

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Intra Court Appeal No.689/2011

JUDGMENT

Asghar Bin Shahid Jafri Vs. Defence Housing
 Authority and another.

Date of Decision: - 12.01.2017

Appellant by: - Mr. Muhammad Ahmad Qayyum, Advocate

Respondents by:- Mian Sultan Tanvir Ahmad
 Advocate.
 Mr. Usman Ali Cheema, Advocate
 Mr. Mehmood A. Sheikh, Advocate
 Supreme Court (*amicus curiae*)

JAWAD HASSAN, J:- Through this appeal, the Appellant/Petitioner has called in question the judgment rendered in W.P. No.8300/2003 dated 11.10.2011 passed by the learned Single Judge (the “**Impugned Judgment**”), whereby the Constitutional Petition of the Appellant/Petitioner was dismissed and he was refused permission to be buried in graveyard of Defence Housing Authority (the “DHA”) alongwith his spouse after their death.

2. Brief facts for the disposal of instant appeal are that the Appellant/Petitioner alleges to be resident/tenant of House No. 240, Block-B, DHA Lahore for more than twenty-four (24) years. The grievance voiced in the Constitution petition was that in the year 2002, when the DHA did not allow the dead body of a friend of the Appellant/Petitioner to be buried in the DHA Graveyard on the ground that a tenant cannot be permitted to be buried in the DHA Graveyard, the Appellant/Petitioner wrote a letter to the Vice Chairman of the DHA on 28.12.2002, voicing his grievance on the said issue

and also sought permission for his burial along with his wife. However, the said request of the Appellant/Petitioner was turned down on 18.3.2003 by the DHA. Subsequently, the Appellant/Petitioner again addressed a letter to the Respondent Authority on 27.3.2003 showing displeasure on rejection of his application, and the Appellant/Petitioner was constrained to file Constitutional Petition for redressal of his grievance but the same was dismissed through the Impugned Judgment. Hence, this Intra Court Appeal.

3. Before dilating on the arguments raised and urged by the counsels for the parties at length, following moot points are essential for consideration and determination of this Division Bench, arising out of instant Intra Court Appeal:

- a. Whether any place owned/bought by an authority/society and allocated for specific purpose for its use be declared as *waqf* and/or public property in constitutional jurisdiction by the High Court?**
- b. Whether the Respondent Authority/DHA is authorized to regulate, manage and control its own affairs/land, assigned for specific purpose in the master plan?**

Since both the issues are interlinked and connected, therefore, we will deal them together.

APPELLANT'S SUBMISSIONS:

4. It is reflected from perusal of record that in the W.P No. 8300/2003, the Appellant/Petitioner has challenged the purported policy of the DHA/Respondent Authority to deny the Appellant/Petitioner and his spouse to be buried in its graveyard unless they own property in the said Authority. The counsel for the Appellant/Petitioner has contended that the restrictions imposed by the Respondent Authority are

unreasonable and unlawful, and the Impugned Order is against fundamental rights of the Appellant/Petitioner and the *Shariah*.

5. The stance of learned counsel for the Appellant/Petitioner is that once anyone has allocated land for a graveyard and used it as such, this amounts to consecration or *Waqf* of a property, which is irrevocable in character and it transfers property forever into ownership of Almighty Allah for the benefit of His human beings and thereafter, the said property cannot be used or considered personal property and no person seeking burial can be denied by the owner of the property. The counsel for the Appellant/Petitioner stated that the right to burial is an easement that is available to all occupants including tenants who do not own property in Respondent Authority.

6. The learned counsel for the Appellant/Petitioner further submitted that graveyard is *Waqf* in Islamic Law and there can be no distinction between public and private graveyard and consequently burial of the Appellant/Petitioner or for anyone else in the graveyard of the Respondent Authority cannot be denied. In support of his contentions he has placed reliance upon the cases titled *Syed Mohd. Salie Labbai (Dead) by L. Rs. And others v. Mohd. Hanifa (Dead) by Lr. Rs. And others* (AIR 1976 SC 1569) and *Noor Mohammad and another v. Ballabh Das and others* (AIR 1931 Oudh 293), to establish that there is no distinction in law between a “public” graveyard and a “graveyard” simpliciter. The use of a piece of land as a graveyard establishes dedication and the land thereby becomes *waqf* property. He further relied on *Umar Din and others v. Mst. Aishan and others* (AIR 1921 Lahore 303), and *Haji Ghulam Rasool and others. V. The Chief Administrator of Auqaf, West Pakistan* (PLD 1971 SC 376).

RESPONDENT'S SUBMISSIONS:

7. While on the other hand learned counsel for the Respondents has argued that graveyard of the Respondent Authority is a private property of the DHA and the corpse of the Registered persons, their spouses, parents, and dependent children can be buried in the graveyards managed and maintained by the Respondent Authority. He further submitted that the Respondent Authority is under obligation to safeguard the rights/interests of its members/owners which have paid the development of the facilities, which have vested rights and for whom the Respondent Authority was established. In the master planning, specific areas were allocated/reserved for specific purposes to provide places to fulfil the requirements of only the members/owners in the Respondent Authority, and no stranger/tenant can claim a right to be buried in the DHA because it is not a *waqf* property. He further stated that the Appellant/Petitioner has alternatives for burial in vicinity of the Respondent Authority and no particular reference under Islamic law or *Shariah* has been quoted by the Appellant/Petitioner. Lastly, the counsel for the Respondent argued that the DHA is already facing problems to meet the requirements of owner's members of the DHA who has the vested right to be buried in the DHA.

AMICUS CURIA'S SUBMISSIONS:

8. In order to resolve the above said controversy, assistance of Mr. Mahmood A. Sheikh, Advocate Supreme Court was sought who was appointed as *Amicus Curia* to assist this Court. He has entered appearance and contended that there are private and public Graveyards. In order to determine whether a graveyard is a public or a private one, it may be stated as follows:

- i. *“A public graveyard by immemorial use i.e. where the corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all.*
- ii. *If the graveyard is a private or a family graveyard, then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in family graveyard members of the public are allowed to bury their dead, the private graveyard shed its character and becomes a public graveyard.*
- iii. *In order to prove that a graveyard is public by dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is a public one; and that where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be a conclusive proof to show the public character of the graveyard.”*

9. He has placed reliance on the case titled **Mohammad Kasam Abdul Rehman and another v. Abdul Gafoor Ahmedji and others** (AIR 1964 Madhya Pradesh 227), wherein it has been held that *“a Kabarstan cannot be a private Kabarstan unless it is used for the family members exclusively. Once the public are allowed to bury their dead it ceases to be a private property. The evidence of the defendants even disclosed that the property was being used as a Kabarstan for a pretty long time. There was no discrimination about the user. It was being used by the predecessors of the defendants as well as by the public. This will indicate that it was not a private Kabarstan.”*

DETERMINATION:

10. In order to resolve the controversy and to deal with the issues raised in paragraph 3, we are of the view that before

discussion the submissions of the parties on the first issue that whether any place owned/bought by an Authority/Society and allocated for specific purpose be declared as *waqf* and/or public property in the constitutional jurisdiction of the High Court, it is essential to discuss the statutory and/or non statutory powers in the form of Standard Operating Procedure/ Instructions/ Regulations of the Respondent Authority qua burial in the DHA.

11. Admittedly, the Respondent Authority has been established under Order 3 of the Defence Housing Authority Lahore Order, 2002 (the “**2002 Order**”) by the Federal Government for carrying out the purposes of the 2002 Order. The 2002 Order further established the Governing Body under Order 4(1), consisting of Chairman, Vice Chairman, and other three members, and an Executive Board under Order 4(2) “*to exercise all the administrative, executive and financial powers and do all acts and things, which may be exercised or done by the Authority but under the guidance and directions on questions of policy by the Governing Body*”. Moreover, the Executive Board is bound to carry out the instructions of the Governing Body issued from time to time.

12. Under Order 4(3) of the 2002 Order, the Executive Board consists of Corps Commander Lahore Corps as its President and the Administrator of the Authority, two co-opted resident civilian members and the Secretary of the Authority as members, and the Executive Board, under Order 7(2)(k) of the 2002 Order, is authorized “*to do all such acts, deeds and things that may be necessary or expedient for the purpose of proper planning and development of the specified area*.” Similarly, the Governing Body is authorized under Order 22 of the 2002 Order, by notification in the official Gazette, to make Rules for carrying out the purposes of 2002 Order. Further, under Order 23 of the 2002 Order, the Executive Board is authorized to

make regulations and rules as it may consider necessary or expedient for the administration and management of the affairs of the Respondent Authority.

13. It is essential to highlight that the Respondent Authority, under Order 13 of the 2002 Order, “*may do all such acts and things as may be necessary for the planning and development of and for providing and regulating housing facilities in the area notified by the authority.*” Similarly, under Order 24 of the 2002 Order, the provisions of 2002 Order have effect notwithstanding anything in any other law for the time being in force.

14. It is evident from the above discussion that the Respondent Authority is a nationally recognized corporate Organization, and is authorized in its independent capacity to do all such acts for its planning, development and regulating housing facilities, either through Executive Board or Governing Authority as specified in 2002 Order. Therefore, the decision on the request of the Appellant/Petitioner to be buried in the DHA Lahore alongwith his wife, squarely falls within the domain of the Respondent Authority because the specified area is under the management and control of the Respondent Authority.

15. Generally, the Respondent Authority allocates specific area, so notified, for use of residential and commercial purposes, and also earmarks/reserves area to provide essential needs to the residents of the DHA, consisting of parks, graveyards, parking areas etc. Since the management and control of the specified area is with the Respondent Authority, it may make Rules, Regulations and Policies, as specified in Order 22 and 23 of the 2002 Order, to manage the area for better allocation of its resources to create structural harmony, privacy, security and tranquility for the residents, who have developed vested rights through ownership of any plot or building. The vested rights of the owners of the Respondent

Authority may be harmed, encroached and restricted if the facilities are not properly managed, controlled or provided.

16. For this purpose, the Executive Board of the Respondent Authority has made Construction and Development Regulations 2009 under the Order 23 read with the Order 4 and all other enabling provisions of the 2002 Ordinance (the “**DHA Regulations**”), which have been placed on record by the Respondent Authority. Regulation 53 of the DHA Regulations is re-produced as follows:

“53. GRAVEYARD

- a. *The Authority shall have the exclusive powers to develop, maintain, protect, upgrade and to undertake proper maintenance and administration of the graveyard, for the welfare and facility of the resident Registered Persons only.*
- b. *The corpse of the Registered person, their spouses, parents and dependent children can be buried in the graveyards managed and maintained by the Authority whereas in exceptional circumstances the corpse of another person may be allowed to be buried with the permission of the President DHA only.”*

17. Further, the DHA Construction & Development Regulations, 2014 are also available on the website of the Respondent Authority and Regulation 56 and 57 of the *ibid* Regulations are reproduced herein below:

“56. GRAVEYARD

- a. *The Authority shall have the exclusive powers to develop, maintain, protect, upgrade and to undertake proper maintenance and administration of the graveyards.*

- b. *The corpse of the members, their spouses and dependent children living in the same house as per burial policy can be buried in the graveyards managed and maintained by the Authority.*

57. BURIAL POLICY ELIGIBILITY FOR BURIAL

Following categories of deceased are eligible for burial in DHA graveyard:-

- a. *Owner of a plot / building (residential / commercial) and his / her spouse (s).*
- b. *Parents, mother & father and mother-in-law & father-in-law of the owner of plot / building.*
- c. *Dependent children of the owner of plot/building as under:-*

(1) Sons unmarried and dependents of any age, living in the same house.

(2) Daughters of any age who are dependent being unmarried / divorced or widow and living in same house.”

18. We have examined that both *ibid* Regulations shall apply to the residents for the purpose of burial, but generally both Regulations appear similar in the case of the Appellant/Petitioner, who is not deceased yet and is the alleged occupant/tenant in the Respondent Authority. It is manifest to note that no such lease/rent agreement and/or any document has been placed on record by the Appellant/Petitioner, enlisting the rights and obligations of the Appellant/Petitioner and it remains unclear that whether the Appellant/Petitioner is still residing over the said property from twenty-four (24) years under the terms of the tenancy agreement, if any. Further, no proof of rent being paid by the Appellant/Petitioner since the alleged period has been annexed with the Constitutional petition or this Intra Court Appeal.

19. It is also essential to note that while dismissing the application for burial of the Appellant/Petitioner, the Respondent Authority has duly stated that the matter was considered and selected for discussion/deliberation at the highest levels. It follows logically that the policy and facility of the Respondent Authority in respect of burial of the deceased is for the parents, spouse, dependent children of the Registered Persons/members/owners of plot or building. Since the Appellant/Petitioner has failed to establish that he is a registered person, member or owner of any plot/building in the Respondent Authority, therefore, we are constrained to overrule the Policy of the Respondent Authority to manage, control and maintain the specified area, and to preserve graveyard for its members and owners. Even otherwise, if a different perspective is to be taken that in absence of any bye-laws of the DHA whether restrictions can be imposed by the Respondent Authority qua the burial of non-members of the authority, the applicability of bye laws and/or regulations for burial should be restricted to the Regulations or Rules which are prevailing at the time of death of a person.

20. As regard to the submission of the Appellant/Petitioner about the *waqf* property is concerned, it is to be noted that ‘graveyard’ has been defined in **Stockton v. Weber** (ILR 98 Cal. 433), as a place for the interment of dead bodies. Further, the case titled **Mst. Ulfat Butt v. Muhammad Arif and others** (2000 YLR 2753 [Lahore]) and **Lt. Col. (Retd.) Muhammad Abbas Malik v. Malik Zafar Ali** (1999 YLR 1863 [Lahore]) establishes the principle that “*where any piece of land was used for a graveyard for considerable length of time, creation of Waqf and dedication could be validly presumed.*”

21. The case titled **Chief Administrator Auqaf and others v. Diwan Sheikh Taj-Ud-Din and others** (PLD 2012 Supreme Court 897) has taken into account the definition of ‘waqf property’ as defined in Section 7 of the Punjab Waqf Properties Ordinance, 1979, which states as under:

"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, but does not include property of any Waqf such as is described in section 3 of the Musalman 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 any member or his family or descendants."

22. Further, in the case titled **Muhammad Ramzan v. The State and others** (2013 SCMR 737), it was recognized as under:

"What imparts significance to this trust theory, in the context of waqf property, is the fact that as in the case of legal sovereignty, so in the case of waqf property, the entire body politic, that is the State, becomes a trustee and it is the State, through its State functionaries, that has to discharge the functions in regard to waqf properties on behalf of Almighty Allah. The Kazi is one of the State functionaries one of the persons in authority within the meaning of the Holy Quran V.4:60. The reason why it was the Kazi who was entrusted with the function of dealing with waqf properties was that function is judicial function and the kazi was, therefore, the most appropriate State functionary to be entrusted with its performance. Thus the Islamic Law seems to proceed on the basis that it is the kazi as delegate of Almighty Allah who has to perform the function of its carrying the waqf into execution and to deal with the waqf property".

23. On general principle, only the person in whom the ownership of the property vests can lawfully deal with it. The

status of the property could be determined on the basis and regulations of the officer or authority charged with the duty to determine the question of status of property. From the above arguments and the cited case law as well as from the perusal of the record, we cannot negate that the land in question shown to be owned by Respondent Authority and in fact was purchased with the intention to use the same for the purpose of graveyard of the inhabitants and owner of specific land or building of the Respondent Authority.

24. However, it is pertinent to note that even if we consider the allocated land for graveyard of the Respondent Authority as *waqf*, it should be kept in mind that it does not create any right in favour of public at large who can claim to be buried on the said property. It is important to keep in mind the good of resident/owners of plot or building and vested rights conferred on all persons who own any land or building in the Respondent Authority, which are absolute, and are granted to maintain public order because the Respondent Authority is obliged to itself develop, maintain and make policies regarding public parks, playing fields and graveyards. The property was allocated in the master plan of the DHA for specific purpose and the *waqf*, if considered, was for specific purpose to accommodate the needs of the members and owners. As the easement right had been created in favour of owner of any building or land in the Respondent Authority to use facilities for the general convenience of the inhabitants/owners of the plot or building and no one had authority to take away such right of enjoyment and to deprive general public permanently from convenience except in accordance with law. The Respondent Authority is expected to act in the interest of its members by providing amenities and facilities and not to take away such rights by allowing everyone or public at large to be buried in its specified area. The rights and facilities available to

the members of the Respondent Authority are available against the whole world and could be described as a right against land itself. Even though if it is established that the land is a *waqf*, the purpose for which it was created and allocated cannot be denied.

25. Further, as highlighted above, even though the said graveyard of the DHA is declared as *waqf*, there must be persons or authority responsible to administer such trust/*waqf* property, and in this case, it is a statutory authority which could manage it and make Policies for its use. Such private trust was established for benefit of members and their families, as highlighted above, and such objectives must be achieved through permissible means and not at the cost of giving the public-at-large right to be buried. The Respondent Authority has made Rules and Regulations to foster the cause of justice to the members and they should not hamper it unless any party was prejudiced by any violation of the same. Since the rights of the Appellant/Petitioner are arising out of the tenancy agreement, if any, which has not been produced on record, it cannot be established that the Appellant/Petitioner paid anything against which the authority is liable to provide him such services. Therefore, allowing such petition in favor of the Appellant/Petitioner would encroach upon the rights of the members of the DHA/Respondent Authority to be buried in such graveyard.

26. Even otherwise, this Court is of the view that the learned Single Judge while passing the Impugned Judgment has rightly held which is as follows:

“Considering from another angle, if the outsiders, including tenants putting up in DHA, are allowed to be buried in DHA Graveyard, it will be filled up within months and no place would be available for the permanent members of DHA to bury their kith and kin in the event of their death. At the cost of repetition, it is observed that the DHA earmarked

certain patch out of the land it has acquired by way of purchase or in lieu of allotment of developed plots to the original owner and by no stretch of imagination it is held that the said graveyard falls within the definition of Waqf.”

27. From the perusal of above, it clearly manifests that the DHA Graveyard is property owned by the Authority. Further, the Authority has earmarked the said area for the burial of dead bodies of the members of the DHA and their dependents which have paid price for it while purchasing the plot/property. Thus, it cannot be said that the DHA Graveyard falls within the definition of *Waqf* as according to different *Fatwas*, a property owned by a private entity and specified to provide facilities to the members cannot be used for burial of dead bodies of public at large. Learned Single Judge has rightly held that the decision taken by the Governing Body under the supervision of the Secretary, Ministry of Defence, Govt. of Pakistan as well by the Executive Board under the auspices of Commander Lahore Corps would have the similar force as a that of bye-law. Since the decision was taken by the Authority after approval by the competent authority, it cannot be said that the same is not executable being unconstitutional. The Executive Board of the Authority, with approval of the General Body, is competent to take all the decisions towards the provision of better residential facilities to the members of the Authority and the restriction put on non-burial of a non-member in the DHA Graveyard was competently imposed by the DHA. Since the Appellant is non-resident, therefore, he has no vested right to be buried in the DHA Graveyard after his death as the same is owned by the DHA and nobody can avail benefit therefrom except with the permission of the Respondent Authority. It is also essential to note that the

Appellant/Petitioner has many other places and graveyard for his burial along with his spouse after their death.

28. Furthermore, during pendency of the writ petition the Respondents have also amended their Bye-Laws (*Construction Bye-Laws 2009*) with the term that *The corpse of the Registered person, their spouses, parents and dependent children can be buried in the graveyards managed and maintained by the Authority where as in exceptional circumstances the corpse of another person may be allowed to buried with the permission of the President DHA only.*

29. Hence, learned counsel for the Appellant/Petitioner has failed to point out any illegality or perversity in the impugned judgment which otherwise is apt and calls for no interference. The instant Intra Court Appeal being devoid of any force is hereby dismissed.

(AYESHA A. MALIK)
JUDGE

(JAWAD HASSAN)
JUDGE

Approved for reporting.

JUDGE

JUDGE