

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

Court of Appeal Case No.
CA/WKF/02/19

Wakf Tribunal Case No.
WT/262/2018

In the matter of an application for Leave to Appeal under and in terms of section 754(2) read with section 757 of the Civil Procedure Code and section 55A of the Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956 (as amended) against the Order of the Wakfs Tribunal dated 02.03.2019.

1. A.S. Hibathullah,
Rock Side Villa,
51/1, Sumangala Mawatha,
Kurunegala.
2. M.H.M. Irshad Marikkar,
590, Marikkar Harware,
Kanumulla North,
Maduranguli.
3. I.M. Dilashad Mohamed,
F 36, nankurugama,
Mawanella.
4. Jamaldeen Ifthi,
129/3, Sri Saththarma Mawatha,
Maligawatta, Colombo 10.
5. L.M. Asham,
12, Gramodaya Mawtha,
2nd Lane, Obeysekarapura,
Rajagiriya.

Plaintiffs

Vs.

1. Mohamed Alavi Nawaz Gafoor,
57, Green Path,
Colombo 07.

2. Majid Abdul Cader,
85, Barnes Place,
Colombo 07.
3. Mohamed Riyaz Mohamed Hamza,
11, Ruhunukala Mawatha,
Colombo 08.
4. Ahmed Jazeem Mohamed Arif,
171/7A, Baudhaloka Mawatha,
Colombo 04.
5. Mohamed Zubair Nehru Gafoor,
10/16A, Lake Drive, Lake Drive Enclave,
Colombo 08.
6. Mohamed Iqbal Faiz Abdul Gafoor,
31, W.A.D. Ramanayake Mawatha,
Colombo 02.
7. Farzard Hussain Gafoor,
5, Flower Road, Colombo 07.
8. Azmeth Hussain Gafoor,
114B, Hortan Place,
Colombo 07.
9. Mohamed Thalib Hussain Gafoor,
81, Hortan Place,
Colombo 07.
10. Mohamed Uvais Mohamed Hamza,
26/9, Sir Marcus Fernando Mawatha,
Colombo 07.
11. S.L. Nawfer
12. Ziyad Ibrahim
13. J.M. Imran
14. U. Abdul Azeez
15. M.B.M. Zarook
16. M.I.M. Sahabtheen
17. M.S.A.M. Shahrin
18. Rameez

19. A.C. Rishad Ahmed
20. M.C.M. Jabardeen
21. M.S. Asana Lebbai

All are members of the Management Committee of Gafooriya Arabic College, Pamunuwa Road, Maharagama.

Defendants

AND NOW BETWEEN

In the matter of an application for Leave to Appeal under and in terms of section 754(2) read with section 757 of the Civil Procedure Code and section 55A of the Muslim Mosques and Charitable Trusts or Wakfs Act, No. 51 of 1956 (as amended) against the Order of the Wakfs Tribunal dated 02.03.2019.

1. Mohamed Alavi Nawaz Gafoor,
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114B, Hortan Place,
Colombo 07.
8. Mohamed Thalib Hussain Gafoor,
81, Hortan Place,
Colombo 07.
9. Mohamed Uvais Mohamed Hamza,
26/9, Sir Marcus Fernando Mawatha,
Colombo 07.

All are currently the trustees of the Muslim Charitable Trust established by Deed of Trust bearing No. 2125 dated 21.11.1935.

1st, 2nd, 4th to 10th Defendants-Petitioners

Vs.

Mohamed Riyaz Mohamed Hamza,
No. 11, Ruhunukala Mawatha,
Colombo 08.

3rd Defendant-Respondent

1. A.S. Hibathullah,
Rock Side Villa,
51/1, Sumangala Mawatha,
Kurunegala.
2. M.H.M. Irshad Marikkar,
590, Marikkar Harware,
Kanumulla North,
Maduranguli.
3. I.M. Dilashad Mohamed,
F 36, nankurugama,
Mawanella.
4. Jamaldeen Ifthi,
129/3, Sri Saththarma Mawatha,

Maligawatta, Colombo 10.

5. L.M. Asham,
12, Gramodaya Mawtha,
2nd Lane, Obeysekarapura,
Rajagiriya.

Plaintiff-Respondents

11. S.L. Nawfer
12. Ziyad Ibrahim
13. J.M. Imran
14. U. Abdul Azeez
15. M.B.M. Zarook
16. M.I.M. Sahabtheen
17. M.S.A.M. Shahrin
18. Rameez
19. A.C. Rishad Ahmed
20. M.C.M. Jabardeen
21. M.S. Asana Lebbai

All are members of the Management Committee of Gafooriya Arabic College, Pamunuwa Road, Maharagama.

11th to 21st Defendant-Respondents

Before: **M. T. MOHAMMED LAFFAR, J. and
K. K. A. V. SWANADHIPATHI, J.**

Counsel: Chandaka Jayasundera, PC with Mehran Careem and Imaz Imthiyas instructed by Nalin Samarakkoon for the Petitioners.

N.M. Saheed with M.M.F. Shafeena and N.R. Husni for the Respondents.

Written Submissions on: 03.07.2019 (by the 1st, 2nd, 4th, and 5th Defendant-Petitioners).

03.07.2019 & 17.07.2019 (by the 6th to 10th Defendant-Petitioners),

28.08.2019 (by the 3rd Defendant-Respondent).

04.09.2020 & 24.02.2021 (by the Plaintiff-Respondents).

Argued on: 08.03.2021.

Decided on: 14.07.2021.

MOHAMMED LAFFAR, J.

The 1st, 2nd, 4th, and 10th Defendant-Petitioners (hereinafter referred to as the “Petitioners”) are seeking Leave to Appeal from the order of the Wakfs Tribunal dated 02.03.2019. The leave was granted on 24.05.2019.

The Plaintiff-Respondents (hereinafter referred to as the “Respondents”), in terms of the provisions of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 (as amended), instituted action before the Tribunal against the petitioners, seeking, *inter alia*,

1. To declare that the properties referred to in the Deed of Trust bearing No. 2125 is a charitable trust and governed by the provisions of Muslim Mosques and Charitable Trust or Wakfs Act.
2. To declare that the trustees of the said trust are mandated by the said trust to maintain the buildings and meet all cost of expenses that may be required to teach Arabic Language and maintain the students of the Gafooriya Arabic College.

At the hearing of the Tribunal on 02.03.2019, the learned Counsel for the Petitioners raised Preliminary Objections as to the maintainability of this action on the basis that:

1. The Tribunal did not have jurisdiction to hear and determine the said disputes that were presented to the Tribunal by the Respondents as the said Trust is not subject to the provisions of the Wakfs Act.
2. The Respondents failed to file the Director's certificate¹, along with the plaint and therefore, the plaint is bad in law.

It appears to this Court that the Tribunal has not yet made any orders in respect of the first objection. However, the Tribunal, in its order dated 02.03.2019, overruled the second objection. It is against that order the instant appeal is preferred.

In terms of section 9E (3) of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 (as amended), the Tribunal has no jurisdiction to entertain applications without a certificate issued by the Director, which reads thus:

“No application, other than an application made by the Director, shall be entertained by the Tribunal under this section unless the application is accompanied by a certificate under the hand of the Director that the application has been approved by the board.”

Admittedly, on 13.11.2018, the Respondents instituted action against the Petitioners in the Wakfs Tribunal. At that time, the Respondents had not obtained a certificate in terms of section 9E (3) of the said Act. Subsequently, the Respondents, along with the amended plaint dated 02.03.2019, tendered a certificate under the hand of the Director.

The observation made by the Wakfs Tribunal was that the action has subsequently been approved by the Board and the certificate has been issued. The irregularity of the non-filing a certificate with the original plaint has subsequently been rectified², which is permitted in law.

¹ Certificate issued under section 9E (3) of the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 (as amended),

² Vide the Wakf Tribunal's Order dated 02.03.2019 (P5), at p. 3.

Thus, the question that arises for determination in this appeal is *whether the irregularity the non-filing a certificate along with the original plaint can be rectified subsequently during the pendency of the action.*

In this regard, I refer to the case of **Rodrigo vs. Raymond**³ . This is the case where the action was filed without first obtaining a certificate of non-settlement from the Mediation Board. The Court of Appeal held that,

- 1) *Absence of a certificate does not create an absolute bar to the institution, and the maintenance of an action, even where the value of the action is less than Rs. 25,800.*
- 2) *It only creates a latent want of jurisdiction as opposed to total lack of jurisdiction or patent want of jurisdiction, where there is a latent want of jurisdiction, it can be validated by the conduct of parties, such waiver, acquiescence and inaction unlike in the case of total or patent want of jurisdiction, no such conduct will confer jurisdiction on the Court.*

Absence of a certificate is a procedural defect which could be rectified during the pendency of an action. It is pertinent to be noted that there will be no prejudice caused to the Petitioners for not filing of a certificate along with the original plaint.

In **Gunaratne vs. Abeysingha**⁴ the Supreme Court observed that,

“A noncompliance with a procedural requirement could be treated mere irregularity when there is no material prejudice caused to the parties due to such procedural noncompliance.

In the instant case, it is to be noted that there is no material prejudice caused to the etitioners for not filing a certificate with the original plaint. However, the said irregularity has subsequently been rectified by producing a certificate with the amended plaint.

³ [2002] 2 Sri LR 78.

⁴ [1988] 1 Sri LR 255.

I do agree with the observation made by the Wakfs Tribunal stating that this is a technical objection raised by the learned Counsel for the Petitioners⁵.

In the case of **Elias vs. Cader**⁶, the Supreme Court observed that,

*“...For the proper dispensation of justice, raising of technical objections should be discouraged and the parties should be encouraged to seek justice by dealing with the merits of cases. The raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if the parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that courts of law are Courts of justice and not academies of law.”*⁷

The learned President’s Counsel for the Petitioners cited the case of **Sheriff vs. Jamaldeen**⁸ where it was held that, *“it is mandatory to obtain a certificate from the Director to invoke the jurisdiction of the District Court/ Wakfs Tribunal.”*

It is pertinent to be noted that the *Sheriff’s* case (supra) is factually different from the instant case. In the case in hand, the said certificate has subsequently been filed by the respondents during the pendency of the action before the argument. But, in *Sheriff’s* case the approval was not obtained from the Board and the certificate was not issued by the Director. In the circumstances, it is the view of this Court that the decision in *Sheriff’s* case has no application to the instant case.

⁵ Supra note 2.

⁶ SC Appeal No. 50/2008. S.C. Minutes dated 28.06.2011.

⁷ SC Appeal No. 50/2008. S.C. Minutes dated 28.06.2011, vide p. 7.

⁸ [2000] 2 Sri LR 90.

The attention of this court is drawn to the fact that the Petitioners failed to produce the certificate filed by the Respondents in the Wakfs Tribunal, along with their amended petition where they are obliged to do so.

For the foregoing reasons, I see no basis to interfere with the order of the Wakfs Tribunal dated 02.03.2019. Thus, the appeal is dismissed with costs, fixed at Rs. 25,000/-.

The Registrar is directed to dispatch the order to the Wakf Tribunal.

Judge of the Court of Appeal.

K. K. A. V. SWARNADHIPATHI, J.

I agree.

Judge of the Court of Appeal.