

~~AC~~
~~61162~~

Judgment
2, 1966

15 OF 1965

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CEYLON

THE BOARD OF TRUSTEES OF THE
MARADANA MOSQUE

- and -

1. THE HONOURABLE BADI-UD-DIN MAHMUD
Minister of Education, Slave Island,
Colombo.

2. S. F. DE SILVA
Director of Education, Malay Street,
Colombo.

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

THE BOARD OF TRUSTEES OF
THE MARADANA MOSQUE Appellant

- and -

1. THE HONOURABLE BADI-UD-DIN MAHMUD
Minister of Education,
Slave Island, Colombo.

10

2. S. F. DE SILVA
Director of Education,
Malay Street, Colombo.

Respondents

CASE FOR THE APPELLANT

Record

20

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon (Herat J.) dated the 3rd day of September, 1963, dismissing the Appellant's application for a mandate in the nature of a Writ of Certiorari to quash an Order made by the 1st Respondent on the 19th day of August, 1961, under Section 11 of the Assisted Schools and Training Colleges (Special Provisions) Act (No. 5 of 1960) as amended by Act No. 8 of 1961 hereafter called "the Act".

p.18

p.70

2. The principal questions arising in this appeal are : -

(a) whether the acts of the Minister in making the Order under Section 11 were "judicial" or "executive".

Record

(b) whether there was a duty upon the Minister to act judicially in making an Order under Section 11;

(c) whether the act of the Minister was ultra vires the provisions of the Act;

(d) whether the Order of the Minister is contrary to Section 29(2) of the Ceylon Constitution, and hence void.

3. The Petitioner is a body incorporated by the Maradana Mosque Ordinance (No.22 of 1924) and is charged with the administration of the said Mosque and its lands and property, including Zahira College. In July 1961 the said College was an unaided school within the meaning of the "Assisted Schools and Training Colleges (Special Provisions) Act" No.5 of 1960. The First Respondent was then Minister of Education and the Second Respondent then Director of Education.

10

4. The relevant portions of Sections 6 and 11 of the said Act read as follows : -

20

"6. The proprietor of any school which, by virtue of election made under Section 5, is an unaided school -

(i) shall pay to every teacher and employee who is on the staff of such school the salary and allowances due to such teacher or employee in respect of any month not later than the 10th day of the subsequent month;

30

(k) shall satisfy the Director that necessary funds to conduct and maintain the school will be available and shall conduct such school to the satisfaction of the Director;"

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
25 APR 1967
25 RUSSELL SQUARE
LONDON, W.C.1.

11. Where the Minister is satisfied -
(b) after consultation with the Director, that any school which, by virtue of the provisions of this Act, is being administered as an unaided school, is being so administered in

40

contravention of any of the provisions of this Act or any regulations or Orders made thereunder or of any other written law applicable in the case of such school.

The Minister may, by Order published in the Gazette, declare that, with effect from such date as shall be specified in the Order -

10

(i) such school shall cease to be an unaided school;

(ii) such school shall be deemed for all purposes to be an Assisted school;

(iii) the Director shall be the Manager of such school."

20

5. The relevant portion of Section 4 of the "Assisted Schools and Training Colleges (Supplementary Provisions) Act" No. 8 of 1961 reads as follows : -

30

"4.(1) Where the Minister, considers it desirable so to do, the Minister may, by Order published in the Gazette (in this Act referred to as a "Vesting Order"), declare that, with effect from such date as shall be specified in the Order (not being a date earlier than fourteen days after the date of such publication), all property of the description specified in the Order, being property liable to vesting, shall vest in the Crown."

40

6. Up to July 1961 the teachers of the said College had been paid their salaries and allowances within the time limit contained in Section 6 (i) of the above Act but although some of the salaries for July 1961 were paid in time some of the staff were not paid before 10th August. These salaries were offered to the staff on the 18th August but the teachers refused to accept such payment. On 21st August the President of the Executive Committee of the

Record

- p.69 Maradana Mosque received a letter from the Second Respondent stating that the First Respondent had ordered that the said College should be taken over for Director-management with effect from that day "as Section 6 (i) of the aforesaid was violated". On the same day an Order was published in the Government Gazette declaring the said College should cease to be an unaided school and that the Second Respondent should be its Manager. The Respondents have from 21st August 1961 taken over the management and administration of the said College and by an Order published in the Gazette of 2nd December 1961 the First Respondent without consulting the Appellants or giving any opportunity for representations to be made, made a vesting Order declaring that the premises in which the said College had been conducted should vest in the Crown as from that day. At a date about October 1961 the First Respondent made a statement concerning the take over of the said College in which he said that there was:
- p.76
- p.71
- p.72
ls.32-42
- "clear indication that the Executive Committee of the Maradana Mosque had not only violated Section 6 (i) but had been disregarding Section 6 (k) which required the Committee to have available with it the necessary funds to conduct and maintain the School.... Under these circumstances there was no alternative for me but to issue the inevitable Order under Section 11 to take over Zahira College for Director-management. This step was rendered compulsory by the failure of the Executive Committee of the Maradana Mosque to comply with the unambiguous provisions of the law."
- p.1 7. By a Petition dated the 14th day of December 1961 the Appellant prayed for a mandate in nature of a Writ of Certiorari quashing the Order of the Respondents on the 21st day of August 1961 on the grounds that
- (a) the First Respondent had exceeded his powers and acted ultra vires;

(b) the conditions and/or facts necessary for the invocation of the said powers were not present;

(c) the Respondents misdirected themselves in taking the view that on any breach of Section 6 of the aforesaid Act they had no alternative but to make the said Order,

10 (d) there was no evidence that the said College was "being so administered in contravention of any of the provisions" of the said Act;

(e) the alleged default had been cured before the making of the said Order;

(f) the Respondents failed to act judicially and observe the rules of natural justice when they were under duty to do so;

20 (g) the said Order had the effect of restricting the free exercise of the Moslem religion and was therefore contrary to Section 29(2) of the Ceylon Constitution.

8. Affidavit evidence was filed on both sides and the trial took place on this alone. pp.6-14

9. On the 9th day of March 1962 the preliminary objection on behalf of the Respondents pp.17-18

(a) that there had been acquiescence on behalf of the Appellants;

(b) that there were laches on the part of the Appellants; and

30 (c) that there had been a complete re-organisation of the administration of the said College and it would be contrary to public policy to alter this new organisation in any way, was overruled.

10. On the 22nd day of March 1962 the case was argued and on the 3rd day of September 1963

Record

p.18 Herat J. delivered judgment dismissing the application on the grounds that the act of the Minister was an administrative one and not judicial and therefore the Writ of Certiorari did not lie and also he held that "one flagrant act of contravention satisfies the condition of being administered in contravention" and therefore the act of the Minister was not ultra vires.

p.20
ls.44-45

11. At no stage had Counsel on behalf of the Respondents argued that this Order was an administrative act but had conceded that it was a judicial one. The learned judge did not consider the constitutional point raised. 10

12. Subsections (1), (2) and (3) of Section 29 of the Ceylon (Constitution) Order in Council, which are relevant to this appeal provide :-

"29. (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island. 20

(2) No such law shall -

(a) prohibit or restrict the free exercise of any religion; or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or

(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or 30

(d) alter the constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious 40

body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body;

(3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void."

10 Under Section 7 of the Maradana Mosque Ordinance No.22 of 1924, the general government and direction of Zahira College which is an educational institution established in connection with the Maradana Mosque is vested in the Appellant Corporation which is a religious body incorporated by that Ordinance. The Order of the Minister seeks to divest the Appellant of the Management of Zahira College and to that extent alters the constitution of the Appellant Corporation. This alteration was not made at 20 the request of nor with the consent of the Appellant's Executive Committee which is the governing authority of the Appellant Corporation. Since the Assisted Schools and Training Colleges (Special Provisions Act) No.5 of 1960 and the Assisted Schools and Training Colleges (Supplementary Provisions) Act No.8 of 1961 do not amend or repeal Section 29(2)(d) such Acts cannot in contravention of the said Section 29(2)(d) empower the Respondents to 30 make an Order under Section 11 substituting the Second Respondent as the Manager of Zahira College and divesting the Appellant of the Management of the said School. In the circumstances the Appellant submits that the Respondents have exceeded their powers in making an Order under Section 11 with reference to Zahira College and that such Order is void, under Section 29(3) of the Constitution.

40 Zahira College is a leading Muslim Educational Institution, built on the property belonging to the Maradana Mosque and established by Muslim Fathers for the propagation and practice of the Muslim Religion in a Muslim

Record

environment. In so far as any Orders made by the First Respondent have the effect of restricting or prohibiting the free exercise of the Muslim religion, such Orders contravene Section 29(2)(a) of the Ceylon Constitution and are void under Section 29(3).

p.18
p.21
p.70

13. The Appellant humbly submits that the Judgment and Order of the Supreme Court of Ceylon dated the 3rd day of September 1963 should be set aside and a mandate in the nature of a Writ of Certiorari quashing an Order of the Respondents dated the 21st day of August 1961 be issued and the Appellants granted their costs for the following amongst other

10

R E A S O N S

1. BECAUSE the Minister was under a duty to act judicially in making an Order under Section 11.
2. BECAUSE the acts of the Minister in making the Order under Section 11 were judicial and not executive. 20
3. BECAUSE in making the Order under Section 11 the Minister failed to observe the principles of natural justice.
4. BECAUSE the Minister in arriving at a decision to make an Order under Section 11 was influenced by irrelevant considerations.
5. BECAUSE in all the circumstances of this case a Writ of Certiorari does lie. 30
6. BECAUSE the Minister in purporting to make an Order under Section 11 has in the circumstances of this case exceeded his powers and acted ultra vires.
7. BECAUSE the conditions necessary for the invocation and/or exercise of the Minister's powers under Section 11 were not present.

8. BECAUSE the Respondents have misdirected themselves in concluding that circumstances existed which justify an Order under Section 11.

9. BECAUSE the Respondents have misconceived the extent and nature of their powers under the Act and have failed to address their minds to the issues essential to a decision under Section 11.

10 10. BECAUSE the Respondents have misdirected themselves in taking the view that on any breach of the letter of Section 6 of the Act, however trivial and unintentional it be, they have no alternative but to make an Order under Section 11.

20 11. BECAUSE one isolated default does not satisfy the description of "being so administered in contravention of any of the provisions of the Act", especially if that default was quickly cured when attention was drawn to it.

12. BECAUSE the first Respondent had a duty to act judicially in making the said Vesting Order and failed so to do, failing to observe the principles of natural justice.

30 13. BECAUSE the Order of the Minister under Section 11 and the consequential Vesting Order are contrary to Section 29 (2)(a) and ~~Section 29(2)(a)~~ and Section 29(2)(d) of the Ceylon Constitution, and hence void under Section 29(3).

14. BECAUSE the Judgment of Herat J. is wrong.

E.F.N. GRATIAEN

THOMAS O. KELLOCK

15 OF 1965

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF CEYLON

THE BOARD OF TRUSTEES OF THE
MARADANA MOSQUE

- and -

1. THE HONOURABLE BADI-UD-DIN MAHMUD
Minister of Education, Slave Island,
Colombo.

2. S. F. DE SILVA
Director of Education, Malay Street,
Colombo.

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.