

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Manzoor Ahmad Malik
Mr. Justice Sardar Tariq Masood
Mr. Justice Syed Mansoor Ali Shah

Civil Petitions No.522-L, 523-L & 588-L of 2013.

(on appeal from the judgment of Lahore High Court, Lahore
dated 29.1.2013, passed in ICA No.268/2010 & 51/2012)

Sikandar Hayat Khan Jogazai, etc (in CP-522-L & 523-L of 2013)
Chief Administrator Auqaf Punjab, Lahore (in CP-588-L/2013)

...Petitioners

Versus

Muhammad Hashim, etc (in all cases)

...Respondents

For the petitioners: Mr. Mehboob Azhar Sheikh, ASC.
(in CPs No.522-L & 523-L of 2013)
& Mr. M. Anwar Bhaur, ASC (in CP-
588-L/13)

For respondent No.5 to 8: Mr. M. Usman Arif, ASC.
(in CPs No.522-L & 523-L of 2013)

For respondents No.1-4: Mr. Sharjeel Adnan Sheikh, ASC.
(in all cases)

For Govt. of Punjab: Rana Shamshad Khan, Addl.A.G.

Date of hearing: 07.03.2019

ORDER

Syed Mansoor Ali Shah, J.- *Waqf* or religious
endowment for the *Shrine and Khanqah of Hazrat Makhdoom Abdul*
Rasheed Haqqani was created in the year 1908¹ over land ("*waqf*
property") situated in tehsil and district Multan. In the year 1950,
a school was also established on a portion of the said *waqf*
property and subsequently, in 1960, the Chief Administrator Auqaf

¹ Vide mutation dated 03.07.1908

took over the said *waqf property* under the erstwhile Punjab Waqf Properties Ordinance, 1959 vide notification dated 23.05.1960. An amended schedule of the said *waqf property* was issued on 24.07.1973 under the Punjab Waqf Properties Ordinance, 1979 ("**Ordinance**") showing the total area of land constituting *waqf property* as 202 acres and 4 marlas.

2. The question before us is the legality of the grant of lease of *waqf property* (4 kanals) by the Chief Administrator Auqaf to the petitioner for setting up a petrol pump, on a monthly rent of Rs. 4,000/- per month for a period of 30 years. The descendants of the original dedicator (*waqif*) challenged the said grant through a constitutional petition, on the ground that the lease offends the object of the *waqf* and is violative of the provisions of the Ordinance and the Rules framed thereunder. The High Court set aside the grant of lease for setting up a petrol pump vide judgment dated 10.02.2010 holding that the trust property could not lawfully be given to the petitioner for establishment of a petrol pump, the grant of lease for 30 years is illegal and the land in question being a playground attached to a school cannot be put to a different use. The Division Bench of the High Court upheld the judgment in appeal vide impugned Order dated 29.01.2013. Hence, the instant petitions.

3. Learned counsel for the petitioners vehemently argued that the department enjoys the power under the Ordinance and the Punjab Waqf Properties (Administration) Rules, 2002 ("**Rules**") to lease out a portion of *waqf property* for setting up a petrol pump

and the department has fully complied with the Rules for doing so and prayed that the judgment of the Courts below be set aside.

4. On the other hand, learned counsel for the respondents have argued that lease of the *waqf property* for setting up a petrol pump offends the provisions of the Ordinance and the Rules. Besides, it is also against public interest as a petrol pump is being proposed to be set up in a playground which is adjacent to a school. He supported the judgments of the Courts below.

5. We have heard the learned counsel for the parties at some length and have gone through the record and the law on the subject. The legal questions involved in the case are whether a part of *waqf property* can be leased out for commercial purposes? And if so, what is the mode, manner and procedure available to the Chief Administrator Auqaf for sanctioning such a lease under the Ordinance and the Rules? In order to meaningfully answer the above legal questions, we need to first consider the concept of *waqf* in Islam; its historical importance; its purpose and utility today and the scope of administration and development of *waqf* properties by the Chief Administrator Auqaf under the Ordinance.

Waqf: meaning and concept

6. *Waqf* and its plural form, *auqaf*, are derived from the Arabic root verb, *waqafa*, which means "to stop" or "to hold."² When the word is employed in a legal sense with regard to a piece of land or a building, it signifies that henceforth that "property" is "stopped." In theory, it can never again change hands by

² H. Wehr, A Dictionary of Modern Written Arabic, 1091-1094.

inheritance, sale or seizure. An individual creating a *waqf*, known in Arabic as the "*waqif*," divests him or herself of the formal rights to possession, but retains the power to appoint a custodian i.e., a "*mutawali*" (literally "one who is trusted"), who manages the property dedicated³. *Waqf* is an inalienable trust⁴ and is the granting or dedication of property in trust for a pious purpose.⁵ D.F. Mullah, in his compilation of principles of Muhammadan Law, has defined "*waqf*" to mean the permanent dedication by a person professing the Mussalman [Muslim] faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.⁶" "*Waqf* signifies the extinction of the proprietor's ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied for the benefit of mankind.⁷" "*Waqf Property*" is defined in section 2(e) of the Ordinance in the following manner:-

"*Waqf Property* means property of any kind permanently dedicated by a person professing Islam for any purpose recognized by Islam as religious pious, or charitable....

Origins of Waqf in Islam

7. Although the word "*waqf*" is not specifically mentioned in the Holy Quran, yet there are many verses⁸ which inspire Muslims to donate and give charity, to obtain piety, righteousness

³ Gregory C. Kozlowski, *Muslim Endowments and Society in British India*- Cambridge South Asian Studies. 1985

⁴ Peter C. Hennigan. *The Birth of a Legal Institution- The formation of the Waqf in the Third Century*. Brill 2004

⁵ Webster's Revised Unabridged Dictionary (1913) by G. & C. Merriam Co.

⁶ D.F.Mullah. *Principles of Muhammadan Law*, para, 173

⁷ See *A Digest of Muhammadan Law*, pp. 557-558 (Neil B.E. Baillie) 2nd Edition and *The Hedaya*, pp.231, 234 (Charles Hamilton) 2nd Edition.

⁸ See Al-Quran, Surah al-Baqarah (2: 215, 261, 265, 271, 280), Aal-e-Imran (3: 92, 134), al-Hadid (57: 18) and al-Lail (92: 18-21).

and fore mostly, the closeness and love of the Allah Almighty. A hadith quoted by Hazrat Abu Hurairah (Allah be pleased with him) is usually referred by the Islamic scholars as the basis of the institution of "*waqf*" in Islam. He reported Allah's Messenger, Mohammad (may peace be upon him) as saying: "when a man dies, all his acts come to an end, but three; recurring charity, or knowledge (by which people) benefit, or a pious son who prays for him (for the deceased)⁹." *Waqf* is the best form of a continuous charity as the dedicated property earns for the dedicators continuous good deeds even after his death. It is this understanding that motivates the Muslims to promote this religious social-welfare institution. Syed Ameer Ali, a great judge and jurist of the subcontinent (Indo-Pak) speaking for the Judicial Committee of the Privy Council in the case of *Vidya Varuthi v. Blusami* (AIR 1922 PC 123) observed:

"13. But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, ... that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty....." (*emphasis underlined*)

8. Hazrat Ibn-e-Umar (may Allah be pleased with him) reported: "Umar acquired a land at Khaibar. He came to Allah's Apostle (may peace be upon him) and sought his advice in regard to it. He said: Allah's Messenger, I have acquired land in Khaibar. I have never acquired property more valuable for me than this, so

⁹ Sahih Muslim, Vol-III, *Kitab al-Wassiya*, Hadith-4005 (Translated by Abdul Hamid Siddiqi, 1973)

what do you command me to do with it? Thereupon he (Allah's Messenger) said: If you like, you may keep the *corpus* intact and give its produce as *Sadaqa*. So, Umar gave it as *Sadaqa* declaring that property must not be sold or inherited or given away as gift. And Umar devoted it to the poor, to the nearest kin, and to the emancipation of slaves, and in the way of Allah and guests....."¹⁰. Thus, these two traditions of the Holy Prophet (peace be upon him) are commonly considered providing the express basis for the emergence of *waqf* in Islam.

Role of Waqf in the development of Islamic Civilization

9. It is not an exaggeration to claim that the *waqf* created in perpetuity has provided foundation for much of what is considered "Islamic civilization."¹¹ *Waqf* fulfilled a crucial gap between the resources available with an emerging State and the need of a growing community in the early days of Islam, and in the later years became a main source for various public services. The *Waqf* contributed to the building of Islamic civilisation; through which many mosques, schools, and educational centres were built along with libraries, scientific research centres and other fields in different walks of life. Throughout the history of the Islamic world, such settlements provided for many of the spiritual and temporal wants of Muslims.¹² *Waqf* played an important role in establishing a flourishing civilization. It created a comprehensive scientific and cultural renaissance. These funds were the main resource for

¹⁰ Sahih Muslim, Vol-III, *Kitab al-Wassiya*, Hadith-4006 (Translated by Abdul Hamid Siddiqi, 1973)

¹¹ Peter C. Hennigan. *The Birth of a Legal Institution- The formation of the Waqf in the Third Century*, Brill 2004

¹² Gregory C. Kozlowski, *Muslim Endowments and Society in British India*- Cambridge South Asian Studies. 1985

schools, scientific centres and libraries, which gave way to the training of many scientists, researchers, inventors, and intellectuals. Therefore, *Waqf* is described as the most important institution which provided the foundation for Islamic civilization as it was interwoven with the entire religious life and the social economy of Muslims. It covered almost all the needs of life during the early period of Islamic civilization; encompassing health, education, basic infrastructures, business and commercial activities, job creation, food provision for the hungry and livestock, shelter provision for the poor and needy, and supporting the agricultural and industrial sectors without any cost to the government¹³. *Waqf* is in fact a comprehensive mechanism of public finance that is capable of bringing upon economic progress as well as social development.

10. With this religious and historical perspective of *waqf* in Islam, we now proceed to examine the legal framework regarding the administration and management of the waqf properties under the Ordinance and the Rules.

Scheme of law under the Ordinance and the Rules

11. The preambular purpose of the Ordinance is to provide for the proper management and administration of waqf properties in the Province of the Punjab. *Waqf* property is defined¹⁴ to mean any kind of property permanently dedicated by a person professing Islam for any purpose recognized by Islam as religious, pious or

¹³ See Baqutayan, et al. *Waqf Between the Past and Present*. Mediterranean Journal of Social Sciences. 9. 149-155. (2018)

¹⁴ Punjab Waqf Properties Ordinance, 1979, section 2(e)

charitable. Property used for the relief of the poor and the orphans, education, workshop, medical relief, maintenance of shrines or for any other object of charitable, religious or pious nature or of general public utility is deemed to be charitable purposes under the Ordinance.¹⁵ The income from boxes placed at shrines and offerings, subscriptions or articles presented at the shrine and property permanently dedicated for the purposes of mosque, shrine, *takia*, *khankah*, *dargah* is deemed to be waqf property. All the waqf properties in the Province vest in the Chief Administrator of Auqaf for the Province appointed by the Government including all the rights, assets, debts, liabilities and obligations relating thereto.¹⁶ Chief Administrator Auqaf is a corporation sole and enjoys perpetual succession and can sue or be sued in its corporate name¹⁷. Chief Administrator Auqaf enjoys the power to take over and assume the administration, control, management and maintenance of the waqf property.¹⁸

12. Under section 15 of the Ordinance, the Chief Administrator Auqaf, is to settle schemes for the administration and development of a waqf property and through the settlement of schemes the Chief Administrator is to give effect to such wishes of the *waqif*, as can be ascertained, and to which effect can be reasonably given. Under the Punjab Waqf Properties (Administration) Rules, 2002, ("Rules 2002") the Chief Administrator Auqaf, after taking control of the waqf property appoints a Manager to administer, control, manage and maintain

¹⁵ *Id.* Explanation 6 to section 2(e).

¹⁶ *Id.* section 3

¹⁷ *Id.* section 4

¹⁸ *Id.* section 7 *ibid*

the waqf property on behalf of the Chief Administrator. The Manager is to prepare scheme for the waqf property to be settled by the Chief Administrator. The scheme must honour the wishes of the *wakif*, as can be ascertained and in the absence of any evidence, the waqf property shall be used for the purpose for which it has been used or for any purpose recognized by Islam as religious, pious or charitable.

13. Under section 17, there are two broad purposes for utilization of the waqf property; (i) the purpose for which it (waqf property) was dedicated or has been used; and (ii) for any (other) purpose recognized by Islam as religious, pious or charitable, as the Chief Administrator may deem fit. The Chief Administrator Auqaf is to maintain a complete record of all the properties under his control and management and keep accounts of income and expenditure of such properties including expenditure on the Chief Administrator and his establishment. All moneys are credited to a fund, called Auqaf Fund, which is under the control of and operated upon by the Chief Administrator subject to general supervision of the Government. The accounts maintained by the Chief Administrator are to be audited at the end of each financial year and the Audit Report with the comments of the Chief Administrator is to be laid before the Government¹⁹. The Punjab Waqf Properties (Accounts) Rules, 1982 provide that the Auqaf Fund shall be audited once a year by the Local Fund Audit Department of the Government.

¹⁹ *Id.* section 18

14. Sections 9 and 19 of the Ordinance recognise that the waqf property can be put out on lease as section 9 provides for termination of lease and resumption of tenancy in cases of breach of the agreement and section 19 deals with recovery of rent or lease money as arrears of land revenue in case of default. While Rule 7 of the Rules 2002 framed under section 26(2)(c) specifically deals with terms and conditions on which waqf property may be leased out. However, any lease of waqf property shall be a part of the scheme approved by the Chief Administrator Auqaf and the "directions" given in Rule 7 are to be read as part of the scheme. The period of lease shall be for one year and not more than three years but can be extended for another two years with the approval of Chief Administrator Auqaf. Lease can also be granted for a longer period if Chief Administrator Auqaf is of the opinion that it is in the best interest of the waqf property.

Opinion

15. One of the core statutory obligations²⁰ of the Chief Administrator Auqaf is to settle a Scheme for the administration and development of the waqf property. In settling a scheme the Chief Administrator Auqaf is to honour the wishes of the *waqif*, as can be ascertained and to which effect can be given reasonably.²¹ Otherwise, the Scheme is to advance purposes recognized by Islam as religious, pious or charitable.²² Relief of poor and the orphans, education, workshop, medical relief, maintenance of shrines or the

²⁰ where gross annual income from the waqf property exceeds Rs 5,000/-, which is so in the instant case.

²¹ *Id.* section 15(2)

²² *Id.* section 17

advancement of any other object of charitable, religious or pious nature or of general public utility are deemed to be charitable purposes under the Ordinance.²³ Under the Rules 2002, the Chief Administrator Auqaf after taking over and assuming the administration of a waqf property appoints a Manager to administer, control, manage and maintain the waqf property. It is the Manager who prepares a scheme for the administration and development of the waqf property under his charge. The scheme is then submitted to the Chief Administrator Auqaf, who may settle or refuse to settle or return the scheme for reconsideration or may call for the further details or information about the scheme or direct any further examination of the scheme as he may consider²⁴.

16. The administration and development of waqf property by the Chief Administrator Auqaf under the Ordinance is, therefore, through the mode and mechanism of *schemes*, with the singular object of advancing and maximizing the wishes of the *wakif* or the religious, pious and charitable purposes recognized by Islam. A scheme under section 15 of the Ordinance is, therefore, a strategic plan, a road map, a financial feasibility or a business plan for the administration and development of the waqf property, driven and directed by the objectives settled by the wakif or as given under the law. While the word "administration" in section 15, signifies the overall control, management and maintenance of the waqf properties, the expression "development²⁵" is of much more

²³ *Id.* Explanation 6 to section 2(e)

²⁴ The Rules, 2002. Rules 4 and 5

²⁵ The word "development" has been added in the Ordinance, 1979 and was not there in the corresponding section 11 of West Pakistan Waqf Properties Ordinance, 1961.

significance and enjoins upon the Chief Administrator Auqaf to expand, evolve and enlarge the scope of charitable work of the waqf with changing times. The scheme to be settled by the Chief Administrator Auqaf must not only carry a plan of action or a programme for the administration of the waqf properties but also the stratagem and vision for its development, evolution and future growth. The Chief Administrator Auqaf must consider, at all time, the best use of the waqf property is to achieve its noble objectives, keeping in view the needs of the time and that of an evolving society.

17. The scheme, like any strategic or development plan has to consider, evaluate and weigh the exiting status of the waqf properties, the revenue generated, the expenditure incurred and most importantly, the central theme of the scheme: the actual advancement of the wishes of the waqif or the promotion of religious, pious and charitable work or work of public utility for the care and welfare of the society. The Chief Administrator Auqaf in settling a scheme must not lose sight of this central objective of the scheme and must always remain cognizant of the historical significance of waqf and how it contributed to the building of Islamic civilization; through which many mosques, schools, and educational centres were built alongwith libraries, scientific research centres and other fields in different walks of life, which gave way to the training of many scientists, researchers, inventors, and intellectuals. The scheme is fundamentally for advancement of such causes and must justify, at all times, that the waqf property is being used to promote and expand the objectives

mentioned above, improving and growing with time. The settling of scheme, therefore, goes to the root of effective administration and development of waqf property and is the central function of the Chief Administrator Auqaf under the Ordinance. To draw up a scheme, therefore, requires the Chief Administrator Auqaf to have sufficient expertise in management, administration, finance, accounts, marketing, planning, development, policy and in running of public charities. He should also be supported by informed and expert recommendations of the qualified managers and administrators appointed under the Ordinance.

18. Maximization of charitable work requires a strong and a growing revenue base, which can be generated through use or letting out of the immovable waqf property or by investments of moneys collected from the waqf property (moveable waqf property). Therefore, waqf property can either be put to use to serve a religious, pious or charitable cause *directly* i.e., by running and managing a shrine or a khanqah or by establishing a school, college, university, hospital, research and training centres, etc for the general public utility and welfare of the society, either free or at subsidized rates; or *indirectly*, by leasing it out for purposes closer to the objectives of the waqf. Only as an exception and in the absence of any viable option to lease the property out for purposes closer to the objectives of the waqf, can the waqf property be leased out for commercial purposes. It is underlined that the Scheme must weigh, evaluate and discuss alternatives when leasing out waqf property and preference should always be given to lease out waqf property for purposes that are more akin or close to the

wishes of the *wakif* or the objectives given under the law, including charitable purposes. Both the *direct* or *indirect* use of waqf property must be justified, in the manner discussed above, with reasons, to be laid out in the scheme that is to be settled and sanctioned by the Chief Administrator Auqaf.²⁶ A deliberative and a well-reasoned scheme shows structured exercise of discretion by the Chief Administrator Auqaf, who is burdened with the sole authority under the law, to settle the scheme for the administration and development of the waqf property.

19. In the present case, the proposal for grant of lease of 4 kanals of *waqf property* for setting up of a petrol pump does not form part of a scheme as discussed above. In fact no scheme has been submitted with the Court. A summary put up for the lease of *waqf property* (as in the present case) to set-up a petrol pump in isolation of the other factors and considerations, without an overall plan or a road map, as discussed above, does not constitute a scheme, envisaged under the Ordinance. Questions like: why is the waqf property required to be put on lease? why for a petrol pump and not for any other purpose more akin to the objectives of the waqf? why for a meagre rental of Rs 4,000/- per month? and why for a period of 30 years? why allegedly in a playground abutting a school? And whether other alternatives were discussed and weighed by the Chief Administrator Auqaf? is the *waqf* in a deficit or loss ? How is the rental money to be utilized for the advancement of the objectives of the *waqf* ? These questions and points need to be explained and answered in the scheme, which, in

²⁶ The Rules, 2002. Rule 7

fact, showcases the lawful exercise of discretion by the Chief Administrator Auqaf under the Ordinance. According to the information supplied to this Court, total revenue earned by the *waqf property* is Rs 3,958,934/- (R) from lease of agricultural land, rent of shops, income from cash boxes, rent of colleges and contract of *mela* ground; while the expenditure of the *waqf* is Rs 1,671,792/- (E). Thus, revenue exceeds the expenditure by Rs 2,287,142/- (R-E). Therefore, the leasing out of a portion of *waqf property* for the establishment of petrol pump (commercial purpose) needs justification and requires explanation. We hold that in the absence of a well thought out scheme, sanction for lease of any *waqf property* cannot be permitted.

20. Sections 9 and 19 of the Ordinance read with Rule 7 of the Rules, 2002 recognize that the *waqf property* can be put out on lease to generate income for the *waqf*. Under Rule 7 of the Rules 2002, lease is granted for a year and shall not exceed three years. However, it is extendable for another two years subject to the approval of the Chief Administrator Auqaf. Finally the lease can be extended even for a longer period if the Chief Administrator Auqaf is of the opinion that it is in the best interest of the *waqf property*. Any departure for the statutory period of lease provided in Rule 7 must be explained and recorded in the scheme with reasons and must show, how the extension in time, best serves the interest of the *waqf property*.

21. The scheme settled for the administration and development of *waqf properties* is a manifestation of the discretion exercised by the Chief Administrator Auqaf, in the best interest of the *waqf*

under the law and is, therefore, always open to judicial review by the courts.

22. For the above reasons, the grant of lease of waqf property for the setting up of a petrol pump to the petitioner without there being settlement of a proper scheme, as discussed above, and in the absence of any plausible reasons for extending the lease beyond the statutory period given under Rule 7 of Rules 2002, is offensive to the provisions of the Ordinance and Rules 2002, and hence illegal. We uphold the decision of the High Court, but for reasons of our own, discussed above. Leave is, therefore, declined and these petitions are dismissed. Chief Administrator Auqaf, may lease out *waqf property*, in future, but after settlement and sanction of the scheme, in the manner provided under the Ordinance and Rules 2002, as explained in this judgment.

23. The Deputy Registrar of the Lahore Branch Registry of this Court shall ensure that a copy of this judgment is dispatched to all the Chief Administrators Auqaf, in the country, for their information and compliance.

Judge

Judge

Announced.

Islamabad,
16th September, 2019.

Judge

Judge.

Approved for reporting.

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