

# HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

## 1<sup>st</sup> Appeal No.01 of 2013

[Syed Ali Bux Shah versus The Chief Administrator Auqaf Sindh & another]

Appellant : Through Mr. Sunder Das advocate  
Respondent No.1 : Through Mirza Zain-ul-Abdin advocate  
Respondent No.2 : Mr. Allah Bachayo Soomro, Addl: A.G Sindh  
Date of hearing : 17.10.2022  
Date of Order : 17.10.2022  
\*\*\*

## ORDER

**ADNAN-UL-KARIM MEMON, J-** This appeal impugns the Judgment & Decree dated 13.12.2012 passed by learned II<sup>nd</sup> Additional District Judge, Badin in Petition No.01 of 2010, whereby the said petition was dismissed being not maintainable in terms of Section 11 of Sindh Waqf Properties Ordinance 1979.

2. Precis facts of the case are that the appellant filed the above petition under Section 11 of Sindh Waqf Properties Ordinance, 1979 before learned II<sup>nd</sup> Additional District Judge Badin in respect of Dargah Saman Sarkar, situated in Deh Char near Pangrio Taluka Tando Bago, District Badin (**Dargah**) with the claim that he is Sajjada Nashin of Dargah; that there is Mosque adjoining the Dargah, which is not the Waqf property; that management and control of Dargah was taken over by respondent No.1 in the year 1975, against which he filed Civil Appeal No.03 of 1976 before learned lower Court but the same was dismissed on 28.02.1979 and he preferred Appeal bearing No.25 of 1979 before this Court; however, the same was also dismissed for non-prosecution on 07.05.1984; thereafter, respondent No.1 vide Notification dated 05.11.1992 de-notified the taking over of management and control of Dargah and handed over the same to the appellant; however, again respondent No.1 issued Notification dated 27.08.1996 for taking over the control and management of Dargah along with Mosque and other properties but it was again de-notified by respondent through subsequent Notification 24.01.1996. Appellant also claimed that once again respondent No.1 issued Notification dated 12.02.1997 thereby assuming the control and management of Dargah and the appellant challenged the said Notification before learned District Judge Badin in Civil Miscellaneous Appeal No.02 of 1997, which was allowed vide order dated 18.09.1998; the said decision was impugned by respondent No.1 before this Court in 1<sup>st</sup> Appeal No.15 of 1999, which was disposed of vide judgment dated 23.12.1999 restraining the respondent from frequent issuance and withdrawal of notifications;

however, again respondent No.1 issued impugned Notification dated 13.10.2010 for taking over possession of Dargah and attached properties which was impugned by the appellant before the learned lower court in Petition No.01 of 2010 but same was dismissed vide impugned Judgment and Decree dated 13.12.2012, hence this appeal.

3. Mr. Sunder Das, learned counsel for appellant argued that the impugned Judgment and decree passed by learned lower court is against the canons of justice, equity and good consciences; that trial Court did not consider that the Notifications issued earlier had either been withdrawn or set-aside by the competent courts of law and respondent No.1 had not challenged any of the orders; on the contrary, they had withdrawn the notifications, but the trial Court failed to consider such aspect of the case and went on to dismiss the petition; that the trial court did not consider that Survey numbers are not the same, as given in the Notification, and no fresh Notification had been issued and the contents of notification clearly mentioning "RE-TAKING", as the earlier Notification had already been declared by the Court being illegal and / or withdrawn under the orders of competent authority, but the trial court failed to consider the same; that the trial court failed to consider that the property is originally purchased privately as Kabuli land, hence same cannot be taken by respondent No.1 as Waqf Property; that there is no proof with regard to ownership of Dargah, being Government property, and the proof submitted by the appellant has neither been considered nor appreciated by the courts below; that the trial court failed to consider entry No.196 produced by the Attorney of appellant, showing names of owners, and the appellant had not filed the petition being the owner rather had filed as Mutawali / SajjadaNashin; however, the trial court illegally and unlawfully discussed the ownership, which is un-warranted under Waqf Properties Ordinance 1979; that the trial Court illegally and unlawfully discussed the maintainability of the petition and connected the same with the ownership, which is gross negligence on the part of trial court as Mutawali-ship or Sajjada Nashin does not require to prove the ownership, though in the present case the petitioner / appellant, his sons, brothers and sisters are the owners of property and it is their Kabuli land given by their ancestors which is being managed by one of the family members as owner of land and Sajjada Nashin of Dargah; that the trial court miserably failed to apply its mind that this court had allowed the Appeal towards the observation given by learned District Judge Badin, regarding placement of grounds before the Court prior to issuance of Notification. He prayed for allowing this appeal and setting aside the impugned Judgment and Decree along with the impugned notification.

4. Mirza Zain-ul-Abdin learned counsel for respondent No.1 submits that Dargah and attached properties thereto are Waqf properties and control and management of the same has been taken under Waqf Properties Ordinance 1979 as such findings of court below are well reasoned and the same does not require interference by this Court; that petition of the appellant was not maintainable and the same had rightly been dismissed by the trial court; that this court vide Judgment dated 23.12.1999 passed in 1<sup>st</sup> Appeal No.15 of 1999 had set aside the earlier order of lower Court and only restrained the respondent from frequent issuance and withdrawal of notifications and there was no direction that control and management of Waqf properties cannot be taken by the respondent. He finally prayed for dismissal of the present appeal.

5. Learned AAG also supported the impugned Judgment and Decree and prayed for dismissal of this appeal.

6. I have heard learned counsel for the parties and perused the record with their assistance.

7. The main question which requires determination of this court is whether the petition filed by the Appellant before the learned District Judge was maintainable.

8. Before going ahead on the subject proposition it is noticed that the Chief Administrator Auqaf Sindh Hyderabad filed Appeal No. 15 of 1999 against the Appellant which was allowed with restraining order for issuing frequent notifications of taking over the properties of appellant.

9. The learned trial court vide impugned judgment and decree framed three issues for determination and concluded that the appellant had no locus standi to file the petition as the same was not maintainable in terms of Section 11 of the Ordinance, 1979. Besides this court has already observed that learned District Judge had acted beyond the scope of statutory provision of law, as such the impugned order was passed without jurisdiction.

10. In view of the findings recorded by this court in 1<sup>st</sup> Appeal No. 15 of 1999, no contrary view could be taken for the reason that the finding has not been called in question which has attained finality so far as restraining the respondents from issuing frequent notification of taking over properties of the Appellant and thereafter withdrawing the same is concerned the respondents have issued the notification dated 13.10.2010 in exercise of powers conferred upon the competent authority U/S 7 (1) of Sindh Waqf Property / Ordinance

1979 to re-take over and assume the Administration, Control, Management and Maintenance of Dargah Hazrat Saman Shah Sarkar with Mosque, Graveyard, Taluka Tando Bago, District Badin along with Waqf properties attached thereto in the schedule which notification has been called in question on the analogy of restraining order passed by this Court as discussed supra.

11. Prima facie exercising of statutory powers conferred upon the competent authority under Sindh Waqf Property Ordinance 1979 could not be restricted to the extent of controlling the management of waqf properties.

12. In view of the above facts and circumstances of the case, I am of the considered view that learned trial court simply observed that the appellant has no locus standi nor any interest or cause of action to file the petition which is not maintainable and was barred under Section 11 of the Ordinance 1979. Primarily the appellant claims to be Sajjada Nashin of Dargah Saman Sarkar, and on the contrary claims ownership of properties. It is settled law that if the property falls within the definition of Waqf properties, the ownership could not be claimed, however, the status of appellant could be of Muttwali of the Dargah and not as owner. So far as the issue of title of subject properties is concerned the same could not be looked into in these proceedings arising out of Judgment and Decree passed by the learned Additional District Judge Badin in Petition No. 01 of 2010.

13. In view of the foregoing this appeal is devoid of merit and is accordingly dismissed with no order as to costs.

JUDGE