

17, 1968

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IN THE PRIVY COUNCIL

No. 32 of 1966

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

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- 1. NILAMDEEN MOHAMED ISHAK (since deceased)
(Defendant-Appellant)
- 2. ABDUL RAHMAN MOHAMED RAUOFF (since deceased)
(Defendant-Appellant)
- 3. M.R.M. SIDDEEK (substituted in place of the 2nd
Defendant-Appellant who is dead)
- 4. MOHAMED ISHAK MOHAMED SHAUKATH (substituted in place
of the 1st Defendant-Appellant
who is dead)
(Defendants-Appellants) Appellants

- and -

- 1. IBRAHIM LEBBE MOHAMED THOWFEEK (Plaintiff-Respondent)
- 2. COLONDA MARIKAR SHAHUL HAMID (Defendant-Respondent)
Respondents

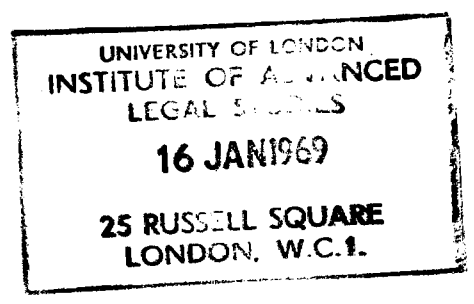
CASE FOR THE APPELLANTS

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Record

1. This is an Appeal from the Judgment and Decree dated 18th October 1963 of the Supreme Court of Ceylon, decided on 9th October 1963. No reasons were given for the dismissal of the Appeal. p.73

2. The Plaintiff Respondent filed this action in the District Court of Colombo on 19-10-1959 praying:- p.28



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(a) for an order requiring the Defendants Appellants to deliver to the Plaintiff Respondent the movable and immovable properties described in the Schedule to the Plaint,

(b) for an order directing the Defendants Appellants to be ejected from the said Mosque and shrine and that the Plaintiff Respondent be placed in possession thereof, and for other reliefs.

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3. The Schedule to the Plaint referred to land and premises called and known as Dewatagaha Mosque and Shrine and premises Nos. 14, 12, 8, 10, 10A, 10C, 16, 16A, 16B, 18, 3, 5, 7, 9, 14/2, 14/2A, 14/3, 14/4, 14/5, 14/6, 14/8 and 14/9 situated at Baptist Chapel Road Cinnamon Gardens within the Municipality of Colombo. The extent of the land and premises was not given.

p.47 11.30-38

4. On 29-2-1960 the Defendants Appellants filed their Answer setting out the fact that since 1867 the Court had accepted the method of selecting a descendant from the family of M.L. Pakeer Thamby, a descendant of one Mamina Pullai.

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They also stated that in terms of a Deed of Trust executed in 1857 the religious law and custom of the Muslims, the local custom pertaining to the said mosque and the practice in force in the said mosque, they were the lawful Trustees of the mosque and that the appointment of the Plaintiff Respondent, if any, was illegal and void. They prayed for the dismissal of Plaintiff Respondent's action and claimed in reconvention a declaration that they be declared Trustees of the mosque.

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5. The main contests at the trial were whether the appointment of the Plaintiff Respondent by the Board of Wakfs was illegal and void or mala fide and whether the premises described in the plaint or any part of them was the property of the Mosque.

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6. The following issues were framed:-

(1) Is the Dewatagaha Mosque duly registered under the provisions of the Muslim

Mosques and Charitable Trusts and Wakfs Act No. 51 of 1956.

(2)a- Was the Plaintiff Respondent appointed Trustee of the said Mosque under the said Act as and from the 22nd August 1959.

b- Is the Plaintiff Respondent the Trustee of the said Mosque under and in terms of the said Act.

10 (3) Were the Defendants Appellants the Trustees of the said Mosque prior to the 22nd August 1959.

(4) Did the movable and immovable properties of the said Mosque and Shrine described in the Schedule to the plaint together with the rents and profits and contributions vest in the Plaintiff Respondent as from 22nd August 1959.

20 (5) Are the Defendants Appellants in wrongful possession of the movable and immovable properties of the said Mosque, and wrongfully appropriate to themselves the offerings and contributions to the said Mosque.

(6) What is the rent and profits from the said movable and immovable properties per month.

(7) What are the offerings and contributions per month of the said mosque.

30 (8) If issues 1-5 are answered in favour of the Plaintiff Respondent is the Plaintiff Respondent entitled to the reliefs claimed in the plaint.

Issues of the Defendants

(9) Was one Mamina Pullai appointed the trustee of the said Mosque by Deed of Trust executed in 1857.

(10) Did the said Deed provide that the Trusteeship should descend to the male descendants of the said Mamina Pullai.

(11) Are the Defendants Appellants the

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male descendants of the said Mamina Pullai.

(12) Are the Defendants Appellants the lawful trustees of the said Mosque in terms of the said Deed of Trust, religious law and customs of the Muslims, local customs pertaining to the said Mosque and the practice in force in the said Mosque.

(13) Is the appointment of the Plaintiff Respondent illegal and void.

(14) If so, does it give the Plaintiff Respondent any right to the removal of the Defendants Appellants from the Trusteeship of the said Mosque. 10

(15) Are the premises described in the plaint or any part of them the property of the said Mosque.

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7. After the evidence of the Plaintiff Respondent and another witness Counsel for the parties addressed Court.

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8. Counsel for the Defendants Appellants (Mr. E.B.Wikramanayake Q.C.) addressed Court and emphasized:- 20

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(a) that there was no proof that Plaintiff Respondent was duly appointed Trustee,

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(b) that the burden was on the Plaintiff Respondent to prove that the premises described in the Schedule to the plaint belonged to the mosque.

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9. The learned Additional District Judge by his order dated 13/3/61 answered the issues in favour of the Plaintiff Respondent and entered decree ordering the ejection of the Defendants Appellants and ordering the Defendants Appellants to deliver to the Plaintiff Respondent the premises described in the Schedule to the Plaint. 30

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10. Aggrieved by the judgment and decree of the District Court of Colombo the Defendants Appellants appealed to the Supreme Court of Ceylon by their Petition of Appeal dated 13/3/61

but the Appeal was dismissed on 9/10/63 by the Supreme Court without any reasons being given for the dismissal.

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11. The Defendants/Appellants applied to the Supreme Court for leave to Appeal from the said decree of the Supreme Court to Her Majesty the Queen in Council. Conditional leave to appeal was granted on the 25th June 1964 and Final leave to appeal was granted on the 9th September 1964.

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10 12. The Petitioners (the Defendants Appellants) humbly and respectfully submit that both the District Court of Colombo and the Supreme Court of Ceylon erred in their respective judgments. They pray that their appeal be allowed for the following among other grounds to be urged by Counsel at the hearing of the appeal.

R E A S O N S

(I) - Since there was a claim in reconvention in the answer of the Defendants Appellants praying that they be declared Trustees of the Mosque the Plaintiff Respondent should have filed a replication and it is submitted that the Additional District Judge did not address his mind at all to the claim in reconvention of the Defendants Appellants.

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(II) - The burden of proving that the properties described in the Schedule to the plaint belonged to the Mosque was on the Plaintiff Respondent who did not prove this at all. In a land case the mere fact that one of the Defendants had made a written statement (P1A) to a person under the heading "Properties" does not make those prop-rties belong to the Plaintiff. The Plaintiff/Respondent did not produce a single deed relating to the title of the Mosque or the property that belonged to the Mosque. Even in P7 relied on by the learned Additional District Judge the same Defendant Appellant (as the one who made the statement in P1a) does not anywhere say that the properties referred to in the Plaint belonged to the Mosque. Neither P9 nor P4, which is a document unsigned by the Appellants, prove that the property described in the Schedule to the

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- p.98 1.21 Plaintiff belong to the Mosque. The 2nd Defendant Appellant had clearly stated in P9 at page 98 that the "tenements belong to us"; he never said that the properties belonged to the Mosque. The 1st Defendant Appellant had not stated in P1A that the properties mentioned there were those that belonged to the Mosque. The list was given as containing the properties that belonged to the family trust as evidenced in P8. Further, P4 is not a document signed by the Appellants. The Additional District Judge had, therefore, misdirected himself and come to the wrong conclusion that the properties set out in the Schedule to the plaint are the properties of the Mosque. There was no evidence before the A.D.J. to conform to the Judgment and Decree entered by him. 10
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- p.96, 1.13
p.97 (III) - The documents P8 and P9 prove beyond doubt that the properties belonged to a family trust and hence the provisions of the Trusts Ordinance would apply; therefore the Wakf Act could not have applied to the properties mentioned in the Schedule to the Plaint (Vide Section 32-2 of the Wakf Act; this Section was repealed by Act 21 of 1962 on June 16, 1962). In any event Parts 2, 3 and 4 of the Wakf Act would not apply to the properties above referred to and it is Section 32 that would apply and not Section 16 of the Wakf Act. 20
- p.29 1.41 (IV) - There is no evidence to substantiate the averment in paragraph 11 of the plaint that the approval of the Board constituted under the Wakf Act was duly obtained for the filing of this action as required by Section 25 (1) of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956. In the absence of admissible evidence of lawful approval the action is not properly constituted. The application for approval had not been produced. 30
- p.91 1.1 (V) - According to D2 the Registration of this Mosque was on 22/8/59. The de facto Trustees of the Mosque (the Defendants Appellants) were interviewed on 2/5/59, 16/5/59, and 30/5/59, that is - long before the mosque was registered. On 1/8/59 the Board decided to call for 40
- p.90 11.11-22
- p.90 1.27

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applications for the post of Trustee. On
 15/8/59 the Board called (inter alia) the
 Plaintiff Respondent for an interview. Even before
 the inquiry the Board had decided not to appoint the
 Defendants Appellants, who were admittedly
 descendants of Mamina Pullai (Vide P2 and page 55
 line 10). The Board then decided to appoint
 without giving any reasons the Plaintiff Respondent
 a Trustee of the Mosque on the very same day the
 Mosque was registered and without interviewing the
 Appellants but after interviewing the Plaintiff
 Respondent. The letter of appointment by the
 Board appointing the Plaintiff Respondent Trustee
 prior to or on the date of the institution of this
 action was not produced at the trial. There is
no proof according to law of the appointment of
the Plaintiff Respondent on 22/8/59. The aver-
 ment in paragraph 3 of the plaint that Plaintiff
 Respondent was duly appointed as sole trustee was
 denied in paragraph 3 of the answer and Issue 2
 (page 52) was raised on this point. The learned
 A.D.J. answered this issue in the affirmative
 although there was no evidence to satisfy the
 learned Judge, P3 and D2 were not Letters of
 Appointment but decisions of the Board containing
decisions to appoint. In P3 the Board had
 decided to appoint but there is no proof of
 appointment. P5 is a letter of appointment given
 in 1961 and does not affect this case which was
 instituted in October 1959.

(VI) - The Plaintiff Respondent had filed a
 petition (which petition and plaint were settled
 by a member of the Board of Wakfs that decided to
 appoint the Plaintiff Respondent as Trustee of
 the said Mosque and shrine) praying for an interim
 injunction restraining the Defendants Appellants
 from collecting the rents and offerings and from
 hindering the Plaintiff Respondent from performing
 his duties as Trustee of the Board of Wakfs and
 obtained an ex parte enjoining order on 22/10/59
 and an interim injunction on 6/11/59. This
 enjoining order was later dissolved and the
 application for injunction refused on 29/1/60.
 It was only on 25/6/60 that the Proctor for the
 Plaintiff Respondent moved Court to delete the
 name of the Member of the Board of Wakfs who had
 settled the plaint and to insert the name of
 another Counsel. It is curious that the Plaintiff

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& 6p.38 1.16
p.40 1.22p.46 1.32-34
p.6 1.5

pp.30 & 33

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pp.6 and 46

Respondent made a mistake on 19/10/59 and realized that it was an error only 8 months later and 5 months after the order was made by the Additional District Judge. This action along with the fact that the Defendants Appellants were not appointed Trustees of the registered mosque lends support to the submission that the Board of Wakfs had neither acted according to law nor in good faith.

p.60 1.10-12

(VII) - The learned Acting District Judge states at page 60, "As I said, if the suggestion is that they have acted dishonestly, then I would expect that they would be called and cross-examined on that footing,"; had members of the Board been called by the Defendants Appellants they could not have been cross examined unless they had proved to be hostile witnesses and then the cross examination could only have been by leave of Court. It is difficult to see how they could be called as witnesses by the Defendants Appellants because obviously they would be hostile to the Defendants' case. The hostility of the Commissioner and Board was very apparent as a Member of the Board of Wakfs had settled the plaint and a petition for the Plaintiff Respondent in this case.

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(VIII) - P7 (1st 2 paragraphs) and P9 (2nd paragraph) make it very clear that since 1867 the ancestors of the Defendants/Appellants were Trustees of the Mosque and the awards and decrees of Court had recognized this fact. The Respondent is a stranger and his evidence to qualify for the post of Trustee was not produced at the trial. The reasons for deciding to appoint a stranger were not given by the Board of Wakfs.

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M. MARKHANI

No. 32 of 1966

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

BETWEEN:

M.R.M. SIDDEEK (substituted for
A.R.M. Rauoff deceased)

MOHAMED ISHAK MOHAMED SHAUKATH
(substituted for N.M. Ishak
deceased) Appellants

- and -

IBRAHIM LEBBE MOHAMED THOWFEEK
Respondent

COLONDA MARIKAR SHAHUL HAMID
Nominal
Respondent

CASE FOR THE APPELLANTS

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