

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

*In the matter of an Appeal made
under and in terms of Section 55A of
the Muslim Mosque and Charitable
Trust or Wakf Act 51 of 1956 as
amended read with Section 754(1)
and 755 of the Civil Procedure Code
as amended an appeal against the
order dated 16.04.2025 of the Wakf
Tribunal*

Court of Appeal Case No.

CA/WKF/02/2024

Wakf Tribunal Case No.

WT/301/2024

Wakf Board Case No.

WB/9500/2023

1. Mohamed Ibrahim Mohamed
Kaamil,
No. 148, Galbokka Road,
Weligama.
2. Mohamed Uwais Moharned,
No. 41, Mohamad Lane,
Weligama.
3. Mohamed Hussein Muhammadu,
No. 20, Badurlane, Galbokka Road,
Weligama.
4. Mohamed Mohamed Mufallal,
No. 17, Kottegoda, Weligama.
5. Muhammed Saheel Muhambadu,
No. 156, Galbokka Road,
Weligama.
6. Mohamed Kowzer Hajjiar Ahmad,

No. 108, Galbokka Road,
Weligama.

PETITIONERS

Vs.

1. M.T.M Areel,
No. 46/10, Jinnah Road, Galbokka,
Weligama.
2. A. Mohammadu,
No. 110, Galbokka Road,
Weligama.
3. A.K. Muhammed,
No. 39/12D, Rubbaer Watta Road,
Nedimala, Dehiwala.
4. A.K.M Athraf,
No. 55/20, Vagirajana Mawatha,
Korattuwa, Weligama.
5. M. Mohideen Cader,
No. 07, 36th Lane,
Off Shady Grove Castle Street,
Colombo 08.

RESPONDENTS

AND BETWEEN

1. Mohamed Ibrahim Mohamed
Kaamil,
No. 148, Galbokka Road,
Weligama.
2. Mohamed Uwais Moharned,
No. 41, Mohamad Lane,
Weligama.
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PETITIONER-APPELLANTS

Vs.

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RESPONDENT-RESPONDENTS

AND NOW BETWEEN

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Colombo 08.

RESPONDENT- RESPONDENT-
RESPONDENTS

Before: Mahen Gopallawa, J.

Dr. D. F. H. Gunawardhana, J.

Counsel:

Saliya Pieris, P.C., with Anjana Ratnasiri and Ishan Jayasundara instructed by Eksith Madawala for the Petitioners.

Sanjeewa Jayawardena instructed by Amila Kumara for the 1st to 3rd Respondents.

Suren Gnanaraj with Sandun Batagoda for the 4th Respondent.

N.M. Reyaz with L.M.C.D. Bandara for the 5th Respondent.

Argued on: 26.03.2026, 27.04.2026, 18.05.2026, and 04.06.2026

Delivered on: 07.08.2026

Judgement

Introduction

This appeal concerns the appointment of trustees of the mosque known as Tareeqathul Aroosiyathil Quadiriyya Mosque and Madrasa situated in Weligama, popularly known as Buhary Mosque and Bary Madrasa. It is common ground that it belongs to the Tareeqa of *Aroosiyathil Quadiriyya*, of which there is a spiritual head. It is also common ground that the said Tareeqa professionally practices Sufism, being a mystic spiritual path of the Islamic religion, and, when necessary, I shall deal with that more fully in the main body of my judgement.

The trustees were appointed by the Wakf Board on 20.09.2023 on the nomination made by the sheik of the Tareeqa, and the appointment papers relating to such appointments were also submitted on 26.09.2023.

However, thereafter, the Appellants, who claim to be members of the Jammath (the congregation, as referred to in Arabic), claimed that they were appointed by the members of the Jammath and thus were duly appointed. They also claimed that the spiritual head of the said Tareeqa does not have any primacy in the appointment process. Therefore, they challenged the appointment made by the Wakf Board in the case bearing No. LET/225A/2023.

However, thereafter, the Wakf Board, having considered the papers filed and having followed two previous decisions on the same issue, upheld that it is the spiritual head (Shaikh) of the Aroosiyathil Quadiriyya Tareeqa who appoints the trustees. Such position had also been accepted in two previous cases bearing Nos. WB/2873/97 and WB/4129/23, which were further upheld by the Wakf Tribunal in appeals bearing Nos. WT/125/2000 and WT/155/2005. Thus, the Wakf Board decided that it was bound by those two orders.

Thus, even without issuing notice on the Respondents, that application was dismissed. Thereafter, the Petitioners made an appeal to the Wakf Tribunal and, once the appeal papers were received there, the Wakf Tribunal also, without issuing notice in appeal bearing No. WT/301/2024, by its order dated 16.03.2024, refused the issuance of notice and dismissed the appeal.

Thereafter, the Appellants, by this Appeal, challenged the dismissal of the said appeal, as well as the order made by the Wakf Board dismissing the application without even issuing notice.

This matter was heard before Justice Gopallawa and me on 26.03.2026, 27.04.2026, 18.05.2026, and 04.06.2026, and oral submissions were made by the respective counsel appearing for the respective parties. In addition to the oral submissions made, written submissions were also filed by the respective parties; hence, this judgement.

The following arguments were advanced by the respective counsel at the hearing.

Arguments

The counsel for the Appellants, Mr. Saliya Pieris, learned President's Counsel, contended that the Wakf Board flouted the rules of natural justice in dismissing the application bearing No. WB 9500/2023. Having brought to our notice Section 11 of the Muslim Mosque and Charitable Trust or Wakf Act, No. 51 of 1956 (as amended), it was contended by Mr. Pieris that once an application is submitted to the Wakf Board, it is their duty to first make all attempts to settle the matter amicably. However, if the parties are unwilling to settle, then notice should be issued and the matter proceeded with in terms of the procedure applicable to civil litigation in a District Court; namely, once the plaint is filed, the Wakf Board should issue summons or notices on the Respondents to answer the plaint.

However, no such procedure was followed and, the matter was dismissed *ex parte*. Therefore, the Wakf Board had failed to follow the rules of natural justice and had also failed to follow the statutory provisions of the Wakf Act.

Thirdly, Mr. Pieris argued that the Tribunal, in case bearing No. WB 301/2024, without issuing notice, even dismissed the appeal, and the Appellants were not given an opportunity to present their appeal either through counsel or by themselves, as the Tribunal made order rejecting and dismissing the appeal. Therefore, the Tribunal also flouted the rules of natural justice.

In addition to that, Mr. Pieris argued that the Appellants do not concede that there is a spiritual head called the Shaikh of the Tareeqa who has a role in the appointment of trustees. According to him, for the last 150 years, the practice had been for the members of the Jammath to elect and select their own members; thus, without going into the merits and evidence, both the Board and the Appeal Tribunal had dismissed the application respectively and arbitrarily. Therefore, the dismissal of the original application by the Board, and the dismissal of the appeal in such a manner, is illegal, irrational, and in violation of the rules of natural justice.

On the other hand, Mr. Suren Gnanaraj argued for the 4th Respondent that the Appellants' appeal to the Tribunal, as well as the Appellants' appeal to this Court; cannot be considered as proper appeals because both appeals preferred by the so-called Appellants to the Tribunal and this Court arise from interlocutory orders made by the respective tribunals, namely the Wakf Board as well as the Wakf Tribunal. Therefore, in such a case, in terms of Section 55A of the Wakf Act and Rules, they should first have sought leave to appeal from both the Tribunal as well as this Court.

As such, heavily relying upon the judgment of a Divisional Bench of the Supreme Court in the case of *S.R. Chettiar and Others v. S.N. Chettiar*¹, and also followed in the case of *Priyanthi*

¹ [2011] 2 Sri L.R. 70.

*Senanayake v. Chamika Jayantha*² by seven-bench judges, Mr. Gnanaraj argued that the Appellants' appeal must be dismissed without going into the merits.

Further, Mr. Riyaz, who appeared for the 5th Respondent, also associates himself with the same submissions on the preliminary matter. In addition to that, he made submissions on the following matters.

Firstly, the Respondents, being the trustees of the mosque and Madrasa, were duly appointed by the spiritual head of the Tareeqa, who is known as the Shaikh, who is stationed in India and operates therefrom, and whose forefathers had founded and built this mosque in Weligama. Therefore, they have the controlling spiritual authority over this place, and no member of the Jammath controls the same.

As such, when similar applications had arisen before the Wakf Board as well as the Wakf Tribunal, both fora had decided upon the same issue, namely as to who has the primacy in the appointment of trustees. In both applications before the Wakf Board and the Tribunal, it was decided that it is the spiritual head who has such primacy. Therefore, the members of the Jammath do not have any control or primacy in such appointments.

He argues that having followed that question of law decided by the Wakf Board and affirmed by the Wakf Tribunal, and since they are bound by such determination on a question of law, the Wakf Board had decided to dismiss the original application of the Appellants without even issuing notice. Therefore, according to him, they were justified in so deciding.

He further argues that when the Appellants preferred an appeal, since the Wakf Board had decided against them on a preliminary matter, they should first have obtained leave to appeal. Further, in the same way, when the Tribunal decided against them on the preliminary matter

² [2017] BLR 74.

without going into the merits, they should have obtained leave from this Court before preferring an appeal. He also associated himself with the same submissions made by Mr. Suren Gnanaraj.

Finally, Mr. Sanjeeva Jayawardena, learned President's Counsel, who appeared for the 1st to 3rd Respondents, argued that already there are four decisions made by the Wakf Board and the Wakf Tribunal in respect of similar matters and that, starting from 1977, for more than 25 years they have been following these principles.

In addition to that, it was their argument that the initial dispute was brought before the Wakf Tribunal in 1977, and the Tribunal made a decision that the spiritual head has the primacy, which was thereafter affirmed by the Tribunal. Later, a similar matter was raised in 2000 and decided in 2005, again accepting the primacy of the Shaikh, the head of the Tareeqa. As such, the same well-established principle of law is now being followed by the Wakf Board as well as the Wakf Tribunal. Therefore, Mr. Jayawardene argues that according to him, the Appellants cannot canvass the same issue before a different Board, whose members are stepping into the same shoes as the original Board and the original members of the Tribunal. Accordingly, he also moved for a dismissal of the appeal. However, he also associated himself with the submissions made by Mr. Suren Gnanaraj on the preliminary issue.

Preliminary issue

In this case, it was argued for and on behalf of the 4th Respondent that the Appellants first have to overcome the hurdle of establishing whether they have a direct appeal or have obtained leave and then appeal. For that purpose, it is argued for and on behalf of the 4th Respondent that the two orders made by the Wakf Board and Tribunal are only interlocutory orders since both applications before the Wakf Board as well as the Wakf Tribunal have been decided preliminarily and disposed of the matter without going into the merits.

Now I will consider in fact whether the impugn order initially made by the Wakf Board, and thereafter by the Wakf Tribunal in appeal, was only interlocutory orders or final orders.

According to Section 9G of the Mosque and Muslim Charitable Trust and Wakf Act, the proceedings instituted before the Wakf Board reads thus;

“9G. In any proceedings under this Act, the Tribunal shall follow the procedure of a District Court, and in the execution of its orders and judgments, shall have all the powers of a District Court and the provisions of the Civil Procedure Code, relating to the procedures and powers of execution of a District Court, shall, mutatis mutandis, apply to and in relation to the procedures and powers of execution of the Tribunal”

An objection has been raised as to the maintainability of this Appeal in the form of a direct appeal which is exercised as a right of appeal. A right of appeal has been recognised by Article 138 of the Constitution; therefore, it appears to be a right given to any dissatisfied or aggrieved party with a judgement or final order.

However, in the case of *Martin v. Wijewardena*³, His Lordship Justice Jameel has further looked deep into the matter and decided that unless there is specifically provided for right of appeal in the procedure, a person cannot exercise his right of appeal. For further clarity, I reproduce the proposition of law with regard to Article 138 proposed by His Lordship Justice Jameel in the said case;

“A right of appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of

³ [1989] 2 Sri L.R. 409.

or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments.”

The objections regarding the maintainability of this appeal as a final appeal have now been raised in relation to the appeal filed by the Appellant in the instant appeal before us. Accordingly, it is now pertinent for us to consider the Appellant’s proceedings relating thereto.

In addition to that, I reproduce Section 55A of the Mosques and Muslim Charitable Trusts or Wakfs Act;

“55A. Every order made by the Tribunal shall be deemed to be an order made by a District Court and the provisions of the Civil Procedure Code governing appeals from orders and judgments of a District Court shall, mutatis mutandis, apply to and in relation to appeals from orders of the Tribunal.”

In terms of Section 55A of the Mosques and Muslim Charitable Trusts or Wakfs Act, attracts the procedure laid down in the Civil Procedure Code with regard to the Appellate jurisdiction and the procedure. Accordingly, the procedure laid down in Chapter LVIII of the Civil Procedure Code should apply.

The relevant sections of the Civil Procedure Code are reproduced below and reads thus;

“754. (1) Any person who shall be dissatisfied with any judgment pronounced, by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.

(2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding, or matter to which he is or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction

of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.”

Accordingly, if the order made in this case is an interlocutory order, then the aggrieved party should first obtain leave; otherwise, the following section applies.

“754. (5) Notwithstanding anything to the contrary in this Ordinance, for the purposes of this Chapter "judgment" means any judgment or order having the effect of a final judgment made by any civil court; and " order" means the final expression of any decision in any civil action, proceeding or matter which is not a judgment.”

On a perusal of the said sections, what I understand is that if such a party is aggrieved by an order which is in the nature of an interlocutory order or incidental order, such a party has to first obtain leave from the court to which such party desires to appeal and then appeal therefrom. Therefore, there is a clear distinction between an appealable order, where direct appeal lies, or an order from which a party cannot directly appeal but first should obtain leave and then appeal. This distinction was decided in several cases.

One such case which prominently decided this issue was *Siriwardena v. Air Ceylon Limited*⁴, where the plaintiff-appellant had filed an action against the Air Ceylon Limited.

However, during the pendency of the action, steps were taken by the President of the Republic to dissolve the defendant-respondent Corporation, Air Ceylon Limited, and appoint a Liquidator. When the case was taken up for trial, the respondent was absent and unrepresented; therefore, the judgement was entered *ex parte*. Later, the Liquidator made an application to purge default and set aside the said judgement and decree; the District Judge dismissed that application. The Liquidator moved the Court of Appeal in revision; the Court of Appeal also

⁴ [1984] 1 Sri L.R. 286.

dismissed the application with costs. Thereafter, the Liquidator has sought an amendment of the judgement and decree in terms of Section 189 of the Civil Procedure Code on the ground that there was an accidental slip or omission made by the District Judge in his judgement. By the deletion of relief in prayer 'd' and specifying that the plaintiff is entitled to damages at a rate of Rs. 1,620/- per month from September 1979.

After inquiry the District Judge by his order dated 10.05.1982, held that the said claim is not tenable, and accordingly, it was further held that the plaintiff was entitled to Rs. 40,000/- with interest in terms of prayer 'd'. Thereafter, from the said order, allowing the amendment in the manner set out above, the plaintiff moved the Court of Appeal for leave to appeal under Section 754(2) of the Civil Procedure Code.

At the hearing, the Counsel for the defendant-respondent opposed the application on the ground that the order made by the learned District Judge was a final order, and has the effect of a final judgement under Section 754(5) of the Civil Procedure Code; therefore, there should be a final appeal instead of leave to appeal. The Court of Appeal by its order, upheld the objection of the defendant-respondent, and held that the order made amending the judgement and decree was the final order from which a direct appeal lies, and therefore, refused the application for leave to appeal.

Then, the plaintiff-appellant with the leave of the Supreme Court preferred this appeal from the said order of the Court of Appeal. His Lordship Justice Sharvananda applied the 'order approach test' which had also been developed in the English rules of procedure and adopted by Lord Esher in *Onslow v. Commissioner of Inland Revenue*⁵.

Here, His Lordship Justice Sharvananda (as he then was) went into this question, and it was His Lordship's view that when an order finally disposes of the rights and duties of the parties,

⁵ [1980] 25 Q.B.D. 465.

such an order should be treated as a judgement order which has the final effect of a judgement. When being aggrieved by such an order a party need not obtain leave from the Higher Court to appeal; otherwise, a party needs to first obtain leave and then appeal. All other orders are interlocutory orders from where if a party is dissatisfied with such an order, such party has to obtain leave; otherwise, if a judgement or a final order disposes of the rights of the parties, then such orders and judgements can be treated as final judgements.

Again, this question came up to the forefront for the decision of the Higher Court in the case of *Ranjith v. Kusumawathie and Others*⁶, where the plaintiff filed a partition action to obtain a partition in respect of certain land, and there were a few defendants. On the day of the trial, none of the defendants were present except for the plaintiff. Accordingly, the plaintiff's evidence was recorded, and consequently, the learned judge delivered the order to partition the land according to the plaintiff's evidence; thereafter, the interlocutory decree was also delivered, followed by the final partition.

However, in the meantime, the 4th defendant made an application in terms of Section 48(4) on the basis that he was unable to be present and therefore wanted to have his rights proven. Then the district judge fixed it for inquiry; however, the 4th defendant died and his heir was substituted in his place and pursued the inquiry. After inquiry, the district judge dismissed the application. Thereafter, the substituted 4th defendant appealed to the Court of Appeal by way of a final appeal, and an objection was raised as to the maintainability of the appeal on the basis that since it is an interlocutory order, he should have first obtained leave and then appealed. This was upheld by the Court of Appeal. Being aggrieved by the said judgement, special leave to appeal was obtained, and appealed to the Supreme Court.

⁶ [1998] 3 Sri L.R. 232.

In the appeal, His Lordship Justice Dheeraratne discussed the difference between ‘judgement’ and ‘order’, and in one instance, such issue distinguishing the same had come up in the annals of the history. His Lordship identified four different instances such issues have arisen; however, he identified that the issue had arisen in the instant case relates to the appeal procedure where Chapter LVIII of the Civil Procedure Code applies.

Further, His Lordship discussed the two tests identified as ‘order test’ and ‘application approach test’, and he also expressed the view that it is very difficult to settle the law as at different times, different Justices and Judges have differed their views on the issue. Having considered the matter that had come up before His Lordship Justice Sharvananda (as he then was) in *Siriwardena*, His Lordship identified that His Lordship Chief Justice had adopted to follow the order approach test, whereas even in later years, Their Lordships in the Court of Appeal of the United Kingdom in the case of *Onslow*, Lord Esher had adopted and followed the application approach test. Accordingly, in this case also, His Lordship decided to follow the application approach test as the most suitable test.

However, later in the case of *Chettiar v. Chettiar*⁷, a similar question arose. Here, a certain trustee was appointed to a Hindu temple, and it was challenged in the District Court. Further, the 1st and 4th respondents moved to dismiss the plain based on a positive rule of law before the trial reached. The learned district judge who inquired into the matter, dismissed the application of the plaintiff on that preliminary objection. Thereafter, the plaintiff filed a final appeal and a leave to appeal as well, and therefore, it came up before the Civil Appellate High Court. In the final appeal, it was argued on behalf of the respondents that no final appeal could be maintained in view that the right of the parties had not been decided; however, the parties relied upon both judgements, namely *Siriwardena v. Air Ceylon Limited* and *Ranjith*, and the

⁷ [2011] 2 Sri L.R. 70.

learned High Court judge decided that leave should be granted, and accordingly, leave to appeal was granted.

Thereafter, after obtaining special leave to appeal, there was an appeal to the Supreme Court, and after the matter was referred to the His Lordship the Chief Justice, constituted of five-judge Divisional Bench (numerically higher bench) to settle the issue finally since there were two lines of thought in *Siriwardena* and *Ranjith*, and later several courts have followed those two judgements. Her Ladyship Shirani Bandaranayake (as she then was), having considered all the authorities, including the English authorities and the two main authorities on either side, finally decided that the correct test to be adopted is the application approach test, where if the application is not made by the party who obtained an order, having decided the case one way or the other, if the case would have gone to the finality and proceeded to trial to the final conclusion, then such an order is considered as an interlocutory order; otherwise, if by such an order the matter has come to the final end, then such an order is called an order with the effect of a final judgement and falls within Section 754 of the Civil Procedure Code. Accordingly, Her Ladyship granted relief to the plaintiff, who had first obtained leave from the High Court, and appealed to the High Court.

Thereafter, this same principle was upheld and followed by two Supreme Court judgements of seven judges since the same issue was raised. Accordingly, it is my view that we are bound by the decision of the five-bench in *Chettiar v. Chettiar*, and the seven-judge benches in *Priyanthi Senanayake v. Chamika Jayantha*⁸. This was also affirmed in the recent Supreme Court judgement of His Lordship Justice Samayawardhena in the case of *The Maharaja Organisation v. Viacom International Inc and Another*⁹.

⁸ [2017] BLR 74.

⁹ SC Appeal No. SC/CHC/APPEAL/4/2002 (SC Minutes 30.06.2021).

According to the proposition of law enunciated by His Lordship Justice Thamotheram in the case of *Walker Sons & Co. (U.K.) Ltd v. Gunatilake and Others*¹⁰, following the age-old principle of *stare decisis* enunciated in the case of *Bandahamy v. Senanayake*¹¹, by His Lordship Chief Justice Basnayake, that the Court of Appeal, being a subordinate court to the Supreme Court under the present Constitution of 1978, being the Grundnorm, the Court of Appeal is bound to follow a Supreme Court judgement even by a three-judge bench.

Here, it is a case where there are judgements of numerically superior bench. Therefore, we are bound by the judgements of *Chettiar*, followed by other cases. As such, it is my view that the same principles have to be followed now as they have been cited before us.

Now, in this case, if such issue was not decided in that manner before the Wakfs Tribunal, it would have gone to the final ending and all parties would have been heard. Here, such questions have not arisen before the finality as an interlocutory order was made which falls within Section 754(2) read with Section 754(5) of the Civil Procedure Code. As such, if some party is dissatisfied or aggrieved by such an order, such party before appealing, should first obtain leave from the Court of Appeal, and this being a court provided for special procedure under the Wakfs Act, as His Lordship Justice Salam proposed in the case of *Al-Hadji Seeni Mohamed Shahul Hameed and Others v. A.H. Aliyar and Others*¹², when a party is aggrieved by an interlocutory order of the Wakfs Tribunal, such party should first obtain leave and then appeal.

Accordingly, it is my view that the preliminary objection based on that, raised by the 4th Respondent and all other Respondents assailing with the 4th Respondent, should be treated accordingly, and thus, I am compelled to uphold the said preliminary objection.

¹⁰ [1978-79-80] 1 Sri L.R. 231.

¹¹ 62 NLR 313.

¹² CA/WAKFS/01/2011 (CA Minutes 26.06.2013).

As such, as the Appellants have failed to first obtain leave and then appeal from the order dated 16.03.2024 in the case bearing No. WT/301/2024, I am compelled to dismiss this Appeal.

The Appeal relating to the connected case bearing No. WKF/03/2025 is of the same Judgement.

Conclusion

For the reasons adumbrated above, I dismiss this Application, without costs.

JUDGE OF THE COURT OF APPEAL

Mahen Gopallawa, J.

I agree.

JUDGE OF THE COURT OF APPEAL