

JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

F.A.O No.46/2012.

Raja Muhammad Ishtiaq Vs. Ch. Muhammad Khan etc.

Appellant by: Raja Abid Hussain Janjua, Advocate.

Respondent No.2 by: Rana Abdul Latif Khan, Advocate.

Respondents No.1 & 3 Ex-parte

Respondent No.4 by: Mr. Naseem Ahmed Shah, Advocate.

Date of Decision: 08.10.2019.

MOHSIN AKHTAR KAYANI, J:- Through the instant appeal, the appellant has assailed the order dated 13.07.2012, passed by learned Additional District Judge (East) Islamabad, whereby petition filed by the appellant in terms of Auqaf (Federal Control) Act, 1976 was dismissed.

2. Brief facts of the case are that Darbar of Sher Shah Mast is situated in village Malot Tehsil & District Islamabad and the said Darbar has been taken over by respondent No.4 vide notification dated 11.06.2011. Feeling aggrieved with the said notification, the appellant filed petition under Auqaf (Federal Control) Act, 1976 before the Court of learned Additional District Judge, Islamabad, which was dismissed through impugned order dated 13.07.2012, hence, the instant appeal.

3. Learned counsel for the appellant contend that Darbar of Sher Shah Mast village Malot Tehsil & District Islamabad is private property, whereas Chief Commissioner Islamabad and private respondents No.1 to 3 have no legal right to interfere in the same; that the land of Darbar is not Waqf property, therefore, action of Chief Commissioner being Administrator General of Auqaf to take over the administration, control, management and maintenance of the Darbar is without jurisdiction; that the appellant belongs to Ghakhar caste and Sher Shah Mast, who is buried in the Darbar was also Ghakhar by caste but all these facts have not been considered by learned Additional District Judge; that no evidence has been recorded

and the matter has been decided without considering the revenue record as well as the Shajra/ancestry.

4. Conversely, learned counsel for respondent No.2 contends that Darbar of Sher Shah Mast belongs to their forefathers as their predecessor in interest was missing a century ago, who died in village Malot and was buried there, therefore, administrative control of the Darbar has to be given to them under the law.

5. Perusal of record reveals that respondents No.1, 3 & 4 were proceeded against ex-parte during the pendency of this appeal, however, in order to reach at just conclusion attendance of respondent No.4 was procured through counsel.

6. Learned counsel for respondent No.4/Chief Commissioner contends that impugned notification dated 11.06.2011 was issued U/S 7 of Auqaf (Federal Control) Act, 1976, whereby the administration, control, management and maintenance of the Darbar have been taken over; that both the contesting parties failed to establish their relationship with Sher Shah Mast through any record.

7. I have heard the arguments and gone through the record.

8. From perusal of the record, it reveals that the appellant is aggrieved with the notification dated 11.06.2011 issued by Chief Commissioner Islamabad being Administrator General of Auqaf, whereby in terms of section 7 of the Auqaf (Federal Control) Act, 1976 the administration, control, management and maintenance of Darbar Sher Shah Mast village Malot Tehsil & District Islamabad have been taken over by the Chief Commissioner. The appellant claims to be manager of the said Darbar and filed an application before the Court of Additional District Judge Islamabad against taking over administrative control of Darbar by the Chief Commissioner, Islamabad, which was dismissed through impugned order dated 13.07.2012 on sole ground that the parties have failed to establish their relationship with the Darbar or Sher Shah Mast but at the same time it was held by the learned Additional District Judge that the determination factor as to whether the property falls within the control of Auqaf or otherwise is beyond his scope in terms of section 11 of the Act.

9. Findings of learned Additional District Judge in terms of section 2(f)(vi) of the Auqaf (Federal Control) Act, 1976 have been seen in the light of available

record and it has been observed that following questions were required to be answered while deciding the application :-

- i. Whether Darbar Sher Shah Mast falls within concept of “Waqf property” as described in section 2(f)(v) of the Act, when a person claiming his administration and control of Darbar has not been confronted with any evidence to adjudge dedication of the property as Wafq?
- ii. Whether Darbar Sher Shah Mast was established by the appellant upon the grave of his forefather/predecessor in interest or it belongs to respondents’ No.3 & 4 forefather/predecessor in interest, who was missing a century ago?
- iii. Whether District Court under Auqaf (Federal Control) Act, 1976 is bound to decide the disputed questions of fact qua the eligibility, entitlement for declaration of Waqf property without recording any evidence?
- iv. Whether the impugned order is valid without reference to any revenue record of Mouza Malot?
- v. Whether Chief Commissioner/Administrator General of Auqaf, ICT can exercise his jurisdiction under Auqaf (Federal Control) Act, 1976 for taking over possession of any property being Waqf property without hearing contesting parties?

10. Learned Additional District Judge while passing the impugned order did not consider the factual aspect as well as the above referred questions, even nothing is brought on record through which it can be assumed that the parties were given due opportunity of hearing, even no valid reason is available on record for not recording the evidence and the issue in question could not be decided without recording of evidence of both the parties.

11. This Court while hearing the instant appeal in terms of Auqaf (Federal Control) Act, 1976 is under obligation to reappraise entire evidence and record, though there is restriction upon this Court to take any other view, however, no order can be passed due to non-availability of evidence, especially when Chief

Commissioner, Islamabad being Administrator General of Auqaf as well as learned Additional District Judge did not record statements of the contesting parties.

12. In view of above discussion, the instant appeal is allowed. Impugned order dated 13.07.2012 passed by learned Additional District Judge and impugned notification dated 11.06.2011 issued by Chief Commissioner being Administrator General of Auqaf are hereby set aside. Chief Commissioner, Islamabad is directed to give proper opportunity of hearing and opportunity of leading evidence to the contesting parties and there-after to pass a speaking order within 90 days in accordance with law without being influenced by the observations made by this Court. If the Chief Commissioner, Islamabad comes to the conclusion that Darbar Sher Shah Mast falls within definition of Waqf property in terms of section 2(f), then he shall issue fresh notification U/S 7 of the Auqaf (Federal Control) Act, 1976 with regard to taking over and assuming the administration, control, management and maintenance of the Darbar Sher Shah Mast, in any other case if the Chief Commissioner, Islamabad comes to the conclusion that the Darbar does not fall within definition of Waqf property, the parties may seek declaration from the Court of competent jurisdiction qua their rights. Till decision of the Chief Commissioner, the administration and control of the Darbar shall remain under the Chief Commissioner being Administrator General of Auqaf as stopgap arrangement.

(MOHSIN AKHTAR KAYANI)
JUDGE

R.Anjam