SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Justice Shahid Waheed
Justice Naeem Akhter Afghan

C.A.337-L/2012
(Against the judgment dated 21.11.2008 of the Lahore High Court, Lahore passed in FAO No.260 of 2006)

Chief Administrator of Auqaf Punjab Lahore, etc ...Appellant(s)

Versus

Muhammad Hussain ...Respondent(s)

For the Appellant(s) : Mr. Abdul Ghaffar Khan, ASC

For the Respondent(s) : Mr. Muhammad Arif Raja, ASC

Date of Hearing : 18.11.2026

JUDGMENT

Shahid Waheed, J:- A landowner buries a revered member of his family on his own land and raises a shrine over the grave. Members of the public begin to visit and leave offerings. Does the land thereby become "waqf property", so that the Chief Administrator of Auqaf may take it over under section 7 of the Punjab Waqf Properties Ordinance, 1979 **("the Ordinance")** without the owner's consent? That is the primary question in this appeal. Two further questions also arise. We therefore formulate the following three questions for determination:

(i) whether the land measuring 5 kanals 3 marlas, or at any rate the 2 kanals 3 marlas under and around the shrine, is "waqf property" within the meaning of section 2(e) of the Ordinance read with Explanations 1 and 5 thereto;

(ii) whether the notification dated 19.11.2003 was issued in conformity with section 7 of the Ordinance, and in particular with its two provisos; and

(iii) whether the High Court was right in treating the absence of a deed of dedication as decisive.

2. The facts giving rise to these questions may be stated briefly. The respondent purchased land measuring 5 kanals 3 marlas, bearing Khasra No. 1723, Khewat No. 3, Khatooni No. 12, in the revenue estate of Tawaley Wali, Tehsil

Pindi Bhattian, District Hafizabad, from one Rab Nawaz through a registered sale deed dated 02.03.1988. Mutation No. 379 was sanctioned in his favour on 22.09.1988 (Ex.P-8 and Ex.P-9). He built his residence on the land and installed a tube-well. Syed Shabir Hussain Shah, a member of his family whom he describes as a saint, died in 1993. With the respondent's permission, he was buried on the land, and the respondent raised a shrine over the grave.

3. On 19.11.2003, the Chief Administrator of Auqaf, Punjab, acting under section 7 of the Ordinance, issued a notification taking over the administration, control, management and maintenance of "Darbar Hazrat Syed Shabir Hussain Shah". The schedule described the property as the khanqah, one room, a verandah (langar khana), a water pump and the shahadatgah, "measuring 5 kanals 3 marlas" in Khasra No. 1723, together with income from cash boxes, offerings and subscriptions, and any credit balance. By an order of the same date, the Manager, Waqf Properties, Hafizabad, was placed in charge. According to RW-2, possession of the shrine was taken on 25.12.2003.

4. The respondent filed a petition under section 11 of the Ordinance before the District Judge, Hafizabad. He pleaded that he had never dedicated the land, and that the notification had neither been published in the official Gazette nor served on him. The appellants replied that the land was attached to the shrine and had been taken over as such. On the pleadings, two issues were framed: whether the property is not waqf property (OPP), and whether the notification was illegal, without jurisdiction and ineffective upon the respondent's rights (OPP).

5. The respondent examined the Patwari Halqa (PW-1), appeared himself as PW-2, and tendered the revenue record (Ex.P-1 to Ex.P-9). The appellants examined Asghar Ali Cheema, Manager Auqaf, Sialkot (RW-1), and Abbas Ali, Kanoongo, Auqaf Department, Gujranwala (RW-2). RW-1 had surveyed the cash boxes on four days in August 2003 and recorded collections ranging from Rs. 290 to Rs. 1,150 a day; he did not know whether the notification was ever handed to the respondent. RW-2 admitted that the land was not waqf property, that nobody

had declared it waqf, and that the notification was not published in the Gazette; he maintained only that the shrine itself was waqf. The notification itself was not produced in evidence.

6. By judgment dated 01.07.2006, the District Judge held that 3 kanals, being under the respondent's cultivation, were not waqf property and declared the notification void to that extent. He held the remaining 2 kanals 3 marlas, found to be "part and parcel" of the shrine, to be waqf property by presumption under the Explanations to section 2(e). He did so although he had found, on the same evidence, that the respondent had not made the land waqf.

7. The appellants accepted that judgment. The respondent appealed under section 12 of the Ordinance. By the impugned judgment dated 21.11.2008, the Lahore High Court allowed the appeal and declared the notification illegal and void as to the whole 5 kanals 3 marlas, holding that the ingredients of section 2(e) were not established. Because the appellants did not challenge the District Judge's findings on the 3 kanals, those findings have attained finality. The live controversy before us therefore concerns the 2 kanals 3 marlas under and around the shrine, although the principles we state apply to the whole.

8. Section 2(e) of the Ordinance defines the expression on which the whole case turns:

> "(e) 'waqf property' means property of any kind permanently dedicated by a person professing Islam for any purpose recognised by Islam as religious, pious or charitable, but does not include property of any waqf such as is described in section 3 of the Mussalman Waqf Validating Act, 1913 (VI of 1913), under which any benefit is for the time being claimable for himself by the person by whom the waqf was created or by any member of his family or descendants."

Three of the Explanations to that clause are relevant:

> "Explanation 1. — If a property has been used from time immemorial for any purpose recognised by Islam as religious, pious or charitable, then, in spite of there being no evidence of express dedication, such property shall be deemed to be waqf property.

> Explanation 4. — The income from boxes placed at a shrine and offerings, subscriptions or articles of any kind, description or use presented to a shrine or to any person at the premises of a shrine, shall be deemed to be waqf property.
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> Explanation 5. — Property permanently dedicated for the purposes of a mosque, takia, khankah, dargah or other shrine shall be deemed to be waqf property."

9. Section 7(1) empowers the Chief Administrator, notwithstanding any other law, custom, decree or pending proceeding, "by notification, [to] take over and assume the administration, control, management and maintenance of a waqf property", subject to two provisos:

> "Provided that, during the lifetime of a person dedicating a waqf property, the Chief Administrator shall not take over and assume the administration, control, management and maintenance of such waqf property except with the consent of such person and on such terms and conditions as may be agreed upon between such person and the Chief Administrator:
>
> Provided further that the notification shall be served upon the management or the mutawalli and also affixed on some prominent part of the property which is sought to be taken over."

10. Section 11(1) allows any person claiming an interest in property notified under section 7 to petition the District Court, within thirty days of the publication of the notification, for a declaration that the property is not waqf property, or is waqf property only within the limits stated in the petition. Section 12 provides an appeal to the High Court within sixty days.

11. Five features of this scheme of law matter here:

a) The power in section 7 is a power over "a waqf property" and nothing else. The definition in section 2(e) is the gateway to the power.

b) The definition of “Waqf Property” provided in Section 2(e) rests on a permanent dedication. Explanation 1 dispenses with proof of express dedication only where religious user is shown "from time immemorial". Explanation 5 widens the purposes to include shrines, but still requires that the property be "permanently dedicated".

c) Explanation 4 to section 2(e) deems offerings and cash-box income to be waqf property. It does not touch the land on which a shrine stands.

d) The first proviso to section 7(1) protects a living dedicator. The second requires that the notification reach the persons in management and be displayed on the property.

e) Sections 11 and 12 make the District Court, and on appeal the High Court, the forum in which the existence of waqf is finally determined. The Chief Administrator's own view of the matter is not conclusive.

12. A waqf is the detention of the corpus of property in the ownership of Allah Almighty, with its usufruct devoted in perpetuity to a purpose Islam recognises as religious, pious or charitable. Under the Hanafi school, the classical texts (Al-Hidaya, Fatawa-e-Alamgiri) and the standard commentaries (Ameer Ali, Mahommedan Law, Vol. I; Mulla, Principles of Mahomedan Law, chapter on Wakfs) agree on its essentials. There must be an owner competent to dedicate. There must be a declaration of intention to dedicate permanently. The object must be lawful. The owner must be divested. Once a waqf is complete, the founder's ownership is extinguished, and the property becomes inalienable and irrevocable. Imam Abu Yusuf held that a declaration alone completes the waqf. Imam Muhammad required, in addition, delivery to a mutawalli or its equivalent. On either view, divestment of the owner is the heart of the matter.

13. Courts look to substance, not form. In Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry (1894) LR 22 IA 76, the Privy Council declined to treat as waqf a settlement under which the substantial benefit remained with the settlor's family. A dedication that leaves the owner's dominion and enjoyment intact is not a dedication at all.

14. Muslim law does not require a waqf to be made in writing. It may be oral. It may be inferred from conduct. In the case of an ancient institution, it may be inferred from user, and Explanation 1 recognises this. What is essential is a declaration of intention to dedicate, express or implied, and a divestment of the owner's interest. In the case of a mosque or graveyard meant

for the public, that is ordinarily followed by its actual use by the public.

15. Precisely because a waqf extinguishes ownership permanently, it is not lightly inferred. Where it is founded on religious user rather than on express dedication, the user must, as Explanation 1 requires, be from time immemorial. The evidence of it must be clear, because recognising a waqf by user radically alters the ownership of property. This Court, in Chief Administrator Auqaf, Punjab v. Koura alias Karam Ilahi (PLD 1991 SC 596), treated proof of permanent dedication as the indispensable condition of waqf under section 2(e).

16. The issues placed the initial onus on the respondent. He discharged it. His title rests on a registered sale deed, a sanctioned mutation and an unbroken chain of entries in the record of rights showing him as owner in possession. Under section 52 of the Punjab Land Revenue Act, 1967, those entries carry a presumption of correctness. Neither the title nor the entries were disputed. Once the respondent had proved ownership, the burden of proving that he had divested himself of it lay on the appellants, who asserted the waqf: Articles 117 and 119 of the Qanun-e-Shahadat, 1984. The appellants led no evidence of dedication. RW-1 spoke only of the cash boxes. RW-2 admitted that the land was not waqf, that nobody had ever declared it waqf, and that the notification was never gazetted. The notification itself, the foundation of the appellants' case, was withheld. The burden was not discharged.

17. "Time immemorial" denotes user so ancient that its beginning is beyond living memory or record. Here the beginning is precisely known. The khasra girdawari for 1987 to 1990 (Ex.P-3) records the land as banjar qadeem, later brought under wheat and fodder. The records of rights for 1990-91 and 1994-95 (Ex.P-4 and Ex.P-5) show it as canal-irrigated land cultivated by the respondent. The grave dates from 1993. The words "Ghair Mumkin Darbar" first appear in the record of rights for 1998-99 (Ex.P-6). The notification followed in 2003. About ten years of visits and offerings is not user from time immemorial. Explanation 1 has no application.

18. The District Judge treated the existence of the shrine as itself attracting a presumption of waqf. That misreads Explanation 5. It applies to property "permanently dedicated" for the purposes of a shrine. It enlarges the class of recognised purposes; it does not dispense with proof of dedication. The presence of a shrine on land shows the use to which the owner has put it, not that he has parted with ownership.

19. The appellants' real case is that the respondent dedicated the land by conduct, in burying his kinsman and raising a shrine. Conduct can amount to dedication only if it is unequivocal and consistent with nothing but an intention to divest. The respondent's conduct fails that test. We are led to this conclusion for the following cumulative reasons:

(i) A graveyard becomes waqf where the owner, intending to dedicate, permits the public generally to bury their dead in it. Permitting the burial of one member of one's own family, with no permission to the public, is the opposite of divestment: it keeps the grave within the family's dominion. (See Abdul Rehman v. Murugappa 83 IC 536, Ali Muhammad Khan v. Ali Akbar Khan, AIR 1924 Lahore 58; Dawson v. Princess Rounia Zamni Begum AIR 1928 Rang 268)

(ii) Visits by devotees and the offerings they leave are, on this record, by the owner's leave. Permissive access does not transfer ownership.

(iii) The respondent continued to live on the land, run the tube-well and cultivate the remainder. The revenue record shows him in possession throughout. He never appointed a mutawalli or delivered possession to anyone.

(iv) The area said to belong to the shrine is not stable in the record. It is recorded variously as 3 marlas, 2 kanals 3 marlas and 4 kanals 3 marlas, varying with the respondent's cultivation from year to year. A waqf, once made, cannot grow or shrink with the owner's cropping pattern. The fluctuation is itself evidence that the owner retained control.

20. If, on the appellants' own theory, the shrine were treated as a family endowment managed by the founder's family for its own benefit, it would fall within the exclusion at the end of section 2(e) for waqfs under section 3 of the Mussalman Waqf

Validating Act, 1913. No such case was pleaded or proved, and we say no more about it.

21. The entry "Ghair Mumkin Darbar" describes the physical character of the land: that it is not cultivable because a structure stands on it. It is not an entry of title. The presumption under section 52 of the Land Revenue Act attaches to the entries of ownership and possession, and those entries in the same record name the respondent. A column describing the kind of land cannot override them. The District Judge found, on a careful reading of the evidence, that the respondent had not made the disputed land waqf. Having so found, he could not hold 2 kanals 3 marlas of the same land to be waqf by presumption, especially by reference to Explanations that either do not apply (Explanation 1) or themselves require dedication (Explanation 5). His finding on the 2 kanals 3 marlas does not follow from his own appraisal of the evidence and cannot stand. We therefore hold that no part of the land is waqf property within the meaning of section 2(e) of the Ordinance.

22. Section 7 confers power over "a waqf property". The existence of waqf property is therefore a condition precedent to the power, a jurisdictional fact. A statutory authority cannot enlarge its jurisdiction by a wrong decision on such a fact. The principle is long established. In White and Collins v. Minister of Health [1939] 2 KB 838, a compulsory purchase order was quashed because the land was in fact part of a park, which the statute excluded. In R v. Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74, the House of Lords held that where a power depends on the existence of a fact, the court decides for itself whether the fact exists. See also Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147. Applied here, the Chief Administrator could not, by describing the respondent's land as waqf, confer on himself the power to take it over. Since the land is not waqf property, the notification was issued without jurisdiction and is void.

23. The result would be the same even if the appellants' case were accepted. Their case, and the reasoning of the District Judge, is that the respondent himself created the waqf by

building the shrine. On that footing, the respondent is "a person dedicating a waqf property", and he is alive. The first proviso to section 7(1) then forbids the Chief Administrator to take over the property "except with the consent of such person and on such terms and conditions as may be agreed upon". The language is prohibitory. Consent and agreed terms are a condition precedent, not a formality. The record shows that the appellants neither sought nor obtained the respondent's consent, and that no terms were settled. Where a statute requires a thing to be done in a particular manner, it must be done in that manner or not at all: Taylor v. Taylor (1875) 1 Ch D 426; Nazir Ahmad v. King-Emperor (AIR 1936 PC 253). The appellants cannot treat the respondent as the dedicator in order to establish the waqf, and as a stranger in order to escape the proviso. A party may not approbate and reprobate. The appellants are thus caught either way. If the respondent made no dedication, there is no waqf and no power. If he did, he is a living dedicator whose consent was mandatory and was not obtained.

24. The second proviso to section 7(1) requires that the notification be served upon the management or mutawalli and affixed on a prominent part of the property. It is the step that brings the takeover to the notice of the person in control and sets running the thirty days allowed by section 11. The principle behind it is old. In Cooper v. Wandsworth Board of Works (1863) 14 CB (NS) 180, a house pulled down by a public board without notice to its owner was held to have been unlawfully demolished, because a public body may not interfere with a person's property without first giving him an opportunity to be heard. There is no evidence of service on the respondent, who was managing the shrine, or of affixation. RW-1 did not know whether the notification was delivered, and RW-2 admitted that it was not gazetted. The appellants did not even produce the notification. Under Article 129(g) of the Qanun-e-Shahadat, 1984, we presume that, had it been produced, it would not have supported them. The notification dated 19.11.2003 is therefore void on three independent grounds: the absence of the jurisdictional fact; non-compliance with the first proviso; and non-compliance with the second proviso.

25. Article 24(1) of the Constitution provides that no person shall be deprived of his property save in accordance with law. The principle is as old as Entick v. Carrington (1765) 19 St Tr 1029: an official who interferes with a person's property must show the law that authorises it, and if he cannot, he has acted unlawfully. Article 23 guarantees the right to hold property, and Article 4 the right of every person to be dealt with in accordance with law. To take over the administration, control, management and maintenance of land is to deprive its owner of its use and enjoyment. Such a deprivation is lawful only if the conditions on which the statute grants the power are strictly met. They were not. Article 10A, though inserted after the events in this case, reinforces the reading we have given: the provisos to section 7 are the statute's own expression of the requirement that a person be heard before his property is taken out of his hands. The Ordinance must be construed so as to keep the Chief Administrator's power within its limits, not to enlarge it at the cost of private ownership.

26. The High Court reached the right result. One observation in its judgment, however, needs correction. It described a deed of dedication as "required by law" to establish waqf. That is too broad. As explained hereinabove, a waqf may be made orally or by conduct, and Explanation 1 expressly recognises waqf by immemorial user without any proof of express dedication. The correct ground of decision is that no dedication, express or inferred, was proved, and that no user from time immemorial was shown. We affirm the High Court's judgment on that ground and on the further grounds stated above.

27. For these reasons:

(i) The appeal is dismissed.

(ii) The judgment of the Lahore High Court dated 21.11.2008 in F.A.O. No. 260 of 2006 is affirmed, with its reasoning modified as stated hereinabove.

(iii) The notification No. SOP-1(133)A/95 dated 19.11.2003, and the consequential order of the same date (and any order dated 21.11.2003 or 25.11.2003 issued pursuant to it), are declared to

have been issued without lawful authority and to be of no legal effect in respect of the land measuring 5 kanals 3 marlas in Khasra No. 1723, Khewat No. 3, Khatooni No. 12, revenue estate Tawaley Wali, Tehsil Pindi Bhattian, District Hafizabad, and the structures on it.

(iv) The appellants shall restore the administration, control and possession of that land and its structures to the respondent within thirty days of receipt of this judgment. The revenue authorities shall correct the record of rights accordingly, if any entry was made pursuant to the notification. Sums already received by the appellants and credited to the Auqaf Fund shall not be reopened.

(v) There shall be no order as to costs.

Judge

Judge

Lahore
18.11.2026
Irfan Aslam + Shehryar Rabbani, L/C
APPROVED FOR REPORTING