

*Privy Council Appeal No. 32 of 1966*

**Nilamdeen Mohamed Ishak (since deceased) and others** – *Appellants*

v.

**Ibrahim Lebbe Mohamed Thowfeek and another** – – *Respondents*

FROM

**THE SUPREME COURT OF CEYLON**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE 1968

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*Present at the Hearing :*

VISCOUNT DILHORNE

LORD MACDERMOTT

LORD HODSON

LORD PEARCE

LORD PEARSON

[*Delivered by* LORD PEARSON]

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The parties to this appeal are rival claimants to the trusteeship of a mosque in Colombo and of the property belonging to the mosque.

The defendants to the action were N. M. Ishak, A. R. M. Rauoof and C. M. Shahul Hamid. Shahul Hamid explained in an affidavit that he suffered from ill-health and had ceased to act as trustee and was making no claim and would abide by the Court's decision. Therefore Ishak and Rauoof were the effective defendants. They claimed title by descent. They said that their ancestor Mamina Pullai created the trust in the year 1857 and provided that the trusteeship should descend to his male descendants; that this provision had been recognised and carried out in subsequent awards and practice; and that the defendants, being Mamina Pullai's male descendants, were entitled to the trusteeship accordingly. Undoubtedly they held the trusteeship for some years up to 22nd August 1959, but their right to retain it after that date was and is in dispute.

The first respondent, who was the plaintiff in the action, is not a descendant of Mamina Pullai. He claimed a statutory title. He said that under the Muslim Mosques and Charitable Trusts or Wakfs Act No. 51 of 1956 he was duly appointed trustee of the mosque and its property from 22nd August 1959 and his appointment had been continued.

The District Court decided in favour of the plaintiff's claim, ordering (*inter alia*) that the defendants should deliver up the mosque and its property to him. On appeal the Supreme Court affirmed the decision of the District Court by dismissing the appeal, but did not give reasons.

The defendants, Ishak and Rauoof, obtained leave to appeal to their Lordships' Board, but afterwards died, and the present appellants Siddeek and Shaukath have been substituted for them. The defendant Shahul Hamid, who had taken no active part in the action for the reasons stated above, was second respondent to the appeal.

On behalf of the appellants it has been argued (i) that there was no adequate proof of the appointment of the first respondent (the plaintiff) as trustee (ii) that his appointment was not valid (iii) that the properties were not included in the Wakf or charitable trust of the mosque, but were the subject of a family trust.

Neither of the respondents lodged any case or was represented at the hearing of this appeal.

It is necessary to consider the relevant provisions of the Act which has been mentioned (No. 51 of 1956) and the steps taken under it as appearing from the evidence in the action.

Section 5 of the Act provided for the establishment of a Board, to be called the Mosques and Muslim Charitable Trusts or Wakfs Board and to consist of the Commissioner and seven other members appointed by the Minister. Section 10 of the Act provided that the trustee for the time being of a mosque . . . opened for public worship before the appointed date should, within six months after that date, make a written application to the Board for registration of the mosque. Section 11 provided that, upon receipt of an application under Section 10, the Board might by notice require the applicant to furnish to the Board . . . all such information and documents regarding the mosque . . . as the Board might consider necessary. Section 12 provided that a Register of Mosques should be maintained. Section 13 provided that . . . upon receipt of such information and documents the Board, after making such inquiries as it might deem necessary for verifying such information and the particulars contained in the application and in such documents, should cause that mosque to be registered in the Register of Mosques by the entry therein of the prescribed particulars relating to that mosque.

Section 14 subsections (1) and (4) of the Act provided as follows:

“ 14. (1) As soon as may be, after a mosque has been registered under section 13, the Board shall appoint a person or persons to be a trustee or trustees of that mosque. In selecting a person or persons for appointment as a trustee or trustees of a mosque, the Board shall have regard to the following matters:

- (a) the terms of any trust instrument relating to that mosque;
- (b) the religious law and custom of the sect of the Muslim community concerned;
- (c) the local custom with reference to that mosque: and
- (d) the practice and other arrangements in force for the administration of the mosque.

(4) On the Board making an appointment or appointments, the person responsible immediately before such appointment or appointments for the exercise of powers and the performance of duties in connexion with the mosque shall forthwith hand over all property and documents relating to the mosque to the trustee or trustees appointed by the Board.”

Section 16 subsection (1) of the Act provided as follows:

“ 16. (1) There shall vest in the trustee or trustees of a registered mosque—

- (a) any movable or immovable property which—
  - (i) belongs to, or in any wise appertains to, or is appropriated to the use of, that mosque, or
  - (ii) is held in trust by, or in the name of, any person exclusively for the benefit of that mosque.

(b) the rents and profits of such property, and

(c) the offerings and contributions made for the use of, or to the funds of, or for the performance of religious ceremonies at, that mosque,

subject to any lease, charge or encumbrance already affecting that property and to the terms of any trust to which that property may be subject."

Section 25 (1) of the Act empowered the trustee of a registered mosque, with the approval of the Board, to sue for the recovery of any property vested in such trustee.

At the hearing of the action an administrative assistant in the Department of Mosques and Muslim Charitable Trusts, Colombo, was called as a witness for the plaintiff. He had brought to court the files relating to the mosque in question, which is the Dewatagaha Mosque, and he produced the relevant documents showing the steps which had been taken under the Act in relation to the mosque.

In pursuance of Section 10 of the Act the defendants by a letter from the defendant Ishak to the Commissioner dated 26th October 1957 made an application to the Board for registration of the mosque under the Act, and they annexed a statement containing particulars of the names of the trustees, the title, the properties, the income, the rates and the expenses. The particulars relating to the properties were as follows:

" Properties:

Shrine No. 14 Baptist Chapel Road, Colombo 7

Mosque No. 12 Baptist Chapel Road, Colombo 7

Boutiques Nos. 8, 10, 16 and 18 Baptist Chapel Road, Colombo 7

Tenements Nos. 3, 5, 7 and 9 Baptist Chapel Road, Colombo 7

Tenements are occupied by the families of the trustees."

In pursuance of Sections 11 and 13 of the Act the Board called for information and documents and held an enquiry, in which the defendants and others gave evidence. The defendant Ishak, giving evidence on 16th May 1959, said: " I state that the land and buildings bounded on the East by Baptist Chapel Road, North by Baptist Chapel, South and West by the Colombo Municipal Printing Office, are all Wakf property. The premises Nos. 18, 16, 16A, 16B, 10C, 12, 10A and 10 Baptist Chapel Road, and building houses Nos. 14/2, 14/2A, 14/3, 14/4, 14/6, 14/7, 14/8 and 14/9 Baptist Chapel Road, are all Wakf property." He went on to give information as to the leasing and occupation of these properties. Afterwards on 30th May 1959 the defendant Ishak was recalled and said that the properties other than No. 12 and No. 14 were not Wakf properties but family trust properties. In answer to questions by the Commissioner he admitted that he had given his evidence at the previous hearing without compulsion and voluntarily but he said that he had not known the meaning of the word " Wakf " and that he now understood its meaning and now said that the land on which the mosque and shrine stood was " family trusts " and there was no Wakf property. Evidence was given by the defendant Rauoof also, and in the course of his evidence the advocate for the trustees admitted that " the letter of 26-10-58 " (which is presumably to be identified with the letter of 26th October 1957 mentioned above) was written to the Commissioner by the defendant Ishak as Chief Trustee on behalf of himself and the other trustees, and that the facts and the particulars given in that letter were true.

On 1st August 1959 the Board decided to call for applications for the post of trustee. A notice inviting applications was issued, requiring applications to be received by 13th August 1959. The notice stated that preference would be given to descendants in the male line of the

late Mamuna Pillai. On 15th August 1959 it was decided to call Messrs. A. H. G. Bhaila, M. I. Abdul Hassan, S. D. M. Makeen and I. L. M. Thowfeek (the plaintiff) for an interview on 22nd August 1959 and to acknowledge receipt of other applications and tell the applicants that their applications would be considered along with the others.

Then the decisions taken at the meeting of 22nd August 1959 are recorded in the minutes as follows:

“The Board decided to register this Mosque and Shrine bounded as follows:— East: Baptist Chapel Road, North: Baptist Chapel, South and West: Colombo Municipal Printing Office. Messrs. A. H. G. Bhaila, S. D. M. Makeen and I. L. M. Thowfeek were interviewed. Mr. Abdul Hassan absented himself from the interview. The Board then considered the applications of these four persons and Messrs. N. M. Ishak, A. R. M. Rauff and C. B. Abdul Cader. The Board is of opinion that although the terms of the previous awards and the documents relating to this mosque indicate that preferably a descendant or descendants of Mamuna Pillai should be trustees, such descendants as were interested in applying for trusteeship are unsuitable for appointment. Therefore the Board decided to appoint Mr. I. L. M. Thowfeek as trustee till 31-12-59 in the first instance. The Board decided to request the Inspector-General of Police to give the trustees all assistance and protection. All other applicants to be informed of the decision pertaining to the appointment of trustee. Messrs. Ishak, Rauff and Shahul Hameed are to be informed that all properties belonging to this Mosque and Shrine should be handed over to the trustee.”

On the same day, 22nd August 1959, the Board in pursuance of Clause 13 of the Act caused the mosque to be registered in the Register of Mosques by the entry therein of the prescribed particulars relating to the mosque. A certified extract from the Register of Mosques was produced at the trial of the action by the administrative assistant who gave evidence for the plaintiff. The certified extract gave particulars relating to this mosque showing the Dewatagaha Mosque and Shrine situated at No. 14 and No. 12 Baptist Chapel Road, and the plaintiff as trustee and his initial appointment up to 31st December 1959 in the first instance and subsequent re-appointments. Under the heading “Particulars of movable or immovable properties belonging to or appropriated to the use of the Mosque, Shrine, etc.” there were then entered “all the immovable properties” within certain specified boundaries, and the properties were stated to include certain specified buildings. The specified boundaries were the same as those which had been stated in the evidence given by the defendant Ishak to the Board on 16th May 1959 and in the Board’s minutes of 22nd August 1959. The specified properties were the same (substantially at any rate) as those listed in the particulars annexed to the defendant Ishak’s letter to the Commissioner dated 26th October 1957 and in the evidence given by the defendant Ishak to the Board on 16th May 1959.

On 5th September 1959 the plaintiff applied to the Board for permission to sue the defendants for the recovery of the mosque and its properties, and the permission was granted. The properties set out in the schedule to the application were the same (or substantially the same) as those previously mentioned.

Then on 19th October 1959 the plaintiff commenced his action, filing his plaint. It is sufficient to say that in his plaint he relied on his statutory title. The defendants Ishak and Rauoof filed an answer dated 29th February 1960. It is sufficient to say that they relied on their title by descent. The plaintiff’s witnesses in the action were the

administrative assistant, who has already been mentioned, and the plaintiff himself, who gave evidence that the defendants had not given him possession of the mosque or of the immovable properties belonging to the trust. No evidence was given on behalf of the defendants. As mentioned above, the District Court decided in favour of the plaintiff and the defendants' appeal to the Supreme Court was dismissed.

As has been stated, three points (or three main points) have been taken on behalf of the appellants in this appeal.

(1) It is said that there was no adequate proof of the appointment of the plaintiff as trustee of the mosque. When the administrative assistant was giving evidence for the plaintiff at the trial of the action he purported to produce as evidence a copy of a letter dated 27th August 1959 sent by the Commissioner to the defendants informing them that the plaintiff had been appointed trustee and directing them to hand over all the properties to the plaintiff. Defendants' counsel objected to this copy letter being put in evidence because he had not been required by notice to produce the original, and the objection was upheld. Accordingly that letter could not be used as evidence. There was however ample other evidence to show that the plaintiff was appointed as trustee: there were the Board's minutes of the meeting on 22nd August 1959 and there was the certified extract from the Register of Mosques, and there was the record of the Board on 5th September 1959 giving the plaintiff permission to sue the defendants for recovery of the properties. There is a clear inference that the plaintiff was appointed as trustee.

(2) It is said that if there was a purported appointment of the plaintiff as trustee, it was invalid as contrary to the provisions of Section 14, subsection (1) of the Act. It is true that the subsection (which has been set out above) states in paragraphs (a), (b), (c) and (d) matters to which the Board in selecting a person or persons as a trustee or trustees of a mosque are to have regard, and that all or most of these matters would be in favour of appointing the defendants as trustees. This position, however, was clearly recognised by the Board at their meeting of 22nd August 1959 recorded in their minutes. They decided nevertheless not to appoint the defendants as trustees because they were in the opinion of the Board unsuitable. Clearly that was a good reason if on the true construction of the subsection the Board had a discretion. If there were no discretion, a case could arise in which the Board would be bound to appoint as trustee of a mosque some person who was utterly unsuitable in all respects. A construction of the subsection leading to that result would be unreasonable and contrary to the public interest, and should therefore be rejected if the other construction allowing the Board to have a discretion is tenable according to the language of the subsection. In fact this other construction is not only tenable but indicated by the language of the subsection. If the intention had been to make the four matters stated in paragraphs (a), (b), (c) and (d) conclusive, or the only admissible factors, that would have been provided. The requirement that the Board shall "have regard" to certain matters tends in itself to show that the Board's duty in respect of these matters is limited to having regard to them. They must take them into account and consider them and give due weight to them, but they have an ultimate discretion and are not bound to select a person or persons whom they consider unsuitable. Their Lordships agree with the view expressed by the learned District Judge, who said "In my opinion, Section 14 clearly gives the Board of Trustees a discretion as to who should be appointed a trustee, and for their guidance in the exercise of that discretion there are laid down subparagraphs (a), (b), (c) and (d) of Section 14(1) which are matters they would take into consideration in making the appointment. I am quite unable to hold that they have not taken these matters into consideration in making the appointment."

(3) It is said that the District Court should not have decided that the immovable properties which have been mentioned above belonged to the Wakf or trust of the mosque. It is true that the defendant Ishak in giving evidence to the Board on 30th May 1959 said that the properties other than Nos. 12 and 14 Baptist Chapel Road belonged not to the Wakf but to a family trust. But there was strong evidence on the other side. The defendant Ishak had said in his earlier evidence to the Board on 16th May 1959 that all the properties belonged to the Wakf. Also it would be inferred from the defendant Ishak's letter of 26th October 1957 (the application for registration of the mosque) and the particulars annexed to it that all the properties belonged to the Wakf. The Board accepted this evidence, deciding that all the properties were included in the Wakf, and plainly the District Court were entitled to take the same view and reach the same conclusion.

The appeal fails on all the points. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. As neither of the respondents took any part in the appeal there will be no order as to costs.



**In the Privy Council**

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**NILAMDEEN MOHAMED ISHAK (SINCE  
DECEASED) AND OTHERS**

v.

**IBRAHIM LEBBE MOHAMED THOWFEK  
AND ANOTHER**

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DELIVERED BY  
LORD PEARSON