

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.

R.A.No.S-237 of 2024

Applicant: Niaz Hussain son of Gulab Shah alias M.Suleman Channa through attorney namely Aijaz Hussain son of Niaz Hussain Channa through Mr. Aqeel Ahmed Siddiqui, Advocate.

Private Respondents: Mst. Aaisha d/o Gulab Shah alias M. Suleman Channa wd/o Maqbool Ahmed & others

Through M/s Syed Babar Ali Kazmi, Mohammad Ali Shaikh, Muhammad Zakaria Baloch and Haji Muhammad Suleman Advocates.

Interveners: Through Mr. Anis-ur-Rehman Siddiqui, Advocate (Auqaf Department). Mr. Muhammad Hashim Bajeer, Advocate (CMA No.906/2026).

The State: Mr. Muhammad Yousif Rahputo, Assistant A.G Sindh and Anis-ur-Rehman Siddiqui,

Date of Hearing: 04.05.2026.

Date of Order 21.05.2026

J U D G M E N T

Syed Fiaz ul Hassan Shah, J :- The Applicant has challenged the concurrent Judgment dated 29.08.2024 (**impugned Judgment**) passed by the learned Model Civil Appellate Court-II/6th Additional District Judge Hyderabad (**Lower Appellate Court**) in Civil Appeal No.122 of 2024 affirming Judgment dated 27.02.2020 and decree dated 22.04.2024 passed by the learned 2nd Senior Civil Judge Hyderabad (**Trial Court**) in F.C.Suit No.958 of 2019 whereby suit filed by the private respondents was dismissed; hence, this appeal.

- 2) Succinctly facts are that the respondent No. 1/plaintiff instituted F.C. Suit No. 958/2019 for declaration, partition, mesne profits, and permanent injunction in respect of property survey No.23 and 24 (consolidated No.1340) Ward “F” the West katcha residential houses,

Hyderabad commonly known as Dargha Mohabat Shah. The suit was Preliminary Decree on 27.02.2020 on the admission of the Defendants while passed Judgment dated 27.02.2020 on admission of parties under Order XII Rule 6 CPC while final Decree was drawn on 22.04.2020. Respondents/plaintiff challenged said judgment in Civil Appeal No. 76/2020, which was also dismissed through impugned judgment.

- 3) In the light of preliminary Decree, which ultimately confirmed by trial Court as well as Lower Appellate Court, the Nazir was directed to ensure compliance and Mukhtarikar City had initiated process of partition in the light of Judgments impugned before me.
- 4) Learned counsel for Applicant/defendants mainly argued that the impugned judgment is against the law, and principles of Muhammadan Law; that the findings on the law points regarding Waqf property was in violation of Supreme Court order nor it can be considered the applicability of inheritance in such property; that the learned appellate court merely reproduced the factual position of the proceedings instead of rendering an independent judgment on the legal status of "Dargah Mohabat Shah Bukhari" and its graveyard known as "Channa Graveyard"; that the property in question is purely a religious site where annual 'Urs' is performed, making it immune to partition and possession under Sharia law; that the courts below erroneously treated a religious/Waqf property as private ownership which is a gross violation of justice; that the record of rights clearly identifies the parties as heirs of the Mutawali (caretaker) as defined under Muhammadan Law, yet the trial court shut its eyes to these facts to give outright favor to respondent No. 1; that the partition is neither available nor feasible on-site. Finally, he prayed to set aside the impugned judgment and final decree and dismissed the suit of respondent No. 1.
- 5) Learned counsel for the private Respondents No.1, 4 and 8 supported the impugned Judgment and argued that it was passed in accordance with the law and no illegality or jurisdictional error was committed by the lower Appellate Court; that the Applicant is merely trying to re-litigate issues that have already been decided at the preliminary stage; that the Honorable Supreme Court has observed that the subject property does not belong to the **Waqf Department** and is held for the benefit of family members both the Applicant and the Respondents; that the allegations

made by the Applicants/Defendants regarding the religious nature of the property are an afterthought intended to frustrate the execution of the decree; that the old Survey No.23 was private property while old Survey No.24 comprises Dargah, Masjid and other waqf objects and due to consolidation of Survey Numbers as new Survey No.1340 confusion was created; that the process of partition carried out through the **Mukhtiarkar City** was transparent and in strict compliance with the court's directives. Finally, he prayed for the dismissal of the instant appeal with costs.

- 6) Counsel for the newly added Respondents No.9 & 10 Mr. Muhammad Hashim Bejar and Counsel for Auqaf Department Mr. Siddiqui contended that in the absence of legal heirs/family members of Late Kamal and Gulab Shah, the applicant or Respondents are not entitled for the management of land as they are not the descendants of Dargah Mohabat Shah or Gulab Shah. They further mentioned that their contention is duly supported with fact that the Applicant and Respondents admitted that they are "channa" caste while the Dargah belongs to one "Syed" caste. The Auqaf department collecting rents from tenants who are occupying attached to the Dargah since forefathers' time. They urged that the property in question is a waqf property and such factum is proved from the Revenue Record as well as from the Order passed by the Hon'ble Supreme Court of Pakistan but applicant or respondent have no connection or affiliation with the Dargah of said saint Mohabat Shah or Kamal Shah or his son Gulab Shah and only the land can be used by a legitimate Mutawalli and income can be given strictly to the family of saint Gulab Shah and in his absence, Auqaf department is competent to regulate the said Waqf.
- 7) Learned A.A.G for the official respondents has adopted the same arguments to that of learned counsel for private respondents as well as supported the impugned final decree.
- 8) Heard learned counsels for the parties and perused the record with their assistance.
- 9) Initially, subject property situated on Survey Nos. 23 and 24, which were subsequently consolidated by the Directorate of Settlement & Survey, Sindh and assigned new Survey No. 1340. One set of parties

(Respondents) claimed legal heirs of the deceased Gulab Shah @ Muhammad Suleman Channa still claims right of inheritance, partition in respect of land falling in previous Survey No.23 while stating that Dargah, Shops and Graveyard are situated on Survey No.24. While second set party are also legal heirs (Applicants) who claimed that entire property is Waqf alal aulad and they are administering it as ***Mutawalli*** and spending its income on the Dargah and welfare of public. The third set are Intervenor tenant and Auqaf department who claimed it is ***waqf property*** and management vested with Auqaf department as applicants or Respondents are not legal heirs of founder of Dargah Gulab Shah who by caste was “Syed” and Applicants and Respondents have no connection with Tomb/Dargah of Gulab Shah as they, by caste are “Channa” and estopped to claim legitimate Mutawalli ship and in the absence of founder’s family, the Auqaf department can be entrusted with the instant subject property.

- 10) Both Courts below accepted the pleadings while giving much weight to the admission of the parties and without determination the legal question and recording findings on the nature of the rights of parties and legitimacy of land status. Therefore, both Judgments passed without determination of actual controversy and without delving into question that subject property or any of it portion is a Waqf OR proprietary rights concerned and that the parties are legal heirs of Gulab Shah, if so, such property devolve upon the (sic) legal heirs.
- 11) In order to determine the controversy between the parties, the following points for determination are framed:
 - a. Whether subject property is a private waqf? If so, to be administered by Mutawalli amongst the family/legal heirs of founder Mohabat Shah or his descendent Kamal Shah or Gulab Shah?
 - b. Whether legal heirs of founder of Dargah and Masjid are entitled to inheritance rights and partitions or beneficial rights of Waqf alal Aulad under Mohammadan Law?
 - c. Whether founder of Dargah Mohabat Shah or Kamal Shah left descendants or that Gulab Shah was actually Muhammad Suleman Channa? If not, in the absence of legal heirs of Founder Gulab

Shah, Auqaf Department can entrust with administration of subject property including to collect rent from the tenants?

Determination Point No.1:

- 12) The point of determination required to go to the legal roots regarding ownership rights of suit property. The official record i.e. Property Register of City Survey, Taluka City Hyderabad, District Hyderabad produced before the trial Court so also in earlier round of litigation between the parties, it revealed that City Survey No. 1340, measuring 3,747.6 sq. feet, is registered in the name of Dargah Muhammad Shah Bukhari. Out which an area about 916.40 sq. feet is reserved for the town area, Masjid, and Aalam, as per the Order of the A.C. City Hyderabad under letter No. 27 dated 06.01.2010 and following Order passed by the Hon'ble Supreme Court in Civil Appeal No. 103-K of 1989, a subsequent entry was made in the revenue record under letter No. 735 dated 30.05.1991 issued by ADC-I Hyderabad in favor of Gulab Shah son of Kamal Shah and Muhammad Sulleman Channa, as a "Waqf for the benefit of family members."
- 13) Upon careful examination of the record there was first known litigation was Suit No.161/1907. It is evident that reliance placed upon Civil Suit No.161 of 1907 (Mst. Birai vs. Basran wife of Kadir Bux and others) is misplaced. The said judgment neither identified the house (subject matter of that suit) with any specificity nor provides a description sufficient to establish its connection with the present *lis*. The pleadings therein were confined to one undefined house near the Tomb of Mohabat Shah and its mosque. The court in that matter did not accept the expert opinion of the Kazi regarding wakf status. Consequently, the said judgment cannot be treated as a binding precedent or as determinative of the present controversy.
- 14) The only authoritative pronouncement relevant to the historical background of the property was Civil Suit No.05 of 1968, decided by the 1st Additional District Judge, Hyderabad on 09.10.1980. In that matter (Re: Gulab Shah and others vs. Administrator General of Pakistan, Auqaf Department), the legality of the suit property and its peculiar nature as part of Dargah Mohabat Shah was adjudicated. The court decreed that the property described in Schedule-A, comprising Survey

No.23, Ward "F" (west katcha residential houses occupied by the predecessors-in-interest of the present parties), and Survey No.24 (the tomb, burial ground, and shops used by tenants), was not wakf property within the meaning of Section 2 of the Waqf Ordinance, 1961.

- 15) Although this decree was subsequently set aside by the High Court in M.A. No.02 of 1981, the Supreme Court of Pakistan, vide judgment dated 12.12.1990, restored the decision of the 1st Additional District Judge, Hyderabad. The apex court further clarified that the property is wakf, for the benefit of the family members of Kamal Shah. The relevant para of said Order is re-produced hereunder:

"Another argument put forward by the appellate Court is that these documents Ex.124 and 125 are to be read along with Ex. 117 produced by Ghulam Mohammed in the trial Court in which Civil Suit No.161/1907 and Civil Appeal No.150/1909 are mentioned and in the appeal, it was held that property in question is Waqf property. Be that as it may, documents mentioned above are to be read along with other documents produced by Ghulam Mohammad and Fazlullah, City Surveyor in the suit proceedings. Ghulam Mohammed has produced Ex.125, which is extract from city survey which shows that Kadir Bux s/o Kamal Shah was occupying survey No.23 as owner. PW Fazlullah after consulting record of city survey affirmed that name of owner in survey No.23 is Kadir Bux, while survey No.24 is shown as grave-yard. In the column of ownership in the Property Register Card Miskeen Shah and after him Kamal Shah are shown as Mutawalli of Dargah Mohabat Shah Bokhari. In column No.8 relating to nature and origin of title it is mentioned as "by inheritance". Evidence produced in the trial Court thus clearly shows that appellants had made out a prima facie case before the trial Court to claim that survey No.23 was owned by Kadir Bux and survey No.24 where Dargah of Mohabat Shah is shown has been inherited by them. This is so in spite of the fact that in Ex.123, which extract from Property Register Card, it is mentioned that property is Waqf property but under the same column it is further mentioned that property has devolved upon by Kamal Shah by inheritance. This evidence as such is sufficient to warrant finding that property though Waqf was restricted for benefits and the enjoyment of family members and therefore, does not constitute to be Waqf as is defined in section 2(d) of the said Ordinance. As against this evidence, produced by appellants/descendants, from the side of Chief Administrator, Auqaf, no such evidence is produced to falsify the claim. In view of such evidence, it was open to the other side to produce some positive evidence to show that property remained Waqf as permanently dedicated for religious and charitable purposes to the exclusion of appellants/descendants from the benefits and enjoyment of such property. Defendants in the suit have examined Maqsood Beg from Auqaf 'department who was not aware with the factual background of the case, hence nothing in rebuttal of evidence produced by plaintiffs in the suit was brought on the record In

support of their claim. On the contrary, document and record of city survey supported the claim of plaintiffs in the suit.

Total reliance by Auqaf department on judgment Ex. 129 in Civil Appeal No.150/1909 declaring property to be evacuee is not helpful for the following reasons. Firstly, judgment does not give description of the property which was under adjudication. Secondly, in 1907 when suit was pending, controversy was whether property was exclusively owned by Kamal Shah or it was Waqf for the benefit of other family members as well. It was held in the judgment in appeal that property in question was Waqf for the benefit of family members. Even if we maintain the finding in the judgment in appeal No.150/1909 then too the case is not covered by the definition of Waqf as contemplated under section 2 (d) of West Pakistan Waqf Properties Ordinance 1961, and is excluded on the ground that the Waqf property is for benefit of family members/descendants.

For the facts and reasons stated above, we set aside impugned judgment of the High Court and restore judgment of the trial Court decreeing the suit. There will be no order as to costs.”

- 16) Undoubtedly, the Supreme Court held that the property is wakf for benefits of family members of Gulab Shah. However, it is significant to note that the apex court did not directly determine the nature of “private wakf” within the statutory framework of the Mussalman Wakf Validating Act, 1913. The adjudication of the present controversy necessitates clarification of the legal legitimacy and character of “Wakf” in light of the principles settled by the superior Courts and the statutory framework governing Muslim charitable endowments.
- 17) Wakf, in Islamic jurisprudence, constitutes a permanent dedication of property for purposes recognized by Muslim law as religious, pious, or charitable. In its juristic conception, wakf bears close resemblance to the doctrine of “trust” known to English common law, though its source, incidents, and governing principles are rooted in Islamic jurisprudence. Historically, Islamic legal institutions evolved as practical instruments developed by Muslim societies to regulate religious, charitable, and familial obligations, including endowments and public welfare. The statutory and juristic roots of wakf trace back to the formative period of Muslim jurisprudence in Madina and have continued to remain operative throughout successive centuries.
- 18) Following the establishment of British rule in the Sub-Continent during the mid-nineteenth century, a comprehensive civil and criminal legal system was introduced. Nevertheless, in matters relating to personal law,

the colonial administration continued to recognize and apply the customs and religious laws of various communities. Consequently, disputes concerning Muslim religious and charitable endowments continued to be governed by principles of Islamic law.

- 19) However, significant transformation occurred in the administration and adjudication of wakf after colonial intervention. The Religious Endowments Act, 1863¹ vested adjudicatory authority in British officials, while the traditional role of Qazis in interpretation and application of Muslim law was substantially curtailed in 1864. Thereafter, wakf disputes came to be adjudicated by British Courts, whose interpretation occasionally departed from established Muslim juristic understanding.
- 20) Wakf denotes the permanent dedication of property for religious, charitable, or public utility purposes. Unlike gifts, wills, or settlements, wakf possesses distinct legal incidents under Muslim law, particularly the irrevocable and perpetual dedication of the corpus of property. Judicial deliberations of the High Courts and the Privy Council during the colonial era demonstrate the tension between traditional Islamic jurisprudence and principles imported from English law.
- 21) Particularly contentious was the status of *wakf-alal-aulad*, namely, wakf created primarily for the maintenance and benefit of the settlor's family and descendants, with an ultimate dedication to charity. Certain judicial pronouncements during the latter half of the nineteenth century declared such family wakfs invalid on grounds analogous to the English rule against perpetuities and uncertainty of charitable benefit.
- 22) In this regard, reference may be made to the judgment of the Privy Council in **Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhuri reported as (1891) ILR 18 Cal 399 at p. 412**, wherein *wakf-alal-aulad* was held invalid on the reasoning that the charitable object was too remote and uncertain. The said pronouncement was widely regarded as inconsistent with settled principles of Muslim law and the doctrine of *ijma*, under which maintenance of one's family is itself recognized as a pious and meritorious obligation.

¹ See First Schedule Serial No.9, Federal Law (Revision & Declaration) Ordinance, 1981

- 23) To remove the uncertainty created by the aforesaid decision and to restore conformity with Muslim jurisprudence, the legislature enacted the **Mussalman Wakf Validating Act, 1913**. The enactment expressly validated wakf-alal-aulad and affirmed the legitimacy of family wakfs under Muslim law.
- 24) Section 2 of the 1913 Act defines wakf as the permanent dedication of property by a Muslim for purposes recognized by Muslim law as religious, pious, or charitable. Section 4 specifically provides that no such wakf shall be deemed invalid merely because the benefit reserved for charitable purposes is postponed or appears remote. The statute thus unequivocally displaced the application of English equitable principles relating to remoteness and perpetuity in matters governed by Muslim law.
- 25) The statutory framework further clarifies that wakf may consist of movable as well as immovable property; that payment of debts from wakf income does not invalidate the dedication; and that maintenance and support of the wakif's family constitute purposes recognized by Muslim law as pious obligations. Importantly, the concepts of "religious", "pious", and "charitable" are to be interpreted in accordance with Muslim jurisprudence and not by reference to English law doctrines.
- 26) The legal incidents of wakf have consistently been recognized by judicial precedent. In *M. Kazim v. A. Asghar Ali* reported as *AIR 1932 Patna 238 at p. 240*, it was held that wakf contemplates the creation of specific property permanently dedicated to a religious or pious purpose. Upon constitution of a valid wakf, the property becomes inalienable and irrevocably tied to the object of dedication.
- 27) Likewise, in *Mazhar Husain Khan v. Abdul Hadi Khan* reported as *1911 All LJ 162; 9 IC 753 at p. 756*, it was observed that dedication for an unlawful object is void to the extent of such illegality and the property reverts to the wakif. Where the original charitable object becomes impossible or incapable of fulfilment, the doctrine of *cy-près* permits the Court to give effect to the donor's intention as nearly as possible.

- 28) The Indian Supreme Court in **Radhakanta Deb & Anr. v. Commissioner of Hindu Religious Endowments, Orissa** reported as *[1981] 2 SCR 826 at p. 842* further explained the juristic character of *wakf-alal-aulad*, observing that although the ultimate benefit is reserved for God or charity, the property vests in the beneficiaries and the income may validly be utilized for the maintenance and support of the founder's family and descendants.
- 29) In view of the foregoing statutory provisions and judicial pronouncements, there remains no legal ambiguity regarding the validity of *wakf-alal-aulad*. Such wakf constitutes a valid and enforceable dedication under Muslim law, provided that the ultimate benefit is reserved for purposes recognized as charitable, religious, or pious.
- 30) After the promulgation of the Mussalman Wakf Validating Act, 1913, a clear distinction emerged between public wakf and private wakf-alal-aulad. Any interpretation extending the regulatory mechanism of the Wakf Properties Ordinance, 1961 to private wakf-alal-aulad without express legislative mandate would defeat the object and protection afforded by the validating statute. Section 2 (e) reads:
- (e) “**wakf**” means the permanent dedication by a person professing the [Muslim] faith of any property for any purpose recognized by the [Muslim] law as religious, pious or charitable, but does not include any wakf, such as is described in section 3 of the 3 [Muslim] Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants.
- 31) Consequently, matters relating to private wakf-alal-aulad are required to be regulated primarily under the provisions of the 1913 Act. The statutory scheme of the 1913 Act, read in conjunction with the principles of Muslim personal law, creates a distinction between public charitable wakfs administered under statutory control and private family wakfs protected under the validating legislation. Therefore, where the subject matter pertains to a private wakf-alal-aulad duly constituted under Muslim law, the applicability of the Pakistan Wakf Properties Ordinance, 1961, or subsequent enactments regulating public wakf properties, becomes legally circumscribed and it cannot ordinarily be

subjected to the regulatory regime contemplated for public wakf properties under the Pakistan Wakf Properties Ordinance, 1961.

- 32) Therefore, I hold that subject property is a *private wakf* for the benefit of the family members and descendants of Dargah Mohabat Shah, namely Kamal Shah and thereafter Gulab Shah, as already held by the Supreme Court of Pakistan vide Judgment dated 12.12.1990 passed in Civil Appeal No.103-K of 1989 (Gulab Shah vs Chief Administrator of Auqaf, Sindh). In consequence, neither the applicant, respondent, nor any other legal heir(s) can claim inheritance or proprietary rights in the property, which stands exclusively as wakf property. The entitlement of the descendants is confined to receiving a share from the *surplus income* only, after meeting the necessary expenses of the Dargah Mohabat Shah, its attached mosque, and graveyard.
- 33) In view of the above, the judgments and decrees of the courts below, to the extent that they acknowledge proprietary or inheritance rights in a wakf or private wakf property or any partition Writ by treating such property propitiatory or any sort of hereditary are erroneous and unsustainable in law. Therefore, both the points of determination are answered accordingly.
- 34) The third point of determination as raised by the newly added Respondents (Auqaf Department and the Tenant of subject property) that the Applicant and the Respondents are not the descendants or family members of Gulab Shah or Kamal Shah who was by caste “Syed” and present Applicants and Respondents are by caste “Channa” or that Muhammad Suleman Channa @ Gulab Shah was not the same but Gulab Shah is different person, neither the subject matter of the *lis* related to such dispute nor the Issues were framed or any evidence was lead on this point as has now been agitated before me. Therefore, such controversial dispute cannot be adjudicated in the present case. Parties are at liberty to seek remedy through a separate suit only on this specific controversy as may be available under the law.
- 35) Unlike the Dargahs and Khanqahs in Sub-Continent, Iran, Iraq and such other part of World, regulate on the basis of Silsila (Chain) connected to Hazrat Imam Ali (a.s.) and govern through a successors Sajjada Nasheen, there are some Dargahs operate without chain. A plane reading

of pleadings, record and previously decided cases reveal that the Dargah Mohabat Shah is a self-styled Dargahs without chain and regulated through Mutawalli as I have noted that earlier suit filed in the year 1968 by Gulab Shah son of Kama Shah Channa and other predecessors-in-interest of the present Applicant and Respondents with claims to be the family member or descendants of this Dargah and since then the family members of said “Channa” family are managing affairs and all parties have stated that present Applicants are “Mutawalli” as essential office attached to every Wakf to manage, administer and control it. Therefore, I allow the applicants to run the affairs of Darah Mohabat Shah and its attached appurtenant Masjid, Graveyard and other institutes and surplus income be distributed amongst the family members by preparing details accounts of expenses and surplus income.

- 36) The Supreme Court of Pakistan in *Habib ur Rehman vs. Abdul Karim through Legal Heirs (2025 SCMR 1262)* reaffirmed that while concurrent findings of fact by lower courts ordinarily command respect, they are not beyond correction where legal infirmities, misreading, or non-reading of evidence are apparent. The High Court, in its revisional or constitutional jurisdiction, or even in a second appeal, retains the authority to intervene in cases of glaring errors or violations of law. Thus, although deference to trial courts remains the rule—given their vantage point in assessing witness credibility—such findings are not sacrosanct and may be reversed to ensure legality, fairness, and evidentiary soundness. In the present case both Courts below erroneously hold property in question as hereditary instead of Wakf.
- 37) In view of above, the impugned Judgment passed by the Appellate Court is set aside while allowing Revision Application and the suit of the Respondents dismissed. Office to draw Decree in terms of Paragraph 32,33,34, 35 & 37 above.

Judge