Privy Council Appeal No. 15 *of* 1965

The Board of Trustees of the Maradana Mosque – – – *Appellants*

v.

The Honourable Badi-ud-din Mahmud and another – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY 1966

Present at the Hearing:
LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD UPJOHN
LORD PEARSON
(*Delivered by* LORD PEARCE)

The Maradana Mosque is a leading place of Muslim worship in Ceylon.

The appellants are a body incorporated over forty years ago by the Maradana Mosque Ordinance (No. 22 of 1924). They are charged with the administration of the Mosque, and its lands and property, part of which is a large school known as Zahira College (referred to as " the school "). The appellants sought from the Supreme Court of Ceylon a mandate in the nature of a writ of certiorari quashing an order made on the 21st August 1961 in respect of the school by the first respondent who was at the relevant dates Minister of Education (referred to as " the Minister ") after consultation with the second respondent who was at the relevant dates Director of Education (referred to as " the Director "). The late Herat J. in the Supreme Court refused a mandate and the appellants' appeal against that refusal. There has been delay in the proceedings since, owing to the illness of the late learned judge, there was an interval of eighteen months between the hearing and judgment.

Until 30th November 1960 the school was an Assisted School, that is to say, it provided free education and received a government grant towards its running expenses. In 1960 however the government was empowered to take over the management of all Assisted Schools by the terms of the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960 (referred to as the 1960 Act). The 1960 Act, however, gave to the proprietors of Assisted Schools an election to carry on the schools without government aid (Section 5). The appellants did so elect within the statutory period and therefore on the 30th November 1960 the school became an Unaided School. As such it was subject to Sections 6 and 11 of the 1960 Act and afterwards to the Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961 (referred to as the 1961 Act) which was passed on the 2nd March 1961, amending the 1960 Act and introducing a new provision for vesting of school property in the Government without compensation.

Section 6 as amended provides:—

" 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;

. . . . . .

(*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; "

. . . . . .

Section 11 provides:—

" 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 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—

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

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

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

Section 4 (1) of the 1961 Act provides:—

" 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."

In the summer of 1961 the school had run into financial difficulties. The salaries of the teachers up to the end of June were duly paid, but most of the salaries for July had not been paid by the 10th August, so that there was a contravention of Section 6 (*i*). On the 11th August 1961 there were two letters from groups of the teachers to the Director. Both letters complained of the non-payment of the salaries. One of them added—"From the time Zahira became unaided on the 1st December 1960 we have been receiving our salaries regularly on or about the last day of each month. This failure on the part of the Management reveals that the Management does not have the necessary funds to manage the institution properly." On the same day, the 11th August, the Director of Education sent to the appellants a formal complaint that it had been brought to his notice that they had failed so far to pay the salaries of the teachers for the month of July 1961 and that they had thereby contravened Section 6 (*i*) (whose terms were set out in full). The letter ended with these words "I shall be thankful if you will show cause on or before the 18th August 1961 why I should not recommend that Zahira College be taken over for Director-management in terms of the Special Provisions Act No. 5 of 1961". There was no reference to paragraph (*k*) of Section 6: the Director did not invite the appellants to satisfy him that "necessary funds to conduct and maintain the school will be available". Nor did he inform them of the observation on this point made by the group of teachers in their letter to him.

In answer to the Director's letter of 11th August, referring only to paragraph (*i*) of Section 6, the appellants, in a letter of 15th August, showed cause as requested. They said :—

" With reference to your letter No. NSB. 112 of the 11th instant, I write to inform you that owing to a certain misunderstanding the salaries of all the teachers of the College were not paid by the 10th instant. I am making arrangements to pay the salaries of the remainder of the teachers by the 18th instant.

> The salaries of the teachers for August 1961 and the subsequent months will be paid by the 10th of the subsequent month in terms of the Provisions of the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960 as amended by the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961."

The appellants were able to provide the necessary funds by means of a further loan from the Mosque, and on the 18th August the unpaid teachers were offered their salaries but refused to accept them from the appellants.

On the 21st August the President of the Executive Committee of the Mosque, who was also the manager of the school, received a letter from the Director stating that the Minister had ordered that the school should be taken over for Director-management with effect from the 21st August "as Section 6 (*i*) of the aforesaid Act was violated". On the same day, the 21st August, 1961 an Order of the Minister (referred to as the first Order) bearing date the 19th August, was published in the Government Gazette declaring that the school should cease to be unaided, that it should be deemed for all purposes to be an Assisted School, and that the Director of Education should be its Manager. From the 21st August 1961 the Director took over the management and administration of the school.

About two months later, as representations had been made to him complaining of the "take-over" of the school, the Minister made a broadcast statement, which was published as an official paper by the Government and was put in evidence. It was headed

" Zahira College
Education Minister's Statement
(Published by the Department of Information)
(Printed at the Government Press Ceylon)

> The following is the text of a broadcast made over Radio Ceylon by the Honourable Minister of Education and Broadcasting, Mr. Badiuddin Mahmud, giving the reasons for the take-over of Zahira College Colombo."

In the course of his statement the Minister referred to the "twelve conditions" (namely 6 (*a*) to (*l*)) "to be satisfied by the proprietor" of a school under Section 6 of the 1960 Act as amended and said—

> "The law further provided that a school should be taken over for Director-management if any of these twelve conditions was violated. The procedure was also laid down. According to it, the Minister, in consultation with the Director of Education has to publish an Order declaring the school to be director-managed. The law does not give the Minister any discretion to excuse the violation of any of the above-mentioned conditions or to adopt any course of action other than director-management."

In a later passage the Minister, referring to what the appellants had said in their letter of the 15th August, said:—

> "These statements were a 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. All these very poignantly pointed to the fact that the Executive Committee of the Maradana Mosque did not have the necessary funds to pay even a month's salary to its teachers. 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."

On the 2nd December 1961 the Minister made an Order under Section 4 of the 1961 Act vesting in the Crown the premises, movable property and money of the school.

The Minister's second Order vesting the property in the Crown is not attacked in these proceedings, nor is the Crown a party to them. Their Lordships are not concerned with any future proceedings that may be taken with regard to the second Order.

The first Order however which declared that the school should cease to be unaided, that it should be deemed an Assisted School and that the Director should be its Manager is attacked on various grounds.

It is contended first that the Minister in making the first Order was acting in a judicial or quasi-judicial capacity and was under a duty to observe the rules of natural justice; this he failed to do in that he did not afford the appellants an opportunity of answering the charge against them.

Further it is contended that the Minister acted in excess of his jurisdiction, in that he failed to consider the right questions and failed to make the decisions which were the requisite foundations for an Order under Section 11. The passages from his broadcast statement, which have been set out above, are relied upon as showing that, in the view of the Minister, as soon as any breach of any of the provisions of Section 6 had been proved, he had no further question to consider and no discretion to exercise and was bound to make the Order. It is contended that the Minister thus erroneously failed to consider (*a*) whether the school "is being administered in contravention of any of the provisions of this Act", which implies an element of continuance in the contravention as at the date of the Order and (*b*) whether, if such contravention had been established, it would in all the circumstances be right to make the Order. Then it is said that, as the Minister failed to consider these questions, he did not make the decisions which were the necessary foundations for the Order and therefore the Order was made in excess of his jurisdiction.

There is also a contention that there was an error of law on the face of the record. This is put on the ground that the Director's letters of the 11th and 21st August 1961 form part of the record and show that the mere single breach of Section 6 (*i*) by failure to pay the July salaries within the statutory time limit was considered a sufficient foundation for the Order. Alternatively it is put on the ground that in the circumstances of this case the record should be taken to include the Minister's own broadcast statement of his reasons for making the Order, and that statement reveals his errors in law in holding and acting upon the belief that if a single breach of the statutory requirements had been proved it would follow automatically that he must make an Order.

Herat J. in the Supreme Court refused the appellants' application on two grounds; first that certiorari only lies to question and quash a judicial act and the act in question, even if unjustified, was purely ministerial; secondly that the minister was acting *intra vires* since one flagrant act of contravention satisfied the condition of "being administered in contravention".

With all respect to the learned judge, it is not correct to regard the Minister's act as purely ministerial. It was not contested below nor before their Lordships that the Minister was acting in a judicial or quasi-judicial capacity in satisfying himself whether there had been a contravention. And until he was so satisfied he had no jurisdiction to make the Order. He must therefore in satisfying himself on that point observe the rules of natural justice. He must give the appellants notice of what was charged against them and allow them to make representations in answer.

So far as a contravention of Section 6 (*i*) was alleged the appellants had fair warning. The Director on the 11th August 1961 sent the formal complaint (referred to above) that they had failed so far to pay the salaries of the teachers for the month of July 1961 and that they had thereby contravened Section 6 (i) and it concluded with the invitation to show cause why he should not recommend that the school be taken over.

The appellants accordingly showed cause in their letter of 15th August 1961 quoted above. So far as concerned the promise of payment on the

18th instant and of good behaviour in the future, that answer was satisfactory, but so far as explaining the past lapse was concerned it was not very illuminating. Whether the appellants took their danger too lightly or whether, having little to excuse their lapse, they felt that the least said would be the soonest mended, one cannot say. But they had an opportunity to state their case and they chose to state the excuse for their lapse in very cursory form.

In respect of the complaint under Section 6 (*i*) therefore, it cannot be said that the appellants were denied an opportunity of stating their case.

They had, however, no notification that any complaint was being made under Section 6 (*k*) which is a different and, in this case, more far reaching matter. If, therefore, an imputed failure under Section 6 (*k*) can be shown to have played a material part in the Minister's decision, the appellants were not fairly treated.

The learned Solicitor-General argues forcefully that a political speech is no adequate evidence for establishing that Section 6 (*k*) formed an important part of the Minister's decision. He relies on *Franklin's* case [1948] A.C. 87 at 105. But the *dicta* in that case are not near enough to the facts of the present case to provide an analogy. Here the Minister presented a serious and detailed statement (in a broadcast which was printed as a government paper) "giving the reasons for the take over of Zahira College". There seems therefore no reason to doubt the truth of the Minister's own assertion that the appellants' contravention of Section 6 (*k*) played an important part (and, it may well be, the most important part) in his decision to make the Order.

When an applicant is applying to quash an Order on the ground that there was an infringement of the rules of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence. In their Lordships' view it is sufficiently established by the government paper that the Minister in making the Order was largely influenced by an alleged contravention of which the appellants had no notice.

Whether it could be a valid answer to say that the appellants had in truth no defence even if they had been given an opportunity of presenting it, need not be considered. That point was left open in *Ridge v. Baldwin* [1964] A.C.40. In the present case their Lordships cannot assume that the appellants had no means to satisfy the provisions of 6 (*k*). It would appear that the Mosque has funds out of which it lent money to the school in order to provide the greater part of the payment which was tendered to the teachers on 18th August. It may be that, if challenged under 6 (*k*), the appellants would have made funds available to the school for its maintenance. If indeed no funds were available, it seems hardly likely that this appeal would have been launched, since its success would in that case be followed immediately by a fresh Order based on a contravention of 6 (*k*).

On the appellants' first argument, therefore, the appeal succeeds.

The second argument is also valid in their Lordships' opinion. Before the Minister had jurisdiction to make the Order he must be satisfied that "any school . . . *is* being so administered in contravention of any of the provisions of this Act." The present tense is clear. It would have been easy to say "has been administered" or "in the administration of the school any breach of any of the provisions of this Act has been committed", if such was the intention of the legislature. But for reasons which common sense may easily supply, it was enacted that the Minister should concern himself with the present conduct of the school, not the past, when making the Order. This does not mean, of course, that a school may habitually misconduct itself and yet repeatedly save itself from any Order of the Minister by correcting its faults as soon as they are called to its attention. Such behaviour might well bring it within the words "*is* being administered". But in the present case no such situation arose. The evidence shows that before July 1961 payment of salaries had always been punctual, a fact which was used to emphasize the lapse that occurred with regard to the July

salaries. Although on this occasion the salaries were not paid, as they should have been, by 10th August, the appellants promised to pay them by 18th August. This promise they fulfilled, since for this purpose tender was equivalent to payment. Moreover a promise was made that all payments would in future be made by the due date. There was therefore no ground on which the Minister could be "satisfied" at the time of making the Order. As appears from the passages of his broadcast statement which are cited above, he failed to consider the right question. He considered only whether a breach had been committed, and not whether the school was at the time of his order being carried on in contravention of any of the provisions of the Act. Thus he had no jurisdiction to make the Order at the date on which he made it.

The remaining contentions of the appellants raise difficult questions as to the scope of the remedy by mandate in the nature of a writ of certiorari. In thinking that he had at the final stage no discretion in deciding whether or not to make the Order, was the Minister exceeding his jurisdiction or merely making a mistake in the exercise of it? What is the record in relation to the Order of a Minister, and in this case should it be taken to include the Director's letters of the 11th and 21st August 1961 and the Minister's broadcast statement of his reasons for the Order? Their Lordships, however, find it unnecessary to embark upon a discussion of these problems.

The appellants have shown by their first and second arguments that the Minister made the Order both without giving the appellant a fair hearing under 6 (*k*) and without jurisdiction. Therefore this appeal succeeds.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the decree of the Supreme Court dated the 3rd September 1963 set aside with costs and the case remitted to the Supreme Court in order that it may issue a mandate in the nature of a writ of certiorari quashing the Order of the first respondent dated the 19th August 1961. The respondents must pay the costs of this appeal.

(93387) Wt. 8052/124 100 2/66 Hw.

In the Privy Council

THE BOARD OF TRUSTEES OF THE
MARADANA MOSQUE

v.

THE HONOURABLE
BADI-UD-DIN MAHMUD AND ANOTHER

DELIVERED BY
LORD PEARCE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1966