by an earlier order of the board dated 3rd Aprril 1991, for a period of two years commencing from the 30th day of March 1991 up to the 29th day of March 1993.

Soon after the said appointments the Petitioners-Respondents have petitioned the board alleging that the appointments have been made contrary to the consistent practices observed hitherto. Thereafter the board has held an inquiry into this petition and made the impugned order dated 24.4.1992, revoking the appointments of the appellants as special trustees, on the ground of mistake of fact under S.14(1)(1A) of the Wakfs Act.

Appellants have canvassed this order by this appeal.

Thus the tribunal in his appeal is invited to determine as to the legality of this order. Counsels of both parties have made their exhaustive submissions both orally and in written form in support of their contentions.

Although it is not the practice to raise issues at inquiries before the board, 8 issues have been raised in this particular case on behalf of the petitioners-respondents. Out of these issues it is the 1st issue, which is most relevant to this appeal. It reads as follows.

" Was the appointment of the respondents as trustees of the Shrine of Sheik Hassan Bin Usmanul Magdoom, dated 3.4.1991 made without following the practices that were followed by the Wakfs Board from 1966"

The Board has answered this issue in the affirmative. In this order the Board says that there has been a consistent practice after 1966, to call for applications from prospective candidates for trusteeship, whereupon selections were made after an interview and no such procedure has been followed in the appointments of the present special trustees. The Learned Counsel for the Respondents-Appellants, countering this position of the board, in his submissions has cited number of instances in the past, where trustees have been appointed without calling for applications. He refers to the minutes of the board dated 7.10.1977 27.12.1977 and 9.1.1978 and annexures "K" "L" "M". As per annexure "K" he says trustees have been appointed on the recommendation of a board member, and as per annexure "M" six persons have been appointed as trustees on the recommendations of Saaduthul Alavia Association, without calling for applications. He also cites another example by referring to annexure "W" where trustees have been appointed on the recommendation of Sheikh Hamza. In addition to this the Learned Counsel has referred to the evidence of one Zubair who has stated on 27.7.1991 and 27.10.1991 in this case that he was appointed as a trustee without calling for application. It is evidence from these instances that there has been no consistent practice of calling for applications for trusteeship in this shrine. Thus the board has erred on a point of fact, when it says that there has been a consistent practice of calling for applications for appointment of trustees to this shrine. Board has failed to look at its own conduct in the past in this regard.

On the other hand, on a comparison of S.14(1) (a) under which normal trustees are appointed with S.14(1)(c) under which special trustees are appointed, it becomes clear that the board is not legally bound to give weight to any practice in the appointment of special trustees. It is only S.14(1)(a), which speaks of practices, rules, regulations or other arrangements in appointments of normal trustees and not S.14(1)(c) under which special trustees are appointed. Intention of the legislature is clearly manifested in these two sections in different forms. Applying the legal maxim "Expressio Unius Est Exclusio Alterius" which means when one is expressly stated the other is excluded, to this situation, one can safely come to the conclusion that the board is not legally bound to follow any practice in making appointments of special trustees.

The board in its order further says that special trustees are appointed in terms of S.14 (1) (c) of the Wakfs Act, only for a very short period of time and in the present case they have been appointed for a term of normal trustees e.g. two years. A perusal of the terminology of S.14 (1) (A) manifestly points out that no limited period of time is specified for the appointment of normal trustees. Thus when the board says that the term of office of normal trustees is limited to two years, it has erred on a point of law.

Similarly S.14 (1) (c) of the Wakfs Act, also does not specify any period for the appointment of special trustees. It says" may appoint a special trustee or trustees for a prticular period if the board considers necessary for the proper administration of the mosque". The term of office of special trustees depends on the purpose for which they are appointed. Section only says "a particular period". It also may depend on the circumstances under which they are appointed. Thus once again the board has erred on a point of law, when it says that special trustees are appointed for

a short period of time. Board has considered this matter of law, as a mistake of fact to justify its order. But in fact it is a mistake of law on the part of the board because no period of time is specified for the appointment of normal trustees or special trustees.

The Learned Counsel for the Petitioners-Respondents in his oral submissions contended that the board has absolute descretion under S.14 (1) (1A) in revoking the appointments of trustees and it applies to special trustees as well. Also he said this descretion cannot be challenged in any forum. The Learned counsel fortified this argument by referring to the judgement of Court of Appeal in Ferdinands Vs. De Silva C.A.L R. 1986, Volume 2 page 87. But the Learned Counsel has failed to see that in the same judgement at page 92 Hon. Justice T.D.G.De Alwis lays down a limitation on this descretion in the following Words.

> *"But it has now been well estabilished that courts will not interfere with the exercise of such administrative authority unless they are satisfied that the administrative tribunal has acted male fide or on no evidence or unreasonably or has gone wrong in law".*

This shows that the descretion of any administrative body or tribunal, to do certain acts, can be interfered with, by the courts, when it acts unreasonably, male fide, or contrary to law. Thus there is no concept of absolute descretion or unfettered descretion in our law.

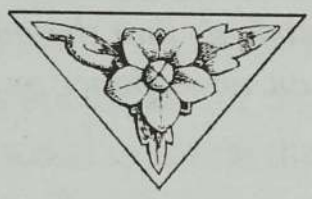
Countering this argument, the Learned Counsel for 2, 3, 4, Appellants in his counter submissions has cited number of authorities in support of this view.viz, Breen vs Amalgamated Engineering Union 1972 2 QB 175, 190, Nakkuda Ali vs Jayaratna (1951) A.C. 66. even the Counsel for the 1st Appellant substantiates

this view in his submissions. On perusing all these authorities one cannot says that the descretion vested in any tribunal or body cannot be absolute or unfettered. Thus the contention of the counsel for the Petitioners-Respondents that the board has unfettered descretion in revoking the appointments of trustees, which cannot be challenged in any forum is not acceptable or tenable in law.

Thus the order of the board dated 24.4.1992 revoking the appointments of the Respondents- Appellants as special trustees is hereby set aside.

M.S.A.Saheed

I agree M.A.Q.M.Ghazzali



Cassim
vs
Munna

WT/ 133/2001

M.S.A.Saheed
A.H.G.Ameen
A.M.I.Saheed

WB/3719/2001

Ratmalana Jumma Mosque – Allegations against Trustees – Special Trustees appointed without holding an inquiry into the allegations.

Held: 1. Order appointing Special Trustees set aside.

2. Hold an inquiry into the allegations against the Trustees immediately.

Appearance: -

Farook Thahir with M.M.A.Riza Attorneys-at-Law for the Appellants.
M.I.Waffa Attorney-at-law for the Respondents.

ORDER

23.08.2003.

A.H.G.AMEEN :-

This is an appeal preferred by the Respondents-Appellants (hereinafter referred to as the APPELLANTS) against the Petitioners-Respondents (hereinafter referred to as the RESPONDENTS).

The Appellants state that they with three others were appointed Trustees of the mosque, Ratmalana Jummah Masjid by election at a meeting of the Jamaath and instrument of appointment dated 19.05.1999 issued for a period of three years from 16.10.1998 to 15.10.2001. On 17.06.2001 they were summoned by the Wakfs Board to answer charges in a petition dated 02.10.2000 sent by the Respondents, On this day the Appellants and the 1st Respondent abovenamed who were present came to a settlement interalia to submit the statement of accounts to the Wakfs Board, update the Jamaath Register and hold a meeting of the Jamaath to elect the Trustees to the said Ratmalana Mosque. The Appellants submitted the statements of accounts on 16.07.2001 and thereafter they were asked to tender an audited statement of accounts which was complied with on 10.10.2001.

The Respondents and other members of the Jamaath have made serious allegations of misappropriation of funds. Some of the allegations are:

1. failure to bring forward a sum of Rs. 435,574.92 in the statement of accounts.

2. a sum of Rs. 14,326/99 shown as expense for electricity for a period of six months but this amount had been paid by a donor.

3. A sum of Rs. 24,500/= shown as paid to Katheebs for Jumma sermons but infact only a sum of Rs. 14,500/= had been paid to them.

4. a sum of Rs. 19,500/= claimed over and above the amount paid as salaries to the Katheebs, muazzin and watcher for the said six months period.

5. a sum of Rs. 400.000/= of the mosque fund withdrawn from the Bank of Ceylon and after a long lapse of time deposited in the Amana Investment without following proper procedure.

In my opinion the Wakfs Board should have held an inquiry into these serious allegations without suggesting a settlement, as the Appellants state that they entered into a settlement in deference to the suggestion made by the Board..

However, the Appellants in keeping with the said settlement had arranged a meeting of the Jamaath on 14.10.2001 for the purpose of electing the Trustees for which they have requested the Asst. Director to send an officer from the Wakfs Division. But since an officer was unable to be present at this said meeting as the said Division was busy in organizing the National Meelad Day celebrations on 15.10.2001 the said Jamaath meeting was in keeping with the said settlement of 17.06.2001 had to be postponed by three weeks on the directions of the Asst. Director . Thereafter the 1st and 2nd Appellants by letter dated 15.10.2001 sent under registered cover had sought permission to hold the said Jamaath meeting on 16.11.2001. But, the Appellants state, the Board without responding to the said letter, had summoned the 1st Appellant, who had been out of the country to appear before the Board on 11.11.2001. However, the 2nd Appellant on the notice sent to the 1st Appellant had appeared on the day and stated about the letter regarding the Jamaath meeting. But the Board had made an order on the same day appointing 6th and 7th Respondents as Special Trustees for a period of two months from 11.11.2001 to 10.01.2002 and the 2nd Respondent to attend to all mosque matters during the period of Ramazan. This appeal is against this order of the Wakfs Board made on 11.11.2002.

The Board in appointing two Special Trustees had asked the 2nd Respondent to administer the mosque during the Ramazan. When the Board appoint Special Trustees for a certain purpose why, should it ask the 2nd Respondent who is not a special Trustee, to administer the mosque during the Ramazan?

Further the Appellants state that the notice dated 04.11.2001 summoning the Appellants for the meeting of 11.11.2001 had been received by them only on 12.11.2001.

The Respondents were represented by an Attorney-at-Law on 11.11.2001 who had made submissions but the 2nd Appellant who was present on the notice sent to the 1st Appellant who had gone abroad, was not represented by an Attorney-at-law. The Appellants state that the Board had made the impugned order on the submissions made by the counsel for the Respondents and this order had been made with notice to the 1st Appellant who had gone abroad at this point of time and no notice sent to the 2nd and 6th Appellants. They further state that the Board had said that this is a consent order and I note that it cannot be so as the appellants except for, the 2nd Appellant who appeared with the notice sent to the 1st Appellant (away from the country) were not before the Board for the so called settlement. It is also noteworthy that the Special Trustees who were appointed by the Board to function for two months from 11.11.2001 never functioned as Trustees and their period had lapsed.

I find that the Respondent had made allegations against the Director as well regarding the postponement of the Jamaath meeting and the failure to hold an inquiry into the allegations of misappropriation of mosque funds.

Therefore I am of the opinion that the Wakfs Board should hold an inquiry into the allegations made against the Appellants immediately and take steps forthwith to hold the Jamaath meeting and elect the Trustees to this mosque.

I set aside the order made by the Wakfs Board on 11.11.2001 in appointing Special Trustees and direct the Board to hold an inquiry into the allegations made by the Respondent immediately and take steps to hold the Jamaath meeting to elect Trustees for the Mosque forthwith.

A.H.G. AMEEN
Member

We agree

M.S.A. Saheed
- Chairman

A.M.I. Saheed
- Member

Zubair
vs
Shakir Ismail
Chairman Wakfs Tribunal of Sri Lanka

CA No: 1214/87

BEFORE : *DR. RANARAJA, j.*

COUNSEL : *F.Musthapa, PC with S.Jayawardena for the Petitioner.*
M.Markhani for 1st - 10th Respondents.
S.Sri Skandarajah, SSC. For 12th Respondent.

ARGUED &
DECIDED ON: 07/12/95

DR. RANARAJA, J.

This matter has been settled on the following terms.

(1) It is agreed that the Maradana Jumma Mosque will be registered under section 12 of the Muslim Mosques and Charitable Trusts or Wakfs Act without prejudice to the previsions of the Maradana Mosque Ordinance No: 22 of 1924, which will continue to govern the appointment of Trustees and the management of the said mosque.

(2) It is expressely agreed that any of the other previsions of the Wakfs Act, excluding the previsions relevant to appointment of trustees and supervision of trustees, will apply to the Maradana Jumma Mosque.

In view of the above settlement, relief is granted in terms of paragraph 'A' and 'B' of the prayer to the petition, quashing the order marked P2 and P3. The application is allowed. No costs.

Sgd/JUDGE OF THE COURT OF APPEAL

P.S. : Paragraphs 'A' and 'B' referred to above are:-

(A) Issue a Mandate in the nature of a Writ of certiorari quashing the order of Wakfs Board dated 15.2.87 contained in P2.

(B) Issue a Mandate in the nature of a Writ of Certiorari quashing the order delivered by the Wakfs Tribunal on 6.11.87 contained in P3.

Sheriff
vs
The Board of Trustees of
Maradana Mosque and Others

SC No: 47/80

Before : *Sharvananda,J, Wanasundera,J & Ratwatte,J*

Counsel : *Harischandra Mendis for Petitioner-Appellant.*
Faiz Musthapha for 1-10th Respondents.
M.S.M. Nazeem with Farook Thahir for 11th Respondent.
M.S.Aziz, D.S.G with K.C.Kamalasabayson, S.C. for 12-21st Respondents.

Argued on: 18th March 1982.

Decided on: 08.4.1982

Sharvananda,J.,

By his application dated 27th September 1980 the petitioner appellant applied to the Court of Appeal –

[a] for the issue of a mandate in the nature of a Writ of Quo Warranto calling on the each of the 2nd to 10th respondents that they have no right to hold the office of Trustee of the Maradana Mosque, and on the 11th respondent that he has no right to hold the office as Principal, Zahira College, Colombo.

[b] For the issue of mandates in the nature of Writ of Mandamus on the 12th to 20th respondents-

(a) calling upon them to determine that Maradana Mosque is a mosque in respect of which no application for registration had been made under section 13 of the Muslim Mosque & Charitable Trusts or Wakfs Act No: 51 of 1956, as amended by Act No:21 of 1962 and that the said mosque should be registered and

(b) requiring the Muslim Mosques & Charitable Trusts or Wakfs Board (12th respondent) to take all steps necessary under the said section 13 to have the Maradana mosque registered in the register of mosques and to appoint person or persons to be trustee or trustees of the said Maradana mosque under section 14(1) of the said amended Act.

By order dated 11th April 1980, the Court refused the application with costs. The petitioner has preferred this appeal from that order.

The Maradana Mosque Ordinance No:22 of 1924 (Chap.347) hereinafter referred to as the Ordinance, was enacted for the incorporation of the Board of electors of the Maradana mosque for the purpose of effectually transacting the affairs of the said mosque and of controlling, managing and dealing with the properties and funds thereof including the general governance and direction of Zahira College. The Ordinance spells out a complete scheme for the administration of the affairs of the Maradana Mosque.

The 1st respondent, namely the "Board of Trustees of the Maradana Mosque" is a Board incorporated and set up under the

provisions of the Ordinance and rules made thereunder and the 2nd to 10th respondents are the members of the 1st respondent Board of Trustees. The 11th respondent is the Principal of Zahira College, having been appointed to the said office by the 1st respondent Board.

The Muslim Mosques & Charitable Trusts or Wakfs Act No:51 of 1956 as amended by Act No: 21 of 1962 (hereinafter referred to as the Act) was enacted "to provide for the registration of mosques, Muslim shrines and Places of Religious Resorts, to prescribe the powers, duties and functions of Registered Mosques, Muslim shrines, Places of Religious Resorts and Muslim Mosques & Charitable Trusts or Wakfs, to establish a Muslim Charities Fund..... to provide for matters connected therewith or incidental thereto (Vide the Preamble).

The 12th respondent is the Muslim Mosque and Charitable Trusts or Wakfs Board established under the said Act and consists of the Commissioner for Muslim Mosques and Charitable Trusts or Wakfs (13th respondent) and 7 members appointed by the Minister (14th to 20th respondents).

The application of the petitioner is based on the premise that the Act has impliedly repealed the Ordinance and that section 10 of the Act imposes an obligation on the Trustees of the Maradana Mosque to apply to the 12th respondent, the Muslim Mosque and Charitable Trusts or Wakfs Board for the registration of the Maradana Mosque and that the said Board is required by section 13, 13A & 13B of the Act to take all steps to register the said Mosque. If however the Act has not superseded the Ordinacne the application fails in limine.

The provisions of the Act ex facie apply to all mosque in Sri Lanka; there is no specific exclusion of the Maradana mosque

from the ambit of the Act. However there is no express provision providing for the repeal of the Ordinance of 1924. Council for the petitioner-appellant contended that, in that context the Ordinance should be deemed to have been impliedly repealed. He supported his argument by reference to section 57(b) of the Act, which reads as follows:-

> *The provisions of this Act shall apply to every mosque, Muslim shrine and Places of Religions Resort, notwithstanding any other written, law where there is conflict between this Act any other written law the provisions of the Act shall prevail".*

He submitted that by virtue of section 57 (b) of the Act it should be held that the provisions of the Act apply to the Maradana Mosque and not the provisions of the Ordinance.

The question in issue is what is the impact of Muslims and Charitable Trusts or Wakfs Act on the Maradana Mosque Ordinance; Has the Ordinance been impliedly repealed and ceased to be operative?

A later statute may repeal an earlier one either expressly or by implication. But repeal by implication is not favoured by the Courts "Forasmuch" said Coke-

> "as Acts of Parliament are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated". Dr. Fosters case (1614)II Reports 56.B at 63A.

The Court leans against implying a repeal "Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time; repeal could not be implied and Special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together, Thorp Vs. Adams (1871) S.C.A. 125" Kutner Vs. Phillips (1891) 2.0.B 267, 272 per A.L. Smith J.;

Thus before coming to the conclusion that there is repeal by implication the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can from the language of the later; imply the repeal of an express prior enactment, the repeal must, if not express, flow from necessary implication. White Vs. Islington Corporation (19190 1 K.B. 133. We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason". Great Western Railway Vs. Swindon Shelthan Railway (1884) 9 App. Cases 787, 809 – Lord Bramb-well. The general rule that prior statutes are held to be repealed by implication by subsequent statutes if the two are repugnant, is said not to apply if the prior enactment, is special and the subsequent enactment is general, the rule of law being as stated by Lord Selborne – Seward Vs. Vera Cruz (1885) 10 App.cases 59 at 68 "that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of general words, without any indication of a particular intention to do so

"There is well known rule .....which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted, and the cases upon the subject will be found collected in Maxwell on Interpretation of Statutes." Lancashire Accident Board Vs Manchester Corporation (1900) 1 Q.B.458, 470. 471, L.Smith, L.J.,

The rule as to presumption against implied repeal is sometimes summed up in the phrase generalia specialibus non derogant – general provisions will not affect special provisions. When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provisions unless it manifests that intention very clearly, Barker Vs Edgar (1898) A.C.A. 748 at 754 per Lord Hobhouse.

In holding that the general language of the Acquisition of Lands (Assessment of Compensation) Act of 1919 did not in the absence of a clear words affect the special provision of the Blackpool Improvement Act 1917, a private Act, Lord Haldane stated that "we are bound, in construing the general language of the Act of 1919, to apply a rule of construction which he has been repeatedly laid down and is firmly established. It is that wherever Parliament in earlier statutes has directed attention to individual cases and has made provision for it unambiguously there arises a presumption that if in a subsequent statute the legislature lays down a general principle, the general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is

specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them, may, of course, be manifested but the presumption is that the language which is in its character only general refers to subject-matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest." Blackpool Corporation Vs. Starr Estates Company (1922) 1 A.C. 27 at 34.

In Garnet Vs. Bradley (1878) 3 App.cases 944 at 950 Lord Hatherley stated the rule thus:-
"An Act directed towards a special object or special class of objects will not be repealed by a subsequent general Act embracing in its generality those particular objects, unless some reference be made, directly or by necessary inference to the preceding special Act."

In Rex Vs. Ramasamy 66 N.L.R. 265 – the Privy Council held that on the principle "generalia specialibus non derogant - section 27 of the Evidence Ordinance over-rode section 122(2) of the Criminal Procedure Code. Section 122 of the Criminal Procedure Code prohibited the use of oral as well as written statements given to the Police in an investigation whereas section 27 of the Evidence Ordinance, passed earlier allowed evidence of information given by the accused in an investigations which related distinctly to a fact discovered in consequence. The accused, in an oral statement to the Police, had given information leading them to find a gun. In the trial of the

accused for murder, it was held by the Privy Council that the statement was properly admitted under section 27 of the Evidence Ordinance. Their Lordships held that evidence falling under section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122. This principle was involved in Selvachandran Vs. Silva (1979) 1 SLR 229 where it was held that section 325(1) of the Administration of Justice Law No: 44 of 1973 which states "that upon Notice of Appeal being accepted by Court, all further proceedings in action will be stayed" is a general provision and did not supersede section 27 of the Rent Act No: 7 of 1972, which provided for the execution of a decree of ejectment in particular cases irrespective of any appeal being preferred and dealt with the special cases.

In my view the correct way to solve the question whether the Muslim Mosque and Charitable Trusts or Wakfs Act has displaced the Maradana Mosque Ordinance is to apply this maxim of interpretation "generalia specialibus non derogant". The Maradana Mosque is a private Act specially enacted to regulate the affairs of the Maradana mosque by –

a) naming the persons who were to be trustees of the mosque.

b) Provide the rules for the election of successors.

c) Incorporating the Board of Trustees, so that it may sue and be sued in its corporate name.

d) Vesting all properties including the Zahira College in the Board of Trustees and conferring power on the

Board to acquire for and deal with the properties of the mosque.

e) Vesting the general governance and direction of Zahira College in the Board and empowering the Board to devote the funds of the mosque for maintaining Zahira College or for establishing other educational institutions.

On the other hand the Muslim Mosque and Charitable Trusts or Wakfs Act No: 51 of 1956 read with Act No: 21 of 1962 is a general Act governing the administration of mosques in general.

The contention of Counsel for the petitioner militates against the rule that where there are provisions in a special Act and a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject the expression of the rule acts as an exception of the subject matter of the rule from the general Act. [Craies 5th Ed. At page 549(n)].

In my view the general legislation does not abrogate the particular law governing the Maradana Mosque. Though the 1956 Act does not contain any express exception of the Maradana Mosque, it cannot be supposed that the legislature having specially provided for the administration of the Maradana Mosque by enactment of the Ordinance, nevertheless by an Act passed in general terms long after in 1956, intended to render inoperative the scheme of the Ordinance or to repeal the Ordinance.

I am of the opinion that words contained in section 57(b) of the Act are not sufficient to rebut the strong presumption raised by the doctrine "generalia specialibus non derogant." The Maradana Mosque continues thus to be governed by the Maradana Mosque

Ordinance of 1924 in spite of the general provisions of the Muslim Mosques and Charitable Trusts or Wakfs Act of 1956 the latter provisions do not apply to the Maradana Mosque. In view of the above conclusion, though there appears to be substance in the other objections of the respondents which were raised on the hypothesis that the Act applied

to the Maradana Mosque it is not necessary to deal with them.

I agree with the judgment of the Court of Appeal and dismiss the appeal with costs.

Sgd.

Judge of the Supreme Court

I agree:

Wanasundera J

I agree:

Ratwatte J

Cader Mowlana
Vs
Adam Bawa

Wakf Tribunal
No: W/TRIB/28

Shakir Ismail
M.A.Q.M.Ghazzali

Wakfs Board
No:WB/1083/90

Appointment of Trustees to a Shrine on the basis of the descendant of the family of the testator – 48 acres of cultivable land yielding income neglected – allegation of maladministration - Three Special Trustees, Quazi of the area. Principal of a school and an officer from the A.G.A's office – Appellant one married in the family who managed the Shrine challenged the appointment –Appointment of Trustees according to the past practices.

Section: *14(1) (a) of the Act*

Held: Decision of the Board to appoint three Special Trustees owing to maladministration of the Shrine upheld. However, Once their term expires, Trustees should be appointed according to the past practices of this Shrine.

Farook Thahir, Attorney-at-Law with *M.H.A.Rahim, Attorney-at-Law for the Appellant.*
N.M.Saheed, Attorney-at-Law for the Respondents.

ORDER
24.07.1990

This is an appeal against the order made by the Wakfs Board dated 10.03.90 in case No: WB/1083/90.

Mr. Farook Thahir appearing for the Appellant submitted that although a principle was established under Section 14(1)(a) of the Wakfs Act that there was a practice to appoint trustees to this Shrine on the basis of the descendants of the family of the late Zain Moulana, the Wakfs Board had opted to depart from this procedure for no known reason, and that there was no necessity for the Board to act under Section 14(1)(c) and appoint Special Trustees.

Mr.Thahir also further argued that the fact that the Board had appointed the 3 Respondents as Special Trustees who had a long-standing quarrel with the descendants of the late Zain Moulana the original Trustee, indicated that there was malafide to some extent on the part of the Board in coming to this decision.

These two matters form the main thrust of Mr. Thahir's submissions attacking the order referred to above.

Mr.N.M.Saheed appearing for the Respondents submitted that there was evidence that the administration of this Shrine was in a very
poor state, and he particularly referred us to the fact that 48 acres of cultivable land, the income of which should have come to the Shrine had not been put to proper use for the benefit of the shrine, and he also referred us to the letter dated 28.5.83 from S.M.S.Z.Moulana to the Director taking up the position that the lands referred to, do not belong to the Shrine and that if the trustees

thought otherwise, they should seek redress either in the District Court or from the Wakfs Board. This letter Mr.Saheed stressed in his submissions was the reason that prompted the Wakfs Board that there was a necessity to act under Section 14(1)(c) and appoint Special Trustees to put things in order at this Shrine.

Mr.Saheed concedes that the practice had been established that the descendants of the Mashoor Moulana family should be appointed trustees of this Shrine, but that this Appellant is not one of them as he had only married into the family, and that it was necessary to temporarily suspend following this practice for the proper administration of the Shrine. He also further pointed out in meeting Mr.Thahir's argument that there was no evidence when the Board came to this decision that the 3 Respondents who had been appointed as Special Trustees had legal battles with the Appellant.

In meeting a further argument of Mr.Thahir, Mr.Saheed submitted that in following a recommendation of the A.G.A. of the area who
was not a Muslim the Board was merely seeking his assistance in identifying responsible and honest persons to hold office of Special Trustees, and that in the first instance in 1984 when 3 Special Trustees were appointed they were the Kathi of the area, the Principal of a School and an officer of the A.G.A's office. But since the Appellant had challenged this appointment in the Court of Appeal,during the course of the appeal their term of office had expired.

We are of the view that the Board was satisfied that there was evidence before it that there was mal-administration of this Shrine, and that they had to appoint Special Trustees suspending the practice of following the earlier practice until the Special

Trustees put the affairs of this Shrine in order. We therefore see no reason to interfere with this decision of the Board. However, it transpired during the course of submissions of both Counsels that the affairs are now to a reasonable extent brought back to good administration and we therefore direct that the Board make further inquiries into this matter, and if they are fully satisfied that the administration now is going on smoothly, they instead of waiting till 9.3.91, the date on which the period of appointment of Special Trustees will expire revert to the earlier practice following section 14(1)(a), and take early steps to appoint trustees in accordance with past practice and that these steps be taken by the Board before 31.12.90, subject to the above variation, the appeal is dismissed.

A Shakir Ismail
(Chairman)

M.A.Q.M.Ghazzali
(Member)

Maharoof
vs
Razeen

Wakf Tribunal
No:W/TRIB/27

Shakir Ismail
M.A.Q.M.Ghazzali

Wakfs Board
No: WB/916/68

Awwal Zavia Road Mosque – Appellants appointed Trustees – No sooner the appointments were made the Board began to hold inquiries and make orders appointing Special Trustees – Respondents absent and unrepresented.

Held: Trustees should be appointed according to the traditions, customs and practices of the Zavia. However, Appellants shall continue as persons in charge until such time the new trustees appointed take over.

Farook Thahir, Attorney-at-Law for the Appellants.
Respondents absent and Unrepresented.

ORDER
17.04.1989

On the last date of hearing both Counsel appearing for the 1st Respondent had indicated to the Secretary that they were not appearing before this Tribunal on that day, namely 10.4.89. The Respondents too were not present. In the circumstances this

Tribunal was of the view that the Respondents, particularly the 1st Respondent should be given an opportunity to be present before this Tribunal in case he was not aware that his Counsel might not represent him on 10.4.89. This matter was therefore put off for further hearing today, and the Secretary was instructed to send the notice of hearing of this matter today by registered express post, which the Secretary informs us today was done on 11.4.89. We therefore feel that the 1st Respondent Mr.O.M. Razeen would have received notice of this hearing of this matter today. The 1st Respondent is not present before this Tribunal in person or represented by any Counsel. In the circumstances we are compelled to hear the Appellants and make a suitable order in this case.

We have heard the submissions of Mr. Thahir, Counsel for the Appellants, and have also perused the documents attached to his petition. It appears to this Tribunal that the 3 Appellants had been duly appointed as Trustees of this Zavia for a period of 3 years commencing from 10.11.88 and ending on 9.11.91. These appointments were made by the Board in the normal course of business, and the 3 Appellants were issued their respective letters of appointment. Thereafter the Board appears to have made several decisions commencing from 25.11.89, barely two weeks after the appointments referred to above were made, which decisions we are unable to understand or the reasons that prompted the Board to cause inquiries by the Board itself in regard to appointments of Trustees including Special Trustees. And the gravest error of the Board in this matter appears to us that they took unilateral decisions without summoning the respective parties concerned. We therefore feel that all decisions made by the Board after 10.11.88 should be set aside, and that the 3 Appellants who were the duly appointed Trustees of this Zavia as at that date should continue as persons in charge for a period of 6 months from today, and they should during

this period conform to the four matters set out by the Board in their letter dated 27.1.89 to Moulavi A.R.M.Mahroof, which has been copied to the 1st Appellant Mr.M.Maharoof, and which 4 matters are as follows:-

1. Action must be taken to elect/or nominate Trustees in accordance with the traditions, customs and practices of this Zavia.

2. Prepare an up-to-date statement of accounts, display a copy of such statement of accounts on the Zavia Notice Board, and forward copy to the Department.

3. The till of the Zavia shall be opened on a fixed date where all three Special Trustees must be present, and the realized amount should be deposited in the Bank Account of the said Zavia within 7 days of such opening.

4. No Wakfs property shall be leased out, which would amount to acting in contravention of Section 22(1) of the Act.

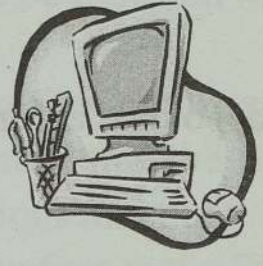
We direct that the Secretary return this file to the Department with a copy of this order. As for this order, we direct the Director of Muslim mosques that in the event of any difficulty of the Board as at present, to issue the 3 Appellants their letters confirming their continuance as persons in charge, that he the Director exercise his powers under the Act and issue same.

The Secretary of this Tribunal is further directed to send by registered post copies of today's order to the 3 Appellants as well as the two Respondents so that there would be no interruption to the smooth working of the affairs of this Zavia.

In the event of new Trustees being appointed in accordance with the directions given above and confirmed by the Board, the three Appellants who would be acting as persons in charge will cease to hold such office with effect from the date of the confirmation of the appointment of new Trustees by the Board.

Sgd. Shakir Ismail
(Chairman)

Sgd. M.A.Q.M.Ghazzali
(Member)



Hussain
Vs
Careem

Wakfs Tribunal
No: W/TRIB/26

Shakir Ismail
M.A.Q.M.Ghazzali

Wakfs Board
No: WB/930/89

Shazuliya Zavia, Panchikawatta, Colombo 10- Special Trustees appointed by the Board disregarding the past practices of the Zavia.

Section: 14(a) (1) of the Act

Held : Trustees should be appointed according to the past practices of the mosque.

Appearance

ORDER
29.08.1989

The appellants had been former trustees and at the time the impugned order had been made on 15.1.1989, they were persons in charge of the Nadhawathu Laha Nooru Shazuliya Zavia, Panchikawatte, Maradana Colombo 10. Previously that is on

27.3.88 the Wakfs Board had appointed the Respondents as Special Trustees, of the said Zavia which appointment came to be immediately challenged by the Appellants before the Wakfs Board in Case No: WB/809/88. The appellants had obtained an interim order from the Wakfs Board on 10.4.88 suspending the Respondents appointment as Special Trustees and permitting the Appellants to continue as Persons-in-Charge.

The contest between the parties was centered round which party had the better right to administer this said Zavia. The matter came up before the Wakfs Board on several occasions but had been consistently postponed and on 12.11.88 the matter was even postponed without a definite date for resumption. Thereafter the Wakfs Board by letter dated 6.1.89 noticed the parties to appear before the Board on 14.1.89.

The Wakfs Board had directed the parties in the said notice to bring their witnesses and documents in support of their respective case as the matter was to be inquired into on 14.1.89.

On 14.1.89 when the parties appeared before the Wakfs Board, the Board announced that the first to the fifth respondents had sent in their resignations and the proceedings terminated. The letter of resignation by the first to the fifth Respondents was dated 14.1.89.

Thereafter the Wakfs Board had met again on 15.1.89 without notice to the Appellants on an application made by an authorized officer in Case No: WB/930/89 and appointed the first to the fifth Respondents as trustees of the Zavia. The Appellants being aggrieved with the order of the Wakfs Board dated 15.1.89 have filed this appeal stating interalia that the appointment of the 1st-5th Respondents on 15.1.89 have been obtained irregularly and

is a consequence of colourable and suspicious steps perpetrated by the 6th Respondent. They have also urged before us that the impugned appointment had been irregular and not in conformity with the statutory provisions requiring the practices, rules, regulations or other arrangements in force for the administration of the Mosque. It was on such established evidence that the Wakfs Board confirmed the appointment in accordance with Section 14(1)(a) of the Act. We are of opinion that anything short of this is not in conformity with the provisions of the statute.

In the instant case an authorized officer had filed a petition praying that the 1st-5th Respondents be appointed trustees of the said Zavia although no evidence of the nomination or selection of the 1st-5th Respondents according to practices, rules, regulations or other arrangements in force for the administration of the mosque had been placed for the guidance of the Wakfs Board. The learned Counsel for the respondents contended that the authorized officer had not played an official role in placing the names before the Wakfs Board. In our view such being the case does not strengthen the case for the Respondents.

We are also unable to agree with the learned counsel's suggestion that the appointment of the 1st-5th Respondents as trustees on 15.1.89 is a matter that has to be considered independently of what proceeded in the relationship between the parties. The parties had been at issue as to who had the legitimate right to be trustees of the Zavia. Suddenly on 14.1.89 the Appellants after being summoned for the inquiry in to the matter were told that the matter is at an end in view of the resignations of the Respondents from the position as Special Trustees. For all intents and purposes the Appellants could have assumed that they were to continue as Persons-in-Charge, blissfully ignorant of the developments that had gone counter to their cause. On this date the Petition of the authorized officer for the appointment of "the

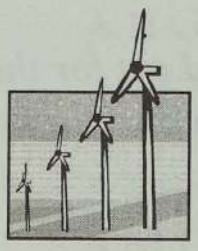
resigning Special Trustees," as trustees of the Zavia was before the Board; no mention was made of his application. On the following day the Special Trustees who had by then resigned as special Trustees had been summoned before the Board, to be duly appointed as trustees.

The development from 6.1.89, or more particularly, from 4.1.89 to 15.1.89 in our view appeared to be a pre-arranged drama carefully plotted to maintain the veil of legality over it. Yet it is clear that all parties involved had moved cautiously to keep the Appellants at bay, without giving them the slightest hint of what was really happening. At least in the interest of "justice to appear to be done" the Appellants should have been noticed on 14.1.89 that their contest had ended not merely because the 1st-5th Respondents have resigned but also because there is an application on their behalf for appointment as Trustees.

For the above reasons we allow the appeal and direct that the Appellants continue as persons in charge until trustees are duly selected and confirmed by the Wakfs Board in accordance with the provisions of the statute.

A.Shakir Ismail
Chairman
Wakfs Tribunal

M.A.Q.M.Gazzali
Member/Wakfs Tribunal



Aboobucker
Vs
Mohideen

Wakfs Tribunal
No: W/TRIB/88/96

A.H.G.Ameen
-Actg. Chairman
A.M.I.Saheed

Wakfs Board
No: WB/2425/95

Akkaraipattu Grand Jumma Mosque –
Election of Trustees on the basis of Kudy System - Board without holding a proper inquiry into two groups elected trustees on the Kudy System appointed one group as trustees without giving a hearing to the aggrieved group –

Held : Order made by the Board in confirming the group as trustees set aside. However, the appointed trustees shall continue as persons-in-charge until the matter is disposed of with a fuller inquiry expeditiously and proper appointment of trustees made.

Farook Thahir, Attorney-at-Law for the Appellants.
M.S.Jaldin, Attorney-at-Law for the Respondents.

ORDER
14.12.1996
A.H.G.Ameen

Mr.Farook Thahir for the appellants states that the main issue is in respect of election made on the basis of the Kudy system. There had been two groups sending its returns to the Wakfs Board after election on the said basis. The Wakfs Board without holding a proper inquiry into the disputed two groups elected as trustees, has made an order on 20.8.95 confirming one of the groups. Mr.Farook Thahir further states that the appellants, the aggrieved group, was not given a hearing.

The Tribunal is of the opinion that this matter could be resolved by the Wakfs Board, and is inclined to send this back to the Wakfs Board for a fuller inquiry. Counsels appearing for the appellants and respondents agree to this suggestion.

The Tribunal set aside the order made by the Wakfs Board on 20.8.95 and subsequent orders, if any, However, the Tribunal decides to allow the persons appointed by the Wakfs Board as trustees on 20.8.95 to continue as persons-in-charge until such time the matter is disposed of by the Wakfs Board.

We direct the Wakfs Board to have a fuller inquiry, expeditiously.

A.H.G.Ameen
Actg. Chairman

I agree.
A.M.I.Saheed

Fayees
Vs
Nijar

Wakfs Tribunal
No: W/TRIB/32

M.A.Q.M.Ghazzali
-Chairman
Yaseen Omar
M.S.A.Saheed

Wakf Board
No: WB/1199/90

Hilur and Mohideen Mosque, Kalutara Preliminary objections – Breach of audi alteram partem rule - Appeal out of time.

Held: Preliminary objections over – ruled. Appeal within Time

Farook Thahir, Attorney-at-Law instructed by M.A.M. Samsudeen, Attorney-at-Law for the Petitioners.

A.M.M.Marleen, Attornay-at-Law instructed by M.I.Razick, Attorney-at-Law for 2nd to 9th Respondents.

Faiz Mustapha,P.C. with Rauff Hakeem, Attorney-at-Law and Rumi Marzook, Attorney-at-Law instructed by M.S.A.Suhaid, Attorney-at-Law for the Respondents/Respondents.

ORDER

Preliminary Objections

05.03.1991

The above matter came up for hearing on 5.3.91 in the presence of Mr.M.A.Q.M.Ghazzali (Chairman), Mr.Yaseen Omar (Member) and Mr.M.S.A.Saheed (Member).

When the appeal was taken up for hearing certain preliminary objections were raised by the counsel for the Respondent/Respondents as follows:-

(a) the Respondent is not an interested party.
(b) The necessary parties are not before the Tribunal.
(c) There is no live issue.
(d) The appeal is vague.
(e) The appeal is out of time.

The parties were heard on the objections and written submissions were tendered to the Tribunal.

(a) On the first objection we cannot lose sight of the fact that the Respondent to this appeal had been the only Respondent to the original application which had been rejected by the impugned order of 30.9.90. The relief sought by the Appellants is interalia to set aside the order of 30.9.90. The Respondent is, in law, vested with an interest in the impugned order as he is empowered by this order to act in a particular manner, and we are of the view that an exercise in the review of the order of 30.09.90 should at least in the interest of natural justice proceed only with notice to the Respondent as a necessary party. We therefore reject the objection that the Respondent is not an interested party.

(b) & (c). The second and third objections that the necessary parties are not before the Tribunal suggests that the Appellants should have cited the trustees who were appointed subsequent to the impugned order and the filing of this appeal, as parties to this appeal.

The instant appeal challenged the status of the order of 30.09.90.In considering the correctness or otherwise of this order the Tribunal cannot be concerned with developments that had taken place since the filling of this appeal even though such development have emanated from the impugned order. The instant situation therefore cannot be equated to that arising in the case "Abeyweera and 162 others Vs. Dr. Stanley Wijesundera, Vise Chancellor, University of Colombo, reported in 1983, SLR page 287 and cited by Counsel for the Respondent.

The finding of this Tribunal cannot do more than to create a situation that would uphold the status of the subsequent appointees or entitle certain interested parties to seek proper legal proceedings to remove the said appointees. We are of the view that the said appointees are not necessary parties until that stage is reached and even so only in such proceedings initiated by an interested party to remove them. Apriori we hold that the status of the impugned order of 30.9.90 is a live issue, and reject the second and third objections.

(d) The objection that the appeal is vague is in itself a vague objection and we over-rule this objection in limine.

(e) The order appealed against is dated 30.09.90 and the appeal has been filed on 25.10.90. The appeal is within time in

accordance with section 9(H) (1). Therefore we reject the objection, that the appeal is out of time.

For the above reasons we over-rule all preliminary objections and fix the substantial matter for argument.

Although we called for submissions on the question of natural justice, we now realize that this question can be best decided after further hearing of this question when this matter is taken up for argument on the substantive appeal.

9797

Sgd.
M.A.Q.M.Ghazzali
-Chairman
M.S.A.Saheed

Dissenting View
Yaseen Omar:-

There were two interim Orders made by the Tribunal on this Application. The majority Order held that-

"Although we called for submissions on the question of natural justice, we now realize that this question can be best decided after further hearing of this question when this matter is taken up for argument on the substantive appeal".

However, I differed from this view and delivered my interim Order in this appeal and stated inter alia that:

1. Principles of natural justice required that before the decision dated 18th October, 1990 was made prejudicial to the interests of the Petitioners, they should have been given

an opportunity to support their Petition and hear them on the merits of their Petition before the decision dated 18th October 1990 was arrived at. The Petitioners' were not heard and are not afforded an opportunity to support their Petition.

2. I was of the view that the Wakf Board has prejudged the Application by the Petitioners and acted contrary to the principles of natural justice and hence the decision dated 18th October 1990 was void in Law and cannot be upheld.

3. I set aside the decision dated 18th October 1990 and directed the Wakf Board to hear the Petitioners and Respondent to make a considered order and left it open for any party affected with such a decision made after hearing both these parties to appeal to this Tribunal in terms of the Law.

4. I further stated in the circumstances it was not necessary for me to consider the other interesting questions of Law raised in this Appeal. Hence I did not decide these questions of Law. İ further stated that I would consider them should a proper appeal arise from the Wakfs Board order after hearing the parties as directed.

My order was a minority decision as the other members did not agree with my order. The majority held as aforesaid.

In terms of the majority decision the parties were heard on the substantive appeal.

Having heard the parties on the substantive merits of the appeal, I hold as follows :

Objections-being that the Respondent is not an interested party; the necessary parties are not before the Tribunal; there is no live issue; and the appeal is vague and out of time.

The Respondent is in law vested with an interest in the impugned Order and the Appellants could have proceeded with the appeal only with notice to the Respondent as the necessary party. At the point of filing of the appeal there were no other parties to be joined as they were then not appointed, as such they could not have been joined. To say that there is no live issue is a frivolous objection considering the circumstances of the appointments and complaints of arbitrary actions by the Wakfs Board. The appeal was objected to as being vague has not been pursued. The Appeal was filed on 25.10.90 against the Order of 30.9.1990 bringing it well within the statutory time limit.

I overrule all the objections for the reasons stated above.

I hold that the Wakfs Board has not given effect to the requirement of selections by consensus and Shura as contemplated under Section 14(1) (a) of the Wakfs Act.

I set aside the Order of 30th September 1990 and direct the Wakfs Board to make immediate arrangements for selection of Trustees as required by Law considering the lapse of over sixteen months for the disposal of this Appeal.

I make no order as to costs.

Sgd.
(Yaseen Omar)
Member-Wakf Tribunal

ORDER – MAIN CASE
18.06.1991

The Wakfs Board had made an order in case No:WB/1103/90 dated 13.5.90 directing the Respondent in this case to submit nominees for appointment of trustees, and the respondent according to his affidavit in the instant appeal had duly noticed all parties on the selection of nominees for appointment of trustees.

The appellants who were not parties to the said action complain that they were unaware of the order of 13.5.90 until September, 1990 and had made an application to the Wakfs Board dated 20.9.90 under section 14(1)(A) of the Wakfs Act, and this application was given the number WB/1199/90. The Wakfs Board had considered this application and by order dated 30.9.90 rejected the appellants claim to set aside the order of 13.5.90. The present complaint of the appellants is that the order of 30.9.90 had been made without giving the appellants an opportunity of being heard on their application dated 20.9.90. The appellants case clearly rests on the issue of natural justice, the denial of the right to be heard.

Admittedly it is fundamental to fair procedure both sides should be heard. However, the area over which this right to be heard although very vast is not without limits inexhaust. There are certain exceptional circumstances when this rule would not apply and it is necessary to carefully see whether the appellants could truly claim this benefit in the instant case.

Section 14(1)(A) on which the appellants base claim to their status to make application to the Wakfs Board is clearly an enabling section craving the Wakfs Board power to re-consider their order to appoint trustee or trustees.

The appellants had invoked this section, that is 14(1)(A) as claimed by the appellants in their written submissions to canvass the order of the Wakfs Board dated 13.5.90. The order of the Wakfs Board dated 13.5.90 is not an order appointing a trustee or trustees and does not qualify for review by the Board under section 14(1)(A). As admitted by the appellants "the Wakfs Board had considered this application and made order rejecting the said application on the ground that the Board cannot vary the said decision in case No: WB/1103/90. The appellants above statement in their written submissions refers to their application of 20.9.90.

Indeed in my view the Wakfs Board could not have done more. The appellants in invoking section 14(1)(A) to canvass the order of the Wakfs Board dated 13.5.90, which order does not come within the purview of that section did not have a "legitimate expectation" of being entertained and could not claim a right to be heard. In the circumstances I hold that the Wakfs Board's order of 30.9.90 is proper and dismiss the appeal accordingly. I make no order for costs.

(M.A.Q.M.Ghazzali)
Chairman

I agree
M.S.A.Saheed

Dissenting
Yaseen Omar

The Petitioners-Appellants complain in Para 7 (b) of their Petition of Appeal to this Tribunal that "The Board acted in violation of the rules of natural justice and arbitrarily without hearing the Appellants and thereby acted in breach of the Audi Alteram Partem rule".

I have looked into the proceeding and find that there is substance in this complaint of the Petitioners-Appellants. The Wakf Board without hearing the Petitioners arrived at a decision adverse to them. In my view the Petitioners should have been heard on their Petition dated 20th September 1990. Principles of natural justice require that before the decision dated 18th October 1990 was made prejudicial to the interests of the Petitioners, they should have been given an opportunity to support their Petition and hear them on the merits of their Petition before the decision dated 18th October 1990 was arrived at. The Petitioners' were not heard and were not afforded an opportunity to support their Petition.

This preliminary issue goes to the root of the application before us, that the Board had acted in breach of the rules of natural justice in making its decision dated 18th October 1990 without hearing the Petitioners Appellants. Non observance of the rule of "Audi Alteram Partem" vitiates the order made by the Wakf Board and renders the decision void in Law.

A principle apt under the circumstances is contained in sura 4:105 of the Holy Quran "Decide according to the evidence produced". It appears to be also a violation of the legal maxim "Justice should not only be done but should manifestly be seen to have been done". I am of the view that the Wakf Board has prejudged the Application by the Petitioners and acted contrary to the principles of natural

justice and hence the decision dated 18th October 1990 is void in Law and cannot be upheld.

I have considered the further submissions made by both parties. Principles of natural justice require that before an order is made the aggrieved party must be heard.

Wade in his book on Administrative Law fifth edition at page 441 states – ".....It is fundamental to fair procedure that both sides should be heard:audi alteram Partem, hear the other side. This is the more far reaching of the principles of natural justice, since it can embrace almost every question of fair procedure...." See the decision of Ridge Vs Baldwin (1964) A.C. 40-the House of Lords emphasized the importance of the principle of the right to be heard.

The Petitioners had legitimate expectations of being heard before their petition was rejected.

I set aside the decision dated 18th October 1990 and direct the Wakf Board to hear the Petitioners and Respondent and make a considered order. It is open to any party affected with such a decision made after hearing both these parties to appeal to this Tribunal in terms of the Law.

In view of the above Order it is not necessary for me to consider the other interesting questions of Law raised in this Appeal. Hence I do not decide these questions of Law. I will consider them should a proper appeal arise from the Wakf Board Order after hearing the parties as directed above.

(Yaseen Omar)
Member Wakfs Tribunal

Athas
Vs
Nizamudeen

Wakfs Tribunal
No: W/TRIB/33

M.A.Q.M.Ghazzali
M.S.A.Saheed
Yaseen Omar

Wakfs Board
No: WB/1041/90

Porvai Mohideen Jumma Mosque, Godapitiya, Akuressa – Report of the Director on the inquiry held by an investigating officer on the question of appointing Trustees – Special Trustees for a Specific purpose and limited time.

Held: Appoint Special Trustees with an official of the Department of Muslim affairs as its chairman.
Election of Trustees to be held after the formulation of a Constitution, preparation of Jamaath Register etc.

Farook Thahir, Attorney-at-Law for the Appellants.
M.H.A.Rahim, Attorney-at-Law for the 1st, 2nd and 6th Respondents.
M.Ashroff Rumi, Attorney-at-Law for the 4th & 5th Respondents.

ORDER
15.02.1991

In accordance with the instructions given to the Director, Muslim Religious & Cultural Affairs on 11.1.91, the Director has forwarded a report after due inquiry by an Investigating Officer of the Department into the appointment of trustees for the Porwai Mohideen Jumma Mosque, Godapitiya, Akuressa.

Perusing the terms of reference suggested by the order of 11.1.91, and after producing the report, the parties have agreed to the suggestion by the Tribunal that the selected members contained in the report be appointed for a period of one year as Special Trustees with specific and defined duties to be completed by the end of the said period of one year. Accordingly, the parties have agreed to the appointment of the following:-

M/s M.H.M.Nazeem)
) Present persons-in-charge.
N.T.M.Nazeer)
M.H.M.Hamseen, Who is a Grama Sevaka of the area.
M.I.M.Fouzik, Postmaster of Akuressa
A.W.Nazeer (Moulavi)
M.L.Kaleel, A school master.

In addition to the above, the Tribunal also directs the Director of the Dept. to nominate an official from the Department of Muslim Religious and Cultural Affairs to be the Chairman of the Special Trustees, and instruct him to steer the affairs of the mosque, and attend to the following aspects before the end of their term of office:-

(1) To prepare a Constitution for the jamath of the Porwai Mohideen Jumma Mosque, Godapitiya, Akuressa.

(2) To prepare and up-date a register of the members of the jamath of the said mosque.

(3) To set out in writing the customs and practices of the jamath with a view to registering it with the Department in accordance with the law.

(4) To up-date all accounts up to 31.3.91, and make all efforts to straighten up accounts pertaining to the period prior to 1987, as far back as possible.

(5) Recover possession of all monies and movable properties in the hands of any persons who are not entitled to possess them.

(6) Make an inventory of all movable and immovable properties belonging to the mosque as at 31.3.91.

(7) To continue with the operation of the present Bank account and collect all monies due to the mosque and deposit into the said Bank account.

We hereby set aside the Order of the Wakfs Board made on 28.10.90.

The Director is hereby directed to nominate immediately a Departmental Official as Chairman of the Special Trustees, and dispatch letters of appointment to the Seven Special Trustees indicated above, in order to enable them to take over the administration of the said mosque. The Chairman shall be instructed

to make arrangements for conducting elections for the appointment of Trustees in accordance with the customs and practices of the mosque before the expiry of their term of office, which will expire on 31.3.92.

Sgd

M.A.Q.M.Ghazzali, M.S.A.Saheed, Yaseen Omar

Sarlani
Vs
Munawwar

Wakfs Tribunal
No:W/TRIB/34

M.A.Q.M.Ghazzali
M.S.A.Saheed

Wakfs Board
No: WB/1063/90

Masjidul Bakiathul Shalihath, Dharga Town – Appointment and Affirmation of Trustees by the Wakfs Board – No approval from the Jamaath- Board revoked the said appointment and appointed them as Special Trustees.

Section: 14(1)(A)

Held: No mistake of fact or law.
The original appointment of Trustees stand Trustees to this mosque directed to formulate a constitution and prepare a Jamaath Register.

M.S.A.Hassen, Attorney-at-Law for the Appellants.
N.M.Saheed, Attorney-at-Law for the Respondents.

ORDER
23.08.1991

This is an appeal made on the order of the Wakfs Board dated 25.3.90 appointing and affirming the Appellants as Trustees of Masjid Ul Bakiathul Salihath, Dharga Town under section 14(1)(a) of the Wakfs Act. This order had been subsequently challenged by the Respondents, and the Board exercising its powers under Section 14(1)(A) had revoked the aforesaid appointments and re-appointed the Appellants as Special Trustees for a specific period. The Appellants have appealed to this Tribunal from the subsequent order dated 9.3.91.

The Appellants in their petition of appeal and in submissions made to this Tribunal in open Court pleaded that the Wakfs Board had not specified a mistake of fact or law on which the Board could have revoked the original appointment of the Appellants as Trustees. Indeed the Wakfs Board in its order had stated that "there is no evidence before the Board that the applicants for Trusteeship have the approval of the jamaath."

At the hearing of this appeal we were not assisted by the Counsel for the Respondent to identify any specific mistake of fact or law for the Board to retract its earlier appointment. It had not transpired at the hearing before the Board that the Board specifically depended upon the approval of the jamaath. The Board had not depended on the approval of the jamath as a pre-condition for the appointment of the Appellants as Trustees, nor has it found that the approval of the jamath was a pre-condition for the appointment and confirmation of the initial Trustees of the said Mosque. In the circumstances the Board's sudden realization that there is no evidence before the Board that the applicants for

Trusteeship have the approval of the jamaath does not in our opinion confer on the Board the authority to revoke the initial appointment.

We are surprised that the Board should seek to exercise its powers under Section 14(1) (A) without a proper situation arising for such exercise. We would expect the board in the exercise of its powers for the appointment and confirmation of Trustees to be more careful and satisfy itself specifically on the competence of the applicants for the post and not proceed to alter or revoke appointment once made, on flimsy grounds. Section 14(1)(A) should not be used as a weapon to pacify aggrieved parties but should be used only when genuine and distinct mistake of facts or law arise.

We note that the Appellants had under arrangements in force for the administration of the said mosque been the Trustees, and the Board had by its initial order confirmed and appointed the Appellants as Trustees. The interference of the Board under Section 14(1) (A) as aforesaid cannot be justified in the cirecumstances. We confirm the initial appointment of the Appellants as Trustees, and authorize them to complete their initial period of Trusteeship up to 9.3.93.

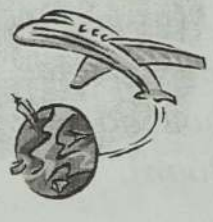
However, these Trustees being the initial Trustees of the said mosque, we specifically direct the Trustees to particularly attend to the formulation of a Constitution and acceptable democratic rules for the selection of future Trustees. They are also directed to prepare a register of jamath; and the aforesaid Constitution and rules and the register of jamath should be submitted to the Director,. Muslim Religious and Cultural Affairs before the end of January, 1992. The Trustees are further directed to keep a close liason with the Director for the conducting of its

affairs and the holding of proper elections as Trustees at the end of the term of the present Trustees.

The Director of Muslim Religious and Cultural Affairs is hereby ordered to have a closer supervision of the operation of this mosque, and the function of the initial Trustees until the end of their period.

Sgd

M.A.Q.M.Ghazzali, M.S.A.Saheed



Fazly Nizar
Vs
Hamza

Wakfs Tribunal
No: W/TRIB/35

M.A.Q.M.Ghazzali
Yaseen Omar

Wakfs Board
No: WB/1017/90

Masjidul Hidayath Jumma Mosque, (Madampitiya Jumma Mosque)- Madampitiya Muslim Burial Grounds Managed by Mutwal Jumma Mosque-Dispute over the boundaries - settlement entered and case reverted back to the Wakf Board.

A.R.M. Kaleel Attorney-at-law for the Appellants
A.A.M. Marleen Attorney-at-law for the Respondents

ORDER
24.04.1993
Yaseen Omar

When this matter was taken up for Inquiry on 3rd March, 1992, several areas of differences between the parties were amicably settled as follows: -

"At this stage the parties have agreed that certain areas of difference could be amicably settled.

The appellants have accepted the de facto position of the Madampitiya Jumma Mosque called as Masjidual Hidayath Jummah Mosque and have conceded to the registration of this mosque. The Director/MRCA is ordered to take necessary steps to register this mosque.

The physical boundaries of this mosque will be within the area depicted as lot 1 in the sketch provided to this Tribunal by the Respondents and marked 'X'. The trustees of this mosque undertake that they will not expand the building beyond the boundaries shown in this sketch in lot 1. The respondents will not claim any appertinent land for the purpose of further expansion of the Mosque. All areas surrounding the mosque will be part of the burial grounds, except lot 2 and 3, the status of which is now decided by the parties. In view of this we make order that the Director/MRCA should make an inspection of the place after due notice to the two parties as to the correct position of lots 2 and 3 and report to this Tribunal for the consideration of the Tribunal. The parties undertake to maintain the status quo until a final determination is made by the this Tribunal in matters arising out of lots 2 and 3.

The burial grounds will be under the control and administration of the Mutwal Jummah Mosque with representation in the ratio 4 : 1 in a Management Committee appointed for the purpose of administrating the burial grounds. Mr. Firoz Samsudeen from Masjidual Hidayath Jummah Mosque will represent his mosque in the first Committee for the administration of the burial grounds. Any subsequent appointments by Masjidual Hidayath

Jummah Mosque to this Committee will be by mutual acceptance by parties. The four members of the Mutwal Jummah Mosque to this Committee will be Mr. M.S.M. Sulaiman, Mr. M.H.M. Marzook, Mr.M.M. Rashid and Mr. T.L.M. Nasim.

The two mosques will function until 30th September, under the guidance of Special Trustees, who will during this period regularize all aspects of administration, according and constitutional matters, and make arrangements for the election of representative Board of Trustees by the members of the Jamaath.

The special Trustees of Mutwal Jummah Mosque will be as follows:-

1. Dr. Fazli Nizar
2. Mr. M.S.M.Sulaiman
3. Mr. M.H.M. Marzook
4. Mr. M.M. Rashid
5. Mr. Y.L.M. Nazim
6. Alhaj Jazuli Salahudeen
7. Major T.K. Passella

The special Trustees for Masjidual Hidayath Jummah Mosque will be:-

1. Mr. A.M. Fareed
2. Alhaj H.U. Hussain Siraj
3. Alhaj Hassen Mohamed
4. Mr. M.S. Salahudeen
5. Alhaj A.R.M. Uvaisul Karani
6. Alhaj S.M.A.C. Seeni Mohamed
7. Mr. C. Firoz Samsudeen.

The special trustees are directed to function in close association with the Director/MRCA and make satisfactory conclusion to the matters relating to submission of accounts, preparation of Constitution of Jamaath register and make the necessary arrangements for the holding of elections for the Board of Trustees under the supervision and control of the Department of Muslim Religious and Cultural Affairs before their period of special trusteeship expires. The Director will also in consultation with the special trustees of Mutwal Jummah Mosque arrange for the housing of the administrative office of the Committee for the burial grounds.

We approve the above settlement and parties cannot be now permitted to go back on the settlement and are bound by it and no evidence can be allowed in relation to matters covered by the settlement.

The parties were at variance as to the status of lots 2 and 3 and the report of the Director was not helpful to this Tribunal in order to arrive at a decision. It was decided that further evidence will have to be taken on the claims of the parties vis-à-vis lots 2 and 3. We therefore direct the Wakf Board to proceed to take evidence on this issue with particular emphasis on the matters referred to in the proceedings before this tribunal on 07.01.1993 set out below:

"Proceedings of Wakfs Tribunal – 07.01.1993.

In this matter the parties were confined to the particular position of claim as per order of 03.03.1992 and thereafter the Director was Commissioned to examine physically the ground situation of that area of dispute as stated by the aforesaid Order.

The Director's report was submitted to this Tribunal on 27.10.1992 and it was found that it was not comprehensive and conclusive on several matters. Mr. Kaleel, counsel for the Appellants is particularly concerned with-

01. Parking of vehicles on the Mahawatte Road without parking on lot 2.

02. Whether there are toilet facilities and Haul inside the mosque in Lot 1.

03. Whether Lot 2 has been used as burial ground.

Mr. Kaleel is ready to lead evidence on the above questions which were considered at the last hearing.

Mr. Marleen says that they are entitled to the use of lots 2 and 3 as they are basic and essential to the use of the mosque depicted in lot 1.

The Tribunal will also wish to have more evidence on the following matters:-

1. Ablution facilities within lot 1

2. Water facilities for the area.

3. The built-up area covered by the mosque in lot 1.

4. The feasibility of having a western gateway to the mosque in lot 1..."

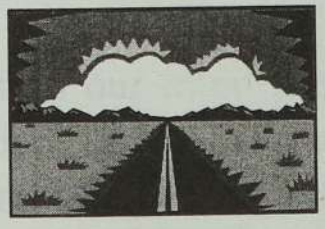
One of the main matters of dispute between the parties centers around the Madampitiya burial ground. It is alleged that

the Trustees of the Madampitiya Jummah Mosque have permitted a thorough - fare to run over the area covered by the graves of the ancestors of the Appellants and the Members of the Jamath of the Mutwal Jummah Mosque and have thereby desecrated the graves which has given rise to ill-feeling and recrimination.

We therefore revert the case to the Wakfs Board and direct the Wakfs Board to record evidence on the issues relating to lots 2 and 3 referred to above. We direct the Wakfs Board to make its finding on the evidence so led on the disputed question in relation to Lots 2 and 3 and the matters referred to in the aforesaid proceedings of 07.01.1993.

Yaseen Omar
-member

I agree
M.A.Q.M.Ghazzali
-Chairman



Ajmeer
Vs
Najmudeen

Wakfs Tribunal
No:WT/111/98

M.S.A.Saheed
A.H.G.Ameen
A.M.I.Saheed

No: WB/2786/96
2969/97

Kurunegala Masjidul Jamiul- Bazaar Jumma Mosque- Wakfs Board open sub files when the matter is before the Wakfs Tribunal in appeal.

Held: Order of Wakfs Board made on 18.10.1998 set aside. Wakfs Board should refrain from hearing and making orders on matters before the Tribunal in appeal.

Farook Thahir, Attorney-at-Law for the appellants.
Nizam Kariapper, Attorney-at-Law for the respondents.

ORDER
10.07.1999
M.S.A.Saheed

When this matter was taken up for further clarification by Counsels for both parties today, Mr.Farook Thahir appeared for the appellants and Mr.Nizam kariapper for the respondents. Mr.Kariapper made his submissions on a point of law on which

we wanted a clarification. Mr.Kariapper submits that the Board in dismissing the application has done so without going into the merits of the case and giving an opportunity to the parties on the ground that it has no jurisdiction and it is wrong in law. Order dated 18.10.98 is the relevant order in this case.

Mr.Farook Thahir also concedes this position. Thus both counsels are agreed on the point that the said order of the Board dated 18.10.98 is invalid in law.

Further both counsels at this stage express their consent that this matter may be sent back to the Board for a re-hearing giving equal opportunities to both parties to be heard before the Board.

At this stage Mr.Farook Thahir brought to our notice that the Board pending this appeal before this Tribunal has opened a further file No: WB/3338/99 in which the Board has again directed the Special Trustees to call for explanation from the former trustees as regards accounts. This is further to the order made on an earlier file bearing No: WB/3306/99 while the matter is pending before this Tribunal.

Mr.Kariapper says that he has no instructions as regards the opening of the third file bearing WB/3338/99.

We have addressed our mind previously also to the fact that the Board should not open sub-files on matters pending before the Tribunal which are in appeal. Although we have made comments in this regard previously also still the Board is persistent in opening sub-files. We express our deep concern in this and it is highly regretted.

Thus we set aside the order of the Wakfs Board dated 18.10.98 and any subsequent order, if made thereafter and accordingly we direct to send back this case to the Wakfs Board to dispose of this matter as expeditiously as possible. The Secretary of the Tribunal is directed to send this file immediately to the Board for a re-hearing.

M.S.A.Saheed
Chairman

We agree:

A.H.G.Ameen -Member

A.M.I.Saheed - Member

Hazar
Vs
Aboo Ubaida

Wakfs Tribunal
No: W/TRIB/48

M.A.Q.M.Ghazzali
M.S.A.Saheed
Yaseen Omar

Wakfs Board
No: R/304/C 35

Shazuliya Zavia Mosque, Panchikawatte, Colombo 10 - Preliminary objection – Jurisdiction of the Wakfs Board- Dispute between the Trustees of the Mosque and some members of the Organisation known as Thablique Jamaath – Wakfs Board has no jurisdiction to entertain this application. Can the members of the Thablique Jamaath conduct activities in the mosque without the permission of the Trustees?

Section 29(1) of the Act.

Held: Preliminary objection that the Wakfs Board has no jurisdiction to hear the dispute rejected. Matter fixed for argument-Permission to be obtained from the Trustee to engage in any activity.

Dissenting: *Preliminary objection upheld Wakfs Board has no jurisdiction to hear disputes. Order of the Wakfs Board made on 30.05.1993 set aside.*

Cases Cited: *Carltona Vs Commissioner of works (1943) 2 ALL ER 560*
Reg Vs Governor of Brixton Prison exparte Armah 1968 AC 192, 134.
Anisminic vs Foreign Compensation Commission 1969,2AC 194.
Shanahan vs Scott 1957 96 com LR 245
Utal construct & Eng.Ltd. vs Pataky 1965,(3) All ER 650,653
Wimalasuriya vs Jayaweerasingham 1976, 79 NLR 88

ORDER
M.A.Q.M.Ghazzali
05.01.1994

This is a matter involving a contest between the Trustees of Laha Noorus Shadulee Zavia, Panchikawatte, viz. 1st to 5th Applicants-Respondents who were cited originally as Applicants on the one hand and the following Respondents on the other, viz. S.A.M. Rizvi Ali, M.I.A. Cassim, T.S.Azhar, N. Ashroff and S.H.M.Iqbal. These Respondents are the Appellants before this Tribunal. The contest had arisen not only in the aforesaid Zavia, but also in the Maradana Jumma Mosque and Kathakalamarathady Thakkiya, Clifton Lane in similar fashion involving the aforesaid Respondents and the respective trustee. The matter had aroused the concern of the O.I.C., Maradana Police Station, who according to information available to him had apprehended a serious breach of the peace and had moved the Secretary, Ministry of Muslim Religious and Cultural Affairs to intervene in the matter. The Secretary had brought the matter to the notice of the Wakfs Board who in turn took upon itself the onus of inquiring into the matter, and had proceeded to hold an inquiry into the matter involving the

Trustees of Laha Noorus Shadulee Zavia and the aforesaid Respondents who claim to represent an organization, commonly known as Thablique Jamath. The Wakfs Board claims to have summoned the members of the Thablique Jamath, and in any event the aforesaid Respondents had appeared before the Wakfs Board.

It appears from the material available that the Respondents had taken different positions on different dates and eventually on 20.2.93 the Counsel for the Respondents after a lengthy discourse on the nature of the Thablique Jamath's mission submitted that the Wakfs Board had no jurisdiction to entertain the matter. The Wakfs Board thereafter proceeded to make order, having heard the Applicants-Respondents' Counsel earlier. The Wakfs Board concluded that the Wakfs Board had jurisdiction in the circumstances and proceed to make order on the merits of the case.

The issue before the Tribunal is the propriety of the exercise of jurisdiction by the Wakfs Board. I am seised of the written submissions of both parties, and having considered the arguments placed before me, I am inclined to see the problem as arising from an attempt by a group of people to use the premises of the Zavia for mass activity that is different in character to the normal religious activities like the five times a day Salaath, conducted either individually or in Jamath or even the weekly JUMMA SERVICE. It is also pertinent to note that the majority of the people engaged in this type of activity is not from the members of the Jamaath of the Zavia. However, when any group of people or even an individual seeks to use the premises of the Zavia in a manner different from its normal use, it amounts to an attempt to exercise certain special rights for which they must initially have the authority to do. On the other hand, the Zavia, although ideally is the "House of Allah", for practical purposes, is managed under certain rules and regulations, and the Managers or the Trustees are responsible for the efficient administration of the Zavia.

On the available material it is also not clear whether there had been a formal complaint by these applicants. This however is not a serious matter, for the Wakfs Board may, of its own motion inquire into any matter it is empowered to inquire into by the statute. In the scheme of things provided for in the Wakfs Act the trustees are responsible for the efficient administration of the Mosque/Zavia, and are legally accountable to the Wakfs Board and/or the Jamaath exercising their right in a prescribed manner. One may surmise, for the purpose of reflecting the instant problem in its correct perspective, as to what the position would be if a group of people belonging to the jamaath seeks to undermine the authority of the Board of Trustees. Could the Wakfs Board stand and watch in the face of a complaint that the authority of the Board of Trustees is being unlawfully undermined? Reading 5.25 With 5.29 it is obviously the Wakfs Board will entertain such a complaint and adjudicate upon it. I cannot see how the jurisdiction of the Wakfs Board could in any way be different in the instant case.

For the aforesaid reasons I hold that the Wakfs Board has properly exercised its jurisdiction to inquire into the dispute involving the applicants and the Respondents in the instant case. The matter may be fixed for argument on its merits. I also direct the Respondents, that they should not interfere with the administration of any mosque and seek to engage in any activity of their own, without first obtaining the leave and license of the Board of Trustees of such mosque, and I also direct the Secretary, Wakfs Tribunal to forward a copy of this order to the O.I.C. Maradana Police Station.

M.A.Q.M.Ghazzali
-Chairman

I agree
M.S.A.Saheed

Dessenting:
Yaseen Omar

This is an Appeal against the order dated 30th May 1993 made by the Wakf Board on directions by the Minister of Muslim and Religious and Cultural Affairs through his secretary.

The Appellants have taken up the following preliminary objection to Jurisdiction of the Wakfs Board:

"..... Section 29(1) expressly and clearly states that the Board can act on its own motion or upon a complaint by any five members. Admitedly in this case the Board has neither acted on its own motion upon a complaint made by the five members of the Jama'ath. Hence it is respectfully submitted the Wakfs Board in acting upon a reference made by the Secretary to the Minister for Muslim affairs contrary to Section 29(1) and without jurisdiction.....".

Section 29(1) states as follows:-

"... The board may, of its own motion or upon a complaint made by any five members of the Jama'ath of any registered mosque, either inquire, or direct the director or any person authorised in that behalf by the board to hold an inquiry...".

In this case there is no evidence to the effect that the Board initiated proceedings of its own motion or by any five members of the Jama'ath of the mosque.

The Respondents state in paragraph 3 of their submissions that:

".... Section 29(1) of the Wakfs Act must be liberally construed to achieve the purpose for which it has been enacted....".
They further state:

"…. In any event, the Appellants had taken part in the proceedings without objections on several dates and the objection was therefore belated. In the circumstances, the Appellants are not entitled to rely on the objection to Jurisdiction…".

The first matter to be decided is the true nature of the powers of the Wakfs Board when a matter is referred to it under section 29 of the Muslim Mosque and Charitable Trusts or Wakfs Act and what are the matters upon which it must be satisfied when such a reference is made to it. The relevant parties:

"…. The board may, of its own motion or upon a complaint made by any five members of the jama'ath of any registered mosque, either inquire, or direct the Director or any person authorised in that behalf by the board to hold an inquiry…."

It is generally expected that a Minister will use his powers not only bonafide but in a responsible spirit and in the true interests of the public.

However the power which he exercises must fall within the four corners of the powers given by legislature. Apart from that the court have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction as was decided in the case of Carltona Ltd. Vs Commissioner of Works (1943) (2) All ER 560.

The powers of the Board are circumscribed and limited by the Sections in the act to the extent provided in the applicable Sections. In the absence of any such provision in the Wakfs Act, the Board cannot claim a power or jurisdiction which it does not have.

Where a Court acts outside its general or plenary jurisdiction, its orders –re a nullity i.e. null & void ab initio.

Jurisdiction in this sense 'power' and action outside is 'ultra vires' and must be distinguished from error within jurisdiction (Reg v Governor of Brixton Prison Ex parte Armah) (1968) A.C. 192, — —. In this connection Lord Pearce's classic analysis in Anisminic Ltd. v Foreign Compensation Commission (1969) 2 AC 194 at 195 is in point viz:

"... Lack of jurisdiction may arises in many ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry, or the Tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice, or it may ask the wrong questions; or take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction... Any of these would cause its purported decisions to be a nullity...."

In the case of Shanahan vs Scott (1957) 96 Com CR 245 at 250 it was held:-

"... (Power delegated by an enactment) does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorize the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends..."

The above interpretations, of the Law was endorsed by the Privy Council in Utah Construction & Eng. Ltd vs Pataky 1965(3) All ER 650, 653.

The least the Wakfs Board could have done was to adopt as it own a complaint by any third party.

In deciding upon the second matter that the question of jurisdiction should have been raised before the Wakfs Board at the beginning of its hearing and the Appellant cannot be heard to complain now:-

It is settled law that the question of jurisdiction so fundamental in nature -- as to strike to the root of the powers of the Board could be raised at any time.

As Sharvananda J, (as he then was) said in Wimalasuriya V Jayaveerasingham (1976) 79 NLR 88 at p. 94:

> *"... It is a fundamental primciple well established, that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution proceedings and even in collateral proceedings. A defect of jurisdiction cannot be cured even by the consent of parties or by waiver, but there is a fundamental distinction between the existence of jurisdiction and the exercise of jurisdiction..."*

It is therefore clear that the Wakfs Board was not properly invoked and had therefore acted without jurisdiction. The Wakfs Board had no authority to inquire into the legality or the regularity or the religiousness or otherwise of the conduct of the Thableeque Jama'ath. As such anything they did or say arising out of this

Application was without lawful authority. I set aside the Order of the Wakf Board dated 30th May 1993.

(Yaseen Omar)
Member

Thamseer
vs
Thahir

Wakfs Tribunal
No: W/TRIB/57

M.S.A.Saheed
A.H.G.Ameen

Wakfs Board
No: WB/1455/92

Horambawa Jumma Mosque – Refusal of Enrollment of members of the Jamaath by the Trustees - Board directed the Trustees to include the name on payment of arrears of subscription – Trustees appealed against the order of the Board -Appeal filed out of time.

Section: 9(H) (1) of the Act

Held: Appeal dismissed

ORDER
24.06.1995
M.S.A.Saheed

This is an appeal coming from the order of the Wakfs Board dated 21.8.1993. This order has been made by the board on an application made to it, by the petitioner-respondent, against the respondents – appellants, alleging that the appellants refused to enroll him as a member of the Jamaath of Horambawa Jumma Mosque, of which the appellants are the trustees. The board having inquired into the complaint, on hearing both parties made the order

that the appellants shall include the name of the petitioner in the Jamaath register of the mosque, on payment of a sum of Rs. 165/= by the petitioner, to the appellants by way of arrears of subscription for a period of 33 months from October 1991 to July 1993. The appellants trustees have preferred this appeal against the said order of the board.

Counsels of both parties have tendered their written submissions in support of their cases. In para 3 of the statement of objections, tendered by the petitioner-respondent, he says that this appeal cannot be maintained since it is made out of time. The impugned order of the board has been made on 21.8.1993 and the appeal papers have been filed in this tribunal on 20.9.1993. In terms of 9(H) (1) of the Wakfs Act, any person aggrieved by an order of the board may prefer an appeal against such order within 30 days of such order. Regulation 16 framed under this Act, also stipulates that an aggrieved party may appeal "within 30 days from the date on which the order was made". On computation of 30 days from the date of order, I find that the 30th day falls on 19.9.1993 but the appeal papers have been filed on 20.9.1993, one day later than the due day. Thus I find that this appeal is out of time and accordingly it is dismissed. It is not necessary to consider the merits of this case for this reason.

M.S.A.Saheed
Chairman

I agree
A.H.G.Ameen

P.S.:- see appeal before the Court of Appeal C.A.No: 02/96 in page 198

Thahir
vs
Thamseer

C.A.No: 02/96

Wakfs
Tribunal No: W/Trib/57

Before : Ismail, J

Counsel : Lakshman de Alwis for the Respondents-Appellants.

Shibly Aziz, P.C. with Ali Sabry for the Petitioner-Respondent-Respondent.

Argued and
Decided on 02nd April, 1997.

ISMAIL,J:

This is an appeal from the order of the Wakfs Tribunal dated 24.06.95 by which the appeal of the respondents-appellants was dismissed as it was out of time. Their appeal was against the order of the Wakfs Board made on 21.08.93. The petition of appeal was filed on 20.9.93.

The Wakfs Tribunal held as follows in its order, "The impugned order of the Board has been made on 21.08.1993 and the appeal papers have been filed in this Tribunal on 20.9.1993. In terms of 9(H)(1) of the Wakfs Act, any person aggrieved by an order of the Board may prefer an appeal against such order within 30 days of such order. Regulatoin 16 framed made this Act also

stipulates that an aggrieved party may appeal" within 30 days from the date on which the order was made. "On computation of 30 days from the date of order I find that the 30th day falls on 19.09.1993 but the appeal papers have been filed on 20.9.1993, one day later than the due day. I find that this appeal is out of time and accordingly it is dismissed."

Learned counsel for the appellants brought it to the notice of Court that as 19.9.1993 was a Sunday, the petition of appeal filed on 20.09.1993 should have been accepted in accordance with the provisions of section 8(2) of the Interpretation Ordinance. It provides as follows:

"8(2) Where a written law any act or proceedings is directed or allowed to be done or taken in a Court or Office on a certain day then if the Court or Office is closed on that day, the act or proceeding shall be considered as done or taken on the next day thereafter on which the Court or Office is open".

Learned counsel for the respondent concedes that in the circumstances the petition of appeal filed on 20.9.1993 is within time.

The order of the Wakfs Tribunal dated 24.06.1995 is therefore set aside. The Tribunal is directed to entertain and hear the appeal according to law.

The appeal is allowed without costs.

Sigd

JUDGE OF THE COURT OF APPEAL

Zanoon
vs
Mohamed

Wakfs Tribunal
No: W/TRIB/10

Shakir Ismail
M.A.Q.M.Ghazzali
M.S.A.Saheed

Wakfs Board
No: WB/545/87

Yatihena Thakkiya – Director issues an instrument of appointment of Trustees under section 29(3) of the Act – No evidence of allegations against any of the Appellant – Trustees.

Sections: *29(1), 29(3) of the Act*

Held: Director's decision in appointing new Trustees without any inquiry against the Trustees is set aside. The Trustees shall function as persons-in-charge.

M.H.M.Ashroff, Attorney-at-Law with N.M.Saheed for the Appellants.

M.Markani, Attorney-at-Law for the Respondent.

ORDER
28.08.1987

Mr. Markani states at the outset that Mr.N.M.Saheed had misled this Tribunal saying that there was no proxy filed by Mr.M.Y.M.Nizar on behalf of the Respondents, whereas in actual

fact a proxy had been tendered by Mr.Nizar when he presented the Petition of appeal to this Tribunal on 9.7.87.

Mr.Ashroff at this stage seeks to interrupt Mr.Markani to express his regrets and that of Mr.Saheed for the inconvenience caused on the last day that this case was heard, which was due to inadvertence on the part of Mr.Saheed.

Since the Tribunal finds that there is a proxy duly filed by Mr.Nizar we accept the statement of objections filed by Mr.Nizar on behalf of the Respondents, and now proceed with the hearing.

Mr.Markani raises a preliminary objection that there is no order of the Board from which the Appellants could have made this appeal to the Tribunal. He states that the Director in issuing the document marked 1R1, the instrument of appointment of trustees, has acted under section 29(3), and as such, the Wakf Act as amended does not provide the Appellants with the right to appeal against the Director's order.

Mr. Ashroff in reply states that 1R1 has to be taken on its face value wherein the Director in appointing the 5 persons named therein states "The Wakf Board has been pleased in terms of section 29(3) of the Wakfs Act to appoint them". He further states "Section 29(3) has to be read with section 29(1)".

This section could apply only when allegations of neglect of duty, misfeasance or breach of trust has been committed by any trustee where the Board by delegation of authority to the Director is empowered to make such inquiries and, if those allegations have been proved, suspend such trustee and appoint an interim trustee, and thereupon submit a report in writing to the Board.

There is no evidence before us even on a perusal of the original record of the Wakf Board that any allegations of neglect of duty, mistrust misfeasance or breach of trust had been made by any one of the Appellant trustees. It therefore follows that the Director or even the Wakf Board had no right or power to act under Section 29(3). We have therefore to go on the face value of 1R1 and presume that the Director had no legal right in the circumstances to issue 1R1.

On further perusal of the record, we do not find any proceedings after 7.12.1986 on which date the Board had decided to inquire into the application on the later date. Thereafter the record maintained by the Wakf Board does not reveal any further proceedings. We therefore over-rule the objection raised by Mr.Markani on behalf of the Respondents.

In view of our findings on the preliminary objection, it follows that the persons in charge as at the date of the letter of the Director dated 26.5.87 will have to continue as persons in charge until such time as the Wakf Board takes further steps on application No: 337 as journalized on 7.12.86, on which date the Board had decided that further inquiry will commence on a later date.

In view of the circumstances of this matter, both before the Board and this Tribunal, we urge the Board to expedite whatever steps they intend taking in this matter. The appeal is accordingly disposed of and the record sent back to the Board.

A.Shakir Ismail
Chairman

M.A.Q.M.Ghazzali M.S.A.Saheed
Member

Zanoon
Vs
Mohamed

Wakfs Tribunal
No: W/TRIB/19

Shakir Ismail
M.A.Q.M.Ghazzali
M.S.A.Saheed

Wakfs Board
No: WB/545/97

Yatihena Thakkiya – Director's decision in appointing Trustees set aside in case No: W/TRIB/10 – The Tribunal made an order that the Trustees should be appointed according to past practices – Authorized Officer files a motion stating that there is no evidence of past practices and customs and appoints the same persons as Special Trustees – Special Trustees need not be from the members of the Jmaath.

Sections: *14(3) (a), 20A, 20A(1), 20A(1)(b), 21,22,25,29 of the Wakfs Act.*
114 of the Evidence Ordinance.

Held: Appointment of Special Trustees on the recommendation of the Authorized Officer set aside.

Farook Thahir Attorney-at-Law for the Appellants
Arthur Samarasekera Attorney-at-Law for the Respondents.

ORDER
28.08.1988

This is an appeal by Messrs A.C.M.Zanoon and A.R.M.Hashim against the order of the Wakfs Board of 27.3.88 in appointing the 5 Respondents to this appeal as Special Trustees.

Mr.Farook Thahir appearing for the appellants submitted that the appellants had been the trustees of this Mosque on being nominated as such by the Sheik of the Nababiyathul Kathiriya Tharika which practice of nomination by the Sheik goes back to time immemorial. Even the nomination for the current period had been made by this Sheik which had been duly channelled through the Director of Wakfs. Mr.Thahir submitted that an Authorised Officer of the Department of Muslim Religious and Cultural Affairs, Mr.S.H.M.Kamil had recommended that the 5 Respondents be appointed Special Trustees, and added that in the "Motion" that he (Mr.Kamil) had filed before the Wakfs Board, Mr. Kamil had stated that he was unable to find any evidence of past practices such as the nomination of Trustees to this Mosque by the Sheik of the Tharika. Mr.Thahir further submitted that this Tribunal had in case No:W/TRIB/10 refused to confirm the appointment of the 5 Respondents as Trustees and had directed the Board to make the appointments in accordance with the past practices of this Mosque, and also the recommendations of the Authorised Officer filed of record.

In initiating this "Motion" and recommending the same 5 persons as Trustees Mr.Thahir stated that Mr.Kamil had treated contemptuously the directions of this Tribunal. He also added that there was no provision for Mr.Kamil to initiate proceedings before the Wakfs Board.

Mr.Samarasekera in reply stated that an Authorized Officer was empowered under section 20A(1) and 20A(1)(b) to make application to the Board under sections 21,22,25 and 29 on being so directed by the Director, and that on a reading of Mr.Kamil's "Motion" it was clear that he had acted under this provision. Mr.Samarasekera also referred us to section 14(3)(a) which requires a Trustee to submit to the Director among other things a duly certified copy of practices, rules and regulations etc. in force at the time being for the administration of the Mosque, and that in the absence of such return it must be presumed that there were no such rules.

Mr.Thahir in reply said that there was no proof that Mr.Kamil was a duly appointed Authorized Officer, to which Mr.Samarasekera referred the Tribunal to section 114 of the Evidence Ordinance which states that "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case".

ORDER

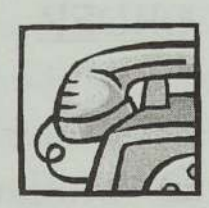
We have considered this matter and are of the opinion that Mr.Kamil when he filed the "Motion" before the Board was authorized to do so under section 20A of the Wakfs Act. Further, Mr.Kamil in his "Motion" states that there was no evidence in the relevant files of any past practices and customs, but does not appear to have made any inquiries in this regard. The neglect of the Trustees to submit reports under section 14(3)(a) does not necessarily mean that there were no such customs and practices. His recommendation

of the 5 Respondents to be appointed as Special Trustees in spite of this Tribunal refusing in the other application W/TRIB/10 to endorse their appointment does not give it a pleasant aroma. We therefore revoke the appointments of the 5 Respondents as Special Trustees and direct the Board to appoint an Authorized Officer other than Mr.Kamil to make inquiries as warranted by the Act, to recommend some Special Trustees keeping in mind that the Special Trustees need not be members of the Jamaath. The Wakfs Board while appointing these Special Trustees should direct them to act under section 14(3)(a). Based on the Special Trustees' report, the procedure could be adopted for appointing normal Trustees.

Sgd.

Shakir Ismail M.A.Q.M.Ghazzali

M.S.A.Saheed



Latiff
vs
Dahlan

Wakfs Tribunal
No: W/TRIB/11

Shakir Ismail
M.S.A.Saheed

Wakfs Board
No:WB/118/86

Colombo Grand-Mosque-Application by the Trustees made to the Board to recover occupation charges in respect of three premises belonging to the Mosque-Appeal against the order of the Board in granting the relief on the basis that the Board has no jurisdiction to entertain such application such jurisdiction with the District Court – members of the Board are not judicial officers they are appointed by the Minister – Generalia specialibus non derogant.

Section : 5B, 15A(1), 15A(7) of the Wakfs Act.
Regulation : 6, 58
Section : 22 of the Rent Act

Case referred: 71 NLR 25

Held : Persons not appointed by the Judicial Service Commission cannot exercise judicial powers. Order made by the Board set aside.

Farook Thahir Attorney-at-Law for the Appellants.
M.Markhani Attorney-at-Law for the Respondents.

ORDER
11.03.1988

This is an appeal by Mr.N.S.S.Lathiff against the Order of the Wakfs Board dated the 14th of June, 1987 authorising the Trustees of the Colombo Grand Mosque to recover a sum of Rs.55,500/= being monies due to the Trustees for the period January, 1980 to February, 1986 as occupation charges for 3 premises bearing Nos. 180-6A, 180-6B and 180-6C, Keyzer Street, Colombo –11, belonging to the Colombo Grand Mosque at Rs. 250/= per month, and directing the Secretary to the Board to issue a notice under Section 15A(2) of the Wakfs Act giving one month's notice from the date of notice and calling upon the Respondent (Mr.N.S.S.Lathiff) to handover possession to the Trustees of these premises as prayed for in the Petition of the Trustees to the Board and on their failure to do so directing the Director of Muslim Religious and Cultural Affairs to act under Section 15A(3) of the Wakfs Act to recover possession of the said "Wakf Properties"

Mr.Farook Thahir appearing for the Appellants submitted that the Board had no jurisdiction to make the Order that it has made. He submitted that this Order amounted to the Wakfs Board usurping and arrogating to itself the functions of the District Court which is empowered under the Judicature Act to make such Orders. He further submitted that in invoking the provisions of Section 15A(1) and Regulation (6) made under the Act, the Board was acting in excess of its jurisdiction. He also submitted that in making this Order, the Board was exercising judicial powers when Members of the Board were not judicial officers as they were not appointed by the Judicial Service Commission but by the Minister of Muslim Religious and Cultural Affairs. He referred us to Supreme Court case reported in 71 N.L.R. –page 25, which held that regulations

even though passed by Parliament cannot change the substantive law of a country, when the powers to exercise such authority was conferred in the District Court. He further submitted that if the Wakfs Amendment Act which brought in a Section 15A(1) and the Regulation No: 6 were aimed at removing the provisions of the Rent Act to deal with cases of this nature, the amending Act had to be specifically worded and in support referred to be accepted legal principle, Generalia Specialibus Non Derogant.

Mr. Thahir also stated that the appellant Mr. Lathiff came into this premises as a Tenant and the Trustees of the Colombo Grand Mosque after the passing of the amending Wakfs Act sought to change this character of a tenant by writing a letter to him stating that he would henceforth be treated as a licensee which he said was unilaterally done without the consent of the Appellant. In anticipation Mr.Thahir also stated that even if there was evidence which he said had not been led before the Board that the 3 premises in question were excepted premises and therefore not governed by the Rent Act, they would have to be dealt with under the Common Law and in the normal Court namely the District Court.

Mr.Markani sought to support the Order of the Wakfs Board by a reading together of Section 15A(1) and Section 58. (Section 58 Interpretation clause) which defines – "Person or Persons" appearing in clause 15A(1) to mean any person who contrary to the provision of any Trust or document, possesses, occupies, alienates, acquires or commits trespass in any manner whatsoever not withstanding any other law, any property movable or immovable belonging to or in any way appertaining to or appropriated to the use of that Mosque. In support of his contention he referred us to Section 22 of the Rent Act which states :- "that all matters relating to premises governed by the Rent Act can be filed in any Court and not necessarily a District Court because it was not so stated

and also referred us to Section 105 sub-Section (2) of the Constitution of Sri Lanka which includes Tribunal and other Institutions to come within the meaning of a Court. He also stated that by appearing before the Wakfs Board and before this Tribunal, he had acquiesced in the jurisdiction of both bodies, when if he contested the jurisdiction of the Wakfs Board he should have made an application to the Court of Appeal by way of writ. Mr.Markani also referred us to Section 15A(7) where it is provided that a decision of the Board under sub-section (2) of that Section shall be final and conclusive and shall not be called in question in any Court.

In regard to acquiescence of the Appellant in the proceedings before us and the Board without raising objections to jurisdiction, Mr.Thahir in reply stated that he had raised this matter before the Board. This objection of Mr.Markhani therefore does not hold.

We have carefully examined the submissions made by both Counsels and studied the phraseology of the various Sections involved in this matter and we are of the opinion that in the absence of clear and specific language in the Wakfs Act and its amendment, to vest in the Wakfs Board the powers now exercised by the District Court to hear and determine rent and ejectment matters either under the Rent Act or under the Common Law, whether such premises are governed by the Rent Act or are exempted premises, we are unable to hold (that) the authority of the District Court to deal with such matters has been vested in the Wakfs Board. While dealing with the definition of "Person or Persons" in Section 5B, we do not wish to lose sight of the opening words of the definition which says "any person who contrary to the provisions of any Trust, Deed or document, possess, occupies..." and since there is no evidence before us that the appellant is occupying the premises in question,

contrary to the provisions of any Trust, Deed, we are unable to give the Respondent namely the Trustees of the Colombo Grand Mosque the benefit of this definition.

We are also of the opinion that if the order of the Wakfs Board is allowed to stand, we will be resting judicial powers in the Wakfs Board. A long series of cases has established the law to the contrary that persons not appointed by the Judicial Service Commission cannot exercise judicial powers.

In view of our finding we allow the appeal of the Respondent-Appellant and set aside the order of the Wakfs Board dated 14th June, 1987.

Although the Appellant has prayed for costs we are not making an order for cost against the Trustees since it will have to be paid out of Mosque funds.

Sgd.

Shakir Ismail
Chairman

M.S.A.Saheed
Member

Dahlan
Vs
Hashim

Wakfs Tribunal
No: W/TRIB/14

Shakir Ismail
M.S.A.Saheed

Wakfs Board
No: 134/86

Colombo Grand Mosque - Petition of Appeal filed out of time – Explanation for the delay that the certified copy of the order was received late and that the whereabouts of the Secretary of the Tribunal was not know to file the appeal.

Case cited: 70 NLR 46

Held : Explanation not acceptable
Appeal dismissed on the basis of the Mandatory time limit of thirty days.

M.Markhani Attorney-at-Law for the Appellants
M.Farook Thahir Attorney-at-Law for the Respondent.

ORDER
Shakir Ismail
19.04.1988

This is an appeal against an Order made by the Wakfs Board on the 14th of June, 1987, and presented by way of Petition dated

9th October, 1987 and presented to this Tribunal on the 19th of October, 1987, although the Petition is dated 9th of October, 1987. Mr. Farook Thahir, appearing for the Respondent raises a preliminary objection that this Petition of Appeal is out of time. He gives various authorities one of which is 70 N.L.R. – page 46, where the Supreme Court held that even if the Petition of Appeal is filed one day late it has to be dismissed.

Mr.Markhani in reply stated that although the Order is dated the 14th of June, 1987, on application to the Board for a certified copy of the order, his instructing Attorney was able to obtain this certified copy of this Order only on the 30th of September, 1987 and produced for the perusal of this Tribunal a certified copy so dated by the Secretary of the Board.

However, on an examination of the file No:WB/133/86, maintained by the Wakfs Board, we find that notices have been issued to all the Petitioners and Respondent in this Case by the Secretary to the Wakfs Board asking these parties to be present on the 14th of June, 1987, on which date the Wakfs Board was taking up this matter for argumant by both sides and it is on this particular date namely the 14th of June, 1987, that the Wakfs Board having heard submissions of Counsel for both sides proceeded to make the Order on that date itself. It is not contradicted that when the Order was made on the 14th of June, 1987, both Counsel were present before the Board. Mr. Markani submits that the delay in presenting the petition of Appeal to this Tribunal was because they were unable to obtain a certified copy of the order of the Board.

Assuming there was this difficulty and the Appellants before the Tribunal were eventually able to obtain the certified copy of the Order only on the 9th of September, 1987, the Appellants should have filed their petition of Appeal in this Tribunal on the

09th of October, 1987, - the date which appears on the petition of Appeal. In answer to a question from the Tribunal, Mr. Markani stated that his instructing Attorney had been unable to locate the Secretary of this Tribunal on the 09th of October, 1987, to hand over the Petition of Appeal.

If this had been so, the instructing Attorney had one of several options to deal with the matter:-

(1) to hand over the Petition of appeal to another Officer present in this Tribunal Office.

(2) to sent it by registered post with a covering letter to that effect or when he realized the delay he was encountering on account of the Secretary to the Wakfs Board not furnishing him with the certified copy of the order of 14th June, 1987 to file the petition stating his inability to obtain the certified copy.

He has not opted for any of these options nor does his Petition of Appeal state the reasons for the delay in submitting to this Tribunal the Petition of Appeal.

In the circumstances we have no option but to hold that the Petition has been presented after the mandatory period of 30 days which entitles an aggrieved party to file a petition in this Tribunal.

We accordingly dismiss the Petition of Appeal.

Sgd.
Shakir Ismail

I agree
M.S.A.Saheed

Mowlana
vs
Ameen

Wakfs Tribunal
No:W/TRIB/18

Shakir Ismail
M.A.Q.M.Ghazzali

Wakfs Board
No: WB/13/778/88

Mohideen Mosque Rambukkana – 1st Petitioner sought a declaration from the Tribunal that he is entitled to perform his optional prayers in the mosque which the Trustees prevent – 1st Petitioner issue "Isms" as medicine in the mosque after Isha prayers.

Held: Trustees may close the doors of the inner section of the mosque and allow the 1st Petitioner to perform optional prayers in the outer section of the mosque and he is not entitled to have free flow of electricity and entertain person to seek his assistance in regard to 'Isms' in the mosque premises.

A.A.M.Marleen Attorney-at-Law for the 1st Petitioner.

ORDER
16.12.1988

This is an application under Section 29 of the Wakfs Act No: 51 of 1956 as amended, by S.A.R.B.I. Moulana and five others against the seven Trustees of the Mohideen Mosque Rambukkana,

seeking a declaration from this Tribunal that the 1st Petitioner is entitled to perform his obligatory and optional prayers in the said Mosque without any hindrance by the 1st to 7th Respondents.

During the course of the inquiry the 2nd to the 6th Petitioners took no part in the proceedings and the 1st Petitioner "as entitled to by the Wakfs Act" continued the application.

Mr. Marleen led the evidence of the 1st Petitioner. During the course of which, the 1st Petitioner stated that he had been a permanent resident of Rambukkana from 1920 uptodate and that from 1963 he had gone to this Mosque to perform his obligatory and optional prayers and that in 1981 the Trustees alleged that he the 1st Petitioner had assisted in the nikkah ceremony of one Mr.Mohamed Ali's son which said Mr.Mohamed Ali had been a person-non-grata with the Trustees and they had thereafter prevented him from performing his optional prayers in this mosque. In the course of the 1st Petitioner's evidence he also stated that he invariably stayed in the Mosque when he went there for Isha prayers upto the early morning Subah prayers.

The spokesman for the Respondents cross-examined the 1st Petitioner at length most of which was irrelevant to the matter in question but one matter which transpired in the course of his cross examination was the fact that the 1st Respondent issued "Isms" for consideration though the consideration was not solicited.

On the substantive matter before us whether the 1st Petitioner had by his practice over a long period of time performed his obligatory and more particularly his optional prayers in this Mosque during the period after Isha prayers till the early morning Subah prayers, was not in any way shaken by the Respondent's cross examination. The Respondents have not given any evidence

or in the course of their cross examination put any suggestion to the 1st Petitioner to support or maintain their action in disallowing the 1st Petitioner to perform his optional prayers during the said period.

We therefore hold that the 1st Petitioner is entitled to continue his practice (apart from attending the five obligatory prayers) of performing optional prayers after Isha prayers till Subah prayers in this mosque. However, in view of the conditions prevailing in the country and for reasons of security of the Mosque and the movables and valuables of the Mosque which may be in the Mosque, it will not be prudent to direct the Trustees to keep the entire Mosque open in the night for the 1st Petitioner to perform his optional prayers. The Trustees may therefore close the doors of the inner section of this Mosque at the normal times in the night that they close the doors but the 1st Petitioner should not be prevented from being in the Mosque after Isha prayers till Subah prayers to perform his optional prayers in any part of the outer sections of the Mosque which are not closed or locked. The Petitioner will also not be entitled to have a free flow of electricity to the sections of the Mosque that he may occupy for this purpose and the Petitioner is also specifically directed that he should not in any manner at any time entertain persons who seek his assistance in regard to "Isms" in the Mosque premises. If he wishes to continue this practice of "medicine" as the 1st Petitioner calls it, he may do so anywhere else but not in the Mosque premises.

We make no order as to costs.

Sgd.

Shakir Ismail — Chairman

M.A.Q.M.Ghazzali — Member

Nawaz Ghaffoor
vs
Mahroof

Wakfs Tribunal
No: W/TRIB/95

M.S.A. Saheed
A.H.G.Ameen
A.M.I.Saheed

Wakfs Board
No: R/803/C/70

Ghaffooriya Arabic College, Maharagama established by a Trust – Allegations against the Trustees – To Re constitute the Trustees – Preliminary objection raised – Wakfs Board has no Jurisdiction to entertain an application of a Charitable Trust.

Sections : 9(J), 32, 34, 35, 40, 41, 42 of the Act.

Held : Preliminary objection upheld.
Wakf Board has no jurisdiction to hear matters relating to Muslim Charitable Trust or Wakfs.
Wakfs Board order of 13.10.1996 set aside.

ORDER
20.09.1997

This is an appeal coming from the order of the Wakfs Board dated 13.10.1996 on the question of the jurisdiction of the Board to hear the matter in question. The said order of the Board relates to the trustee of the Ghaffooriya Arabic College, Maharagama, an

institution established by an instrument of trust No: 2125 dated 26.06.1935 attested by John Wilson, Notary Public, Colombo. According to the petition of appeal the dispute has arisen between the parties on a letter dated 18.02.1995 and sent to the Wakfs Board by the respondents in this case claiming to be the old boys of Maharagama Ghaffooriya Arabic College against the trustees of the institution with regard to certain shortcomings in the administration of this institution. On this basis the respondents have sought the intervention of the Board for reconstitution of the Board of trustees of the said institution.

When this matter was taken up for inquiry before the Board a preliminary objection has been taken up on behalf of the appellant in this matter that since this is a Muslim Charitable Trust the Board has no jurisdiction to hear this complaint, and as such the application be dismissed inlimine.

Counsels appearing on behalf of both parties have made their submissions before the Board in this regard, and the Board has delivered its order on 13.10.1996 dismissing the preliminary objection raised on behalf of the appellant, and stating that the Board has jurisdiction to inquire into this matter. The appellant has preferred this appeal to this tribunal against the said order of the Board.

Thus now this tribunal is invited to make an order on this question of law. The counsel appearing on behalf of the appellant in this connection refers to section 9(j) of the Wakfs Act and states that in terms of the provisions of this section it is the tribunal, which has exclusive jurisdiction with regard to Muslim Charitable Trusts. The counsel for the respondents also made his oral submission countering this arguement, and also has filed a written submission in this regard. On perusal of section 9(j) it is expressly

stated that the jurisdiction exercisable by the tribunal in respect of matters relating to Muslim Charitable Trust or Wakfs shall be exclusive and any matter falling within the jurisdiction shall not be tried or inquired into by any court or tribunal of first instance. In this section the word tribunal appears in two places. The word tribunal in the first line of this section relates to this tribunal and there is no doubt about it. The other word tribunal appears in the last line of this section, and in fact does not relate to this tribunal, but relates to a tribunal of first instance. This position is accepted by the counsel for the respondent in his written submission as well.

Consequently this means that matters relating to Muslim Charitable Trust shall be heard only by the wakfs tribunal and not in other court or tribunal of first instance. Although the word Board is not embodied in this Section it has to be construed in the context it is drafted having regard to the intention of the legislature. Since the word exclusive is used in this section it in its literal meaning means that it is only the Wakfs Tribunal which has jurisdiction relating to Muslim Mosques and Charitable Trusts, and not any other forum whatsoever. This construction of this section goes in line with chapter 5 of this act, which deals with Muslim Charitable Trusts or Wakfs. Section 32(1) of this part expressly states that this chapter applies to Muslim Charitable Trusts or Wakfs created for the purpose enumerated therein other than a Muslim Charitable Trusts or Wakfs which is created solely for the benefit of a registered mosque. The trust in question in this is in fact created for the advancement of Muslim religious education in terms of which the said Maharagama Ghaffooriya Arabic College has been established. This is not disputed. Thus it becomes very clear that this is a matter which has to be dealt with under chapter 5 of the Muslim Charitable Trusts or Wakfs. On a perusal of the scheme of this sections it becomes very clear that the Board has a limited jurisdiction to call for statements of particulars of trust set out in section 34(1) of the

act from the trustees of the trust, and also to call for statements of account under section 35 of the act. Section 40,41 and 42 deal with the powers of the tribunal relating to Muslim Charitable Trusts or Wakfs. When the statute expressly confers Jurisdiction on this tribunal I do not think that the Board has jurisdiction to hear matters coming under the jurisdiction of this tribunal. If the board usurps such jurisdiction and deals with such matters, certainly it will run contrary to the intention of the legislature, and chapter 5 of the act dealing with Muslim Charitable Trusts or Wakfs will be redundant or meaningless.

For the reasons stated above I feel that the preliminary objection raised by the Counsel for the appellants before the Board is well founded in law. In the circumstances I uphold the preliminary objection raised by the counsel for the appellants that the Board has no jurisdiction to hear matters relating to Muslim Charitable Trusts or Wakfs, and accordingly I set aside the order of the Wakfs Board dated 13.10.1996. Accordingly Appeal is allowed.

Sgd/ M.S.A.Saheed – Chairman

Sgd/A.H.G.Ameen - Member

Sgd/A.M.I.Saheed - Member

Ariff Thaha
vs
Maharoof

C.A. No: 1/2000

Wakfs Tribunal
No:WT/98/98

Bambalapitiya Mohiyadeen Jumma Mosque – period of Trustees expire and they continue as persons-in-charge – Appointment of Special Trustees – Appointment of Managing Trustee – Appeal before the Wakfs Tribunal – while pending appeal before the Tribunal revision application before Court of Appeal CA 760/97 – stay order against the Tribunal – CA 760/97 dismissed and leave to appeal before Supreme Court SCLA 105/98 refused – Hearing before the Tribunal – Preliminary objection by the Appellant – Wakfs Board in appointing Special Trustees perform administrative function and not quasi Judicial function – Tribunal rightly over – ruled the preliminary objection – when the matter was in appeal before the Tribunal, the Board had no power or authority to make an order .

Section : 9H(1) 14(1) (c), 14(3), 29.

Held: Order of the Wakfs Tribunal upheld.
Appeal dismissed.

Cases referred:- Rasool vs Cader 1993, 2 SLR 33
Halwan vs Kaleelul Rahman 2000, 3 SLR 50.
Edward vs De Silva 46 NLR 342.

BEFORE :N.E.Dissanayake,J. and
A.M.Somawansa,J.

COUNSEL : Janaprith Fernando for the Respondent-Appellant.

M.Farook Thahir with A.L.N. Mohamed for Appellant-Respondent.

ARGUED ON: 19.06.2002 and 05.09.2000

Written Submissions Tendered On: 10.02.2003

DECIDED ON : 13.06.2003

Dissanayake,J.

This is an appeal filed by the Respondent-Appellant seeking inter-alia, to set aside the order of Wakfs Tribunal dated 06.11.1999.

The Wakfs Board under Section 14(1)(c) of the Wakfs Act appointed the Respondent-Appellant (hereinafter called and referred to as the appellant) and the Respondent as special trustees of the Bambalapitiya Mohiyadeen Jumma Mosque, Colombo 04.

In terms of Section 14(3) of the Wakfs Act the trustees were appointed by the Wakfs Board,upon expiry of their period of office on 30.01.1997, the trustees were entitled to continue to function as Persons-in-charge and by virtue of their office they were responsible for the exercise of all powers and performance of all duties in connection with that mosque. This is a statutory right conferred on the Trustees under Section 14(3) of the Wakfs Act.

The appellant had sent letter dated 18th April, 1997 to the Chairman of the Wakfs Board tendering his resignation from the post of a

person-in-charge. This letter was not acted upon by the Board and the appellant had been summoned before it on 27.04.1997 and the appellant had made certain representations against the respondents.

The Wakfs Board on 27.09.1997 had proceeded to appoint three special trustees including the appellant who was further appointed the Managing Trustee.

It is interesting to note that the Wakfs Board had proceeded to appoint the appellant as the Managing Trustee, despite there being no provision in the Wakfs Act to appoint a Managing Trustee. On this matter being brought to the notice of the Wakfs Board by the Respondents the Wakfs Board made order that the appointment of the Managing Trustee should stand.

The Respondents filed an appeal in the Wakfs Tribunal. However before the appeal could be taken up for hearing the Wakfs Board made an attempt to enforce its order pending the appeal.

On a motion being filed by the Respondents along with their affidavits to the Wakfs Tribunal, the tribunal set aside the order of the Wakfs Board dated 13.06.1997 and fixed the main appeal for hearing.

Before the appeal could be heard by the Wakfs Tribunal, a revision application bearing No: CA 760/97 was filed in another division of this Court by the Appellant and had obtained a stay order against the Wakfs Tribunal from hearing the appeal.

However subsequently the Court that heard the revision application after hearing by its order dated 04.05.1998 had dismissed the said revision application. A special leave to appeal

application by the appellant which bore SC Special LA 105/98 was refused by the Supreme Court.

Thereafter the matter was taken up for hearing by the Wakfs Tribunal.

At the hearing of the appeal before the Wakfs Tribunal the appellant raised preliminary objections on the following grounds:-

(1) the appointment of the respondent was done in the exercise of the administrative functions under Section 14(1)(c) of the Wakfs Act.

(2) An appeal does not lie against the order of the Wakfs Board appointing Special Trustees.

(3) Any remedy against the said order has to be by way of application of a Writ under Section 29 of the Wakfs Act.

(4) The appellants are not persons aggrieved within the meaning of Section 9H(1) of the amended Wakfs Act.

It is to be borne in mind that when the Wakfs Board appoints special trustees under section 14(1)(c) of the Act, it does not perform quasi judicial functions but it is an administrative function.

In Rasool Vs. Cader (1993) 2 SLR 33 it was held that neither the Wakfs Board nor the Director for Mosque and Muslim Chartable Trusts as the delegate of the Board or otherwise has power under Section 29 of the Wakfs Act or any other provision to remove a Trustee ex parte or without an Inquiry. An ex parte suspension is without jurisdiction and in excess of statutory powers of the 1st respondent. It is not a mere procedural irregularity. Therefore a Wakfs Board did not exercise quasi judicial powers but administrative power.

In the instant case the Wakfs Board has removed the Respondents as being persons-in-charge and had not considered them to be appointed as special Trustees on the basis of allegations that were levelled against them by the appellant without affording an opportunity to refute or contradict the allegations against them. The Wakfs Board had acted in violation of principles of natural justice. However by virtue of Section 9(H)(1) of the Wakfs Act every order or decision whether it be administrative or quasi judicial is appealable to the Wakfs Tribunal.

Let us now examine the contention of the learned counsel for the appellant that no appeal lies from the order made by the Wakfs Board appointing special trustees.

As pointed out earlier under section 9(H)(1) of the Wakfs Act every order or decision made by the Wakfs Board is appealable to the Wakfs Tribunal.

It has been held in the case of Halwan vs. Kaleeful Rahuman (2000)3 SLR 50 that an appeal lies from the decision of the Wakfs Board to the Wakfs Tribunal in terms of Section 9(H)(1) of the Act.

Let us now focus our attention on to the question whether there is a right of appeal against the order of the Wakfs Board dated 27.04.1997 that was made against the respondents. The Respondents were removed as persons-in-charge. They were not considered to be appointed as trustees. Therefore it would appear that the Respondents were in the category of aggrieved parties. The Wakfs Tribunal rightly over-ruled the preliminary objections and had stated that under Section 9(H)(1) of the act any party aggrieved by an order of a Wakfs Board has a right of appeal to the Wakfs Tribunal. It was further emphatially stated by the Wakfs

Tribunal that the right of appeal is a substantive right which cannot be denied.

While the appeal was pending before the Wakfs Tribunal the Wakfs Board had made order on 13.06.1997 directing the Respondents to hand over the administration of the Mosque. When the matter was in appeal before the Wakfs Tribunal the Wakfs Board did not have the power or the authority to make such an order.

It was held in the case of Edward vs. Silva (46NLR342) that "the effect of a right of appeal is the limitation of one Court and the extention of the jurisdiction of another." Further Soertz J. went on to say in that case as follows:- "It follows as a corollary that on that right being exercised the case should be maintained in status quo till the appeal court has dealt with it and given its decision.

A certificate from the Director of the Muslim and Charitable Trust is not necessary to file an appeal before the Wakfs Tribunal. Section 9(H)(1) of the Wakfs Act does not require such a certificate.

In the line of the above reasoning I am of the view that the order of the Wakfs Tribunal setting aside the orders of Wakfs Board is correct and the appeal preferred by the appellant cannot be sustained either in law or on the facts.

Therefore I dismiss the appeal of the appellant with costs fixed at Rs.5000/=.

Dissanayake J

I agree.

A.M.Somawansa,J.