

(2013) 11 PAT CK 0013
In the Patna High Court
Case No : First Appeal No. 81 of 2002

Bihar State Sunni Wakf Board

APPELLANT

Vs

Syed Shah Waqaruddin Ahmad and Others

RESPONDENT

Date of Decision : 12-11-2013

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 6
Criminal Procedure Code, 1973 (CrPC) — Section 145
Land Acquisition Act, 1894 — Section 5A
Waqf Act, 1995 — Section 3(i)(k), 6(i)

Citation : (2013) 11 PAT CK 0013

Hon'ble Judges : Vijayendra Nath, J

Bench : Single Bench

Advocate : Rashid Izhar, Mr. Lallan Prasad Singh, Mr. Anil Kumar Saxena, Mr. Navin Kumar Sinha, Mr. Farooque Moazzam, No. 1-Wakf Board, for the Appellant; Rajendra Narain, Senior Advocate for the Respondent Nos. 2, 3, 7, 8, 10 and 11 and Mr. S.S. Dwivedi, Senior Advocate for the Respondent Nos. 4, 5 and 6, for the Respondent

Final Decision : Dismissed

Judgement

Vijayendra Nath, J.—Assailing the dismissal of their suit, the plaintiffs have filed this appeal against the judgment and decree dated 31.07.2001 passed by Sub Judge VIII, Ara in T.S. No. 269/1996. The suit has been filed by the plaintiffs for declaration of right, title and interest of the plaintiff No. 1-Wakf Board over the suit land as Wakf property of the Wakf Estate namely Bari Karbala Maula Bag Pakri (Wakf No. 123) and for confirmation of possession of the plaintiffs over the suit land. The relief has also been prayed for declaration that the defendant Nos. 1 to 12 have no authority to sell or alienate the suit land and any such transfer is void ab initio besides the prayer for decree for permanent injunction against the defendants from disturbing the possession of the plaintiffs over the suit land. There are two plaintiffs in the suit. The plaintiff No. 1 is Bihar State Sunni Wakf Board through its Secretary and the plaintiff No. 2 is Md Raza Khan. However, in

paragraph 2 of the plaint it has been averred that the plaintiff No. 2 is a proforma party in the suit. The suit land has been described in Schedule I of the plaint as 9.08 acres of land recorded in Cadastral Survey Plot No. 310 of Cadastral Survey Khata No. 191 in Mauja Maula Bagh Pakri, Ara, District Bhojpur and the boundaries of the land have also been mentioned.

2. The case of the plaintiffs in short is that the suit land alongwith other lands were purchased properties of two Mohemdan ladies namely Bibi Mahboob Bux and Bibi Sahebjan who had acquired the same from East India Company by registered sale deed dated 21.05.1816 and subsequently by a registered deed of wakf dated 29.10.1833 they dedicated about 110 bighas of their land including the suit land for Masjid, Imambara etc and appointed Sah Kabiruddin as Mutwali of the Wakf. It is further case of the plaintiffs that later on in the year 1948 the said Wakf Estate comprising three Taujis Nos. 72, 534 and 601 in three villages namely Barbatra, Pakri and Maula Bagh respectively was got registered under the Bihar Wakf Act 1947 by the then Mutwali Syed Sah Salihuddin Ahmad, and after the creation of the Wakf Board, the said Wakf Estate including the suit land was registered with the Wakf Board as Wakf No. 123 by the said Mutwali who remained Mutwali till his death in the year 1982. The plaintiffs have also stated that earlier a dispute arose regarding the nature of the properties including the suit land and also about the misuse of the property and removal of Mutawali which led to the filing of T.S. No. 01/1890 which was decided by the Learned District Judge, Sahabad who upheld the religious nature of the suit properties. The matter however had gone to the Hon'ble Calcutta High Court in F.A. No. 193/1891 which was decided on 03.03.1893 whereby the appeal was allowed setting aside the findings regarding the removal of Mutwali.

3. It is further case of the plaintiffs that in the cadastral survey Khata, the suit land was recorded as Bakas Mafidar in the name of the Mutwali Syed Sah Salihuddin Ahmad and at the time of vesting of Jamindari under Bihar Land Reforms Act, the return was submitted in the name of the Wakf and thereafter Jamabandi was created in the name of the then Mutwali Syed Sah Salihuddin Ahmad. The plaintiffs' further case is that on the objection raised by the then Mutwali Syed Sah Salihuddin Ahmad, who was the father of defendant Nos. 1 to 10, the suit land was released from acquisition in L.A. Case No. 04/1963-64. It is also the case of the plaintiffs that after the death of Mutwali Syed Sah Salihuddin Ahmad in the year 1982, no body came forward to become Mutwali and on 09.11.1985 the plaintiff No. 1 had approved a temporary committee with defendant No. 12 Sultan Ahmad as its Secretary for looking after the affairs of the Wakf Estate and later on in the year 1988 S.S. Taqiuddin Ahmad (defendant No. 1) was appointed as Mutwali for the Wakf Estate but the said S.S. Taqiuddin Ahmad (defendant No. 1) alongwith his brothers and sisters, for undue gain executed a power of attorney dated 14.11.1988 in favour of Md Salimuddin Khan (defendant No. 11) treating the suit property to be his personal property and on that basis the defendant No. 11 started selling the suit land. It is also the case of the plaintiffs that in order to save the Wakf property from plunder, the local

people constituted a committee with plaintiff No. 2 Md Raza Khan as its Secretary and the constitution of the said committee as advisory committee was later approved by the plaintiff No. 1. The plaintiff No. 2 thereafter prevailed upon the then Mutwali S.S. Taquiuddin Ahmad (defendant No. 1) and convinced him of the illegality and immorality of his actions upon which the defendant No. 1 alone cancelled the power of attorney but even thereafter the defendant No. 11 continued to sell away the parts of the suit land on the basis of the power of attorney through sale deeds which however had remained inoperative. It is further case of the plaintiffs that the plaintiff No. 2 Raza Khan filed objection in survey proceeding on behalf of the Wakf Estate for recording the suit land as Bari Karbala and those cases were allowed on the basis of compromise by the defendant No. 1 who admitted the suit property to be the Wakf Property. In the proceeding u/s 145 Cr.P.C. also the possession of Md Raza Khan plaintiff No. 2 over the suit land was declared as the defendant No. 1 S.S. Taquiuddin Ahmad supported the claim of the plaintiffs. The municipal authorities also allowed the mutation of the name of Bari Karbala on the petition filed by Md Raza Khan (plaintiff No. 2) by removing the name of earlier Mutwali S.S. Maliuddin and recording the name of Bari Karbala. It is further case of the plaintiffs that the anchal mutation case for the suit land has also been decided against the defendant Nos. 1 to 10 at the appellate stage and affirmed by the revisional authority. The plaintiffs have, thus, asserted that the suit land is part of the Wakf Estate and the produce from the suit land is utilized for maintenance of the institutions of the Wakf Estate like Mosque, Imambara, Musafirkhana etc. The plaintiffs have also asserted that the notice has been issued to the defendant No. 1 for showing cause against his proposed removal from the post of Mutwali of the Wakf.

4. There were altogether 12 defendants initially in the suit out of which defendant No. 11 died during the pendency of the suit and his name was expunged. The defendant Nos. 1 to 10 are the sons and daughters of Syed Sah Salihuiddin Ahmad who according to the plaintiffs was the Mutwali of the Wakf till his death in the year 1982. The defendant Nos. 2 to 9 have contested the suit by filing written statement. The defendant No. 12 Sultan Ahmad has filed his separate written statement and has also contested the suit.

5. The defendant Nos. 2 to 9 in their written statement have claimed the suit land to be their ancestral property and have denied its nature as Wakf Property and its inclusion in the Wakf estate as claimed by the plaintiffs. It is the specific case of these defendants that the suit land is one of the several plots of Khata No. 191 which have been recorded in the name of the defendants and out of which the lands in other plots have already been sold and the purchasers are in possession by constructing their houses without any objection by the Wakf Board. It is their further case that adjacent north to the Suit Plot No. 310, the Plot Nos. 312, 313, 314, 315, 316, 317 and 318 are situated over which Masjid, Imambara and Karbala are situated. These defendants have categorically denied that the Bihar State Sunni Wakf Board has any concern with the suit land and

have asserted that the suit land has never been registered with the Wakf Board and has never been included in the register maintained u/s 26 by the Wakf Board with regard to the Wakf Estate No. 123. It is the case of these defendants that the two Mahomedan ladies namely Bibi Mahboob Bux and Bibi Sahebjan never purchased the suit plot by sale deed dated 21.05.1816 and they never included the suit land in the registered deed of Public Wakf dated 29.10.1833. It has also been stated that Syed Sah Kabiruddin had never been Mutwali with regard to the suit plot rather it was the ancestral property of Sah Maliuddin who was grandfather of defendant Nos. 1 to 10. These defendants have also asserted that the suit land was never the subject matter of T.S. No. 01/1890 and also of F.A. No. 193/1891 which arose therefrom before the Hon'ble Calcutta High Court. These defendants have however accepted that their father Salihuddin Ahmad was the Mutwali of Wakf Estate No. 123 which is situated in the adjacent northern boundary of the suit plot and has no concern with the suit plot. It is further case of these defendants that Sah Salihuddin Ahmad never got the suit plot registered with the Wakf Board and the same was not mentioned in the petition filed by him as Mutwali before the Wakf Board and has also not been mentioned in the register maintained by the Board u/s 26 of the Wakf Act 1954. The defendants have pleaded that they are residents of Sasaram, and therefore, their father Syed Sah Salihuddin Ahmad gave the suit land on batai (share cropping) to the defendant No. 12 who has installed a boring for water in the suit plot at his own cost and has also taken electric connection in his name with the consent of the defendants. The defendants have also denied that their father Syed Sah Salihuddin Ahmad ever gave in writing in the land acquisition case that the suit land was Wakf Property. It is also the case of the defendants that after the demise of Syed Sah Salihuddin Ahmad who was Mutwali of Wakf Estate No. 123, his eldest son S.S. Taqiuddin Ahmad (defendant No. 1) became Mutwali of the said Wakf according to the prevalent custom, and the advisory committee was also constituted with the consent of the defendant No. 1 with defendant No. 12 as its Secretary but later on after realizing that the Wakf Board had no jurisdiction to constitute advisory committee, the defendant No. 12 separated himself from the advisory committee and thereafter the plaintiff No. 2 Raza Khan in collusion with the officials of the Wakf Board became Secretary and started making false claim against the property of these defendants. These defendants have accepted that they had together executed the power of attorney in favour of the defendant No. 11 Salimuddin Khan for selling the suit land as they were residing outside and the suit land was not of profit to them. It has been alleged by the defendants that the plaintiff No. 2 wanted the power of attorney in his favour and therefore he got the power of attorney in favour of defendant No. 11 cancelled by the defendant No. 1 alone but did not finally succeed in his design because later on the defendant No. 1 again executed the power of attorney for the same purpose in favour of defendant No. 11. The defendants have further alleged that no compromise petition was filed knowingly by the defendant No. 1 accepting the suit land to be Wakf property in any proceeding and have further stated that they had also not been parties to the said proceedings. These

defendants have thus claimed the suit land to be their ancestral land and have further claimed to be in exclusive possession over the same as title holders.

6. The defendant No. 12 Sultan Ahmad has filed his separate written statement and has supported the case of the defendant Nos. 2 to 9. This defendant has also alleged that the plaintiff No. 2 has prevailed upon the defendant No. 1 S.S. Taqiuddin Ahmad by convincing him of false gains and had got the cancellation deed executed by him with regard to the power of attorney and had also got the compromise petition filed in the survey proceeding. It has also been asserted that any statement or action by the defendant No. 1 could not be binding on the remaining defendants, and the defendant No. 1 and his brothers and sisters are in possession of the suit land and get the agricultural work done in the suit land through this defendant No. 12 who is their bataidar. This defendant has also alleged that the present suit has not been filed by the Wakf Board rather it has been filed by the plaintiff No. 2 in order to grab the suit land belonging to the defendant Nos. 1 to 10. It has also been asserted by this defendant that the plaintiff No. 1 Raza Khan is not the Mutwali of the Wakf Estate No. 123 but has wrongly been claiming himself as such.

7. In view of the pleadings of the parties the learned court below framed altogether 11 issues out of which issue Nos. 6, 7, 8 and 9 have been decided as material issues and are as follows:--

Issue No. 6:--Is the suit property part and parcel of the Wakf Estate No. 123 known as Maulabagh Wakf Estate created by Bibi Mahboob Bux and Bibi Sahebjan in the year 1833?

Issue No. 7:--Are the plaintiffs entitled to declaration of their title to the disputed land and confirmation of possession and in the alternative for recovery of possession?

Issue No. 8:--Is the disputed land ancestral property of the defendant Nos. 1 to 10?

Issue No. 9:--Have the defendants any right, title, interest in the disputed land and are they in possession of the same through their bataidar, the defendant No. 12?

8. After hearing the parties and scrutinizing the evidence led on their behalf, the learned court below has decided the issue Nos. 6, 7, 8 and 9 against the plaintiffs and has held that the suit land is not part of the Wakf Estate No. 123. It has been further held that the defendants have got right, title and interest over the suit land and they are in possession over the same through their bataidar. The learned court below has also held that the suit has been filed without permission from the Wakf Board and therefore it is not maintainable. The suit has thus been dismissed by the impugned judgment and decree.

9. During the pendency of this appeal a petition (I.A. No. 6192/11) was filed on behalf of the plaintiff-appellants praying to adduce additional evidence. After

hearing the parties, by order dated 16.11.2011, the said interlocutory application was allowed and the trial court was directed to receive the additional evidence adduced on behalf of the plaintiff-appellants and record depositions in support of those documentary evidence and also to receive evidence in rebuttal by the defendant-respondents, and transmit the same to this court. The respondents unsuccessfully assailed this order before the Apex Court.

10. Pursuant to the direction, the trial court received the documentary evidence of the parties and recorded the depositions of the witnesses in support of those documentary evidence and thereafter has sent the same to this court. It appears that earlier the plaintiffs have produced Ext.1 to 3 as documentary evidence and examined P.Ws.1 to 6 as witnesses in support of their case. After the grant of opportunity to lead additional evidence, the plaintiffs have adduced further documentary evidence which have been marked as Ext.4 to 19 in the suit. In rebuttal the defendants have also adduced documentary evidence which have been marked as Ext.J, K and K/1 as well as Ext.G/1. The parties have also examined witnesses in support of the aforesaid documentary evidence.

11. The written arguments in this appeal have also been filed on behalf of the appellant No. 1 and appellant No. 2 separately, and jointly on behalf of the contesting respondents.

12. When the hearing of this appeal was taken up two different sets of lawyers appeared for appellant No. 1 Wakf Board and the appellant No. 2 Md Raza Khan respectively and have made their submissions separately in support of this appeal. Similarly the respondent Nos. 2,3,7,8,10 and 11 have been represented by the learned senior counsel, Mr. Rajendra Narain, and the respondent Nos. 4, 5 and 6 have been represented by the learned senior counsel, Mr. S.S. Dwivedi.

13. Mr. Rashid Izhar, the learned counsel for the appellant No. 1-Wakf Board, has submitted that the fact that the Wakf has been created by two Mohemdan ladies namely Bibi Mahboob Bux and Bibi Sahebjan is fully established by the judgment passed in T.S. No. 01/1890 of the learned District Judge and in F.A. No. 193/1891 of Hon"ble Calcutta High Court. Supporting the locus standi of the plaintiff No. 2 Raza Khan to file the suit, the learned counsel has placed Section 3(i)(k) and Section 6(i) of the Wakf Act 1995 and has submitted that any person interested in a Wakf is competent to file a suit. It has been also urged that the application for registration filed by Syed Sah Salihuddin Ahmad is itself sufficient to establish that the Wakf has been created and has been registered with the Wakf Board in accordance with the provisions of law. The learned counsel has further placed the several provisions of the Wakf Act and even prior legislations to strengthen his submissions and has canvassed that the defendants would be bound by the act of their predecessor Syed Sah Salihuddin Ahmad and cannot deny existence of the Wakf.

14. The learned counsel appearing for the appellant No. 2 while adopting the submissions made on behalf of the appellant No. 1 has further submitted that the

fact that the suit land is included in the Wakf Estate is also established by the copy of the register maintained u/s 26 of the Wakf Act 1954 (Ext.10/A) wherein the suit plot No. 310 of Khata No. 191 has been specifically mentioned. It has been further submitted that the written objection filed by Syed Sah Salihuddin Ahmad in the land acquisition proceeding and brought in evidence as Ext. 13 is conclusive enough to show that the suit land was accepted as Wakf property as far back as in the year 1964. It has been further submitted that the plaintiff No. 2 Md Raza Khan as Secretary of the Advisory Committee constituted by the Board had filed survey cases before the competent authorities wherein also the suit land was ordered to be recorded in the name of Bari Karbala after the compromise. The learned counsel has also placed the orders passed in the mutation proceedings, bataidari case and 145 Cr.P.C. proceeding in support of his submission that the defendants have admitted the nature of the suit land as Wakf property. It has thus been submitted that there has been ample evidence on record to support the right, title, interest and possession of the plaintiffs over the suit land as Wakf property.

15. Per contra, the learned senior counsel on behalf of the respondent Nos. 3, 7,8,10 and 11 has firstly submitted that from the judgment passed in F.A. No. 193/1891 of the Hon"ble Calcutta High Court it will appear that the Wakf created by the two Mahomedan ladies is a Siya Wakf and therefore the plaintiff No. 1-Sunni Wakf Board is not entitled to maintain the suit with regard to this Wakf property. It has been further submitted that the defendants do not deny the existence of the Wakf Estate No. 123 and the only contention of the defendants is that the suit land is not the part of the said Wakf Estate. Elaborating his submissions, the learned senior counsel has pointed out that the burden of proof that the suit land is included in the Wakf Estate No. 123 is upon the plaintiffs but they have squarely failed to produce either the Wakf deed dated 29.10.1833 or the sale deed in favour of the two Mahomedan ladies who are said to have created the Wakf, to support the fact that the suit land is included therein. In absence of the document of title, it has been argued, the plaintiffs cannot get the declaration as sought for only on the basis of collateral evidence. Criticizing the copy of the entries in the register u/s 26 of the Wakf Act, 1954 marked as Ext. 10 A, the learned senior counsel has submitted that the said document is not a reliable document in view of another similar document brought on record by the appellant No. 1 in its affidavit in support of I.A. No. 6182/10 wherein the suit land is not mentioned although the said document has also been issued by the office of the plaintiff-appellant No. 1 and shown to be the extract from the register of Wakf u/s 26 of the Wakf Act 1954. The learned senior counsel has placed the relevant evidence of the plaintiffs in detail in order to establish their insufficiency in reaching to the conclusion that the suit land is part of the Wakf Estate No. 123. The learned senior counsel has further placed the material evidence of the defendants to show that the suit land has always been the exclusive property of the defendants and they have been dealing with the same as owners thereof.

16. Mr. S.S. Dwivedi, the learned senior counsel appearing on behalf of the respondent Nos. 4, 5 and 6 has at the outset submitted that the plaintiffs' reliance on the so called compromise petition containing the statement made by the defendant No. 1 or his statement in the deed of cancellation cannot be treated to be admission binding on the other defendants as there is no concept of joint interest in a Mahomedan family. It has been further submitted that in paragraph 5 of the plaint the categorical statement has been made by the plaintiffs that the suit land was included in the Wakf deed of the two Mahomedan ladies namely Bibi Mahboob Bux and Bibi Sahebjan but no evidence at all in that regard has been produced by the plaintiff and therefore adverse inference must be drawn against them for suppressing the best evidence. It has been pointed out that this aspect is further emphasized when in the order passed in the mutation proceeding it has been mentioned that the photo copy of the Wakf deed had been produced. It has been canvassed that it is a case where the plaintiffs have totally failed to bring in evidence any document prior to 1948 to support their claim that the suit land is the Wakf property. The learned senior counsel has further submitted that much reliance has been placed on behalf of the plaintiff appellants on the petition alleged to have been filed by the S.S. Salihuddin Ahmad in land acquisition case but in view of the categorical denial by the defendants in this regard in paragraph 20 of the written statement, the plaintiffs were required to establish the said fact of filing of the petition by S.S. Salihudin Ahmad by examining hand writing expert which they failed to do. It has been urged that in view of the settled principle of law, a plaintiff has to succeed on the strength of his own case and not on the weakness of the case of the defendant. It has finally been submitted that even on the basis of additional evidence the plaintiff-appellants have failed to establish the crucial fact that the suit land is included in the Wakf Estate No. 123.

17. In view of the rival contentions of the parties, the following singular point arises for determination in this appeal:--

Whether the suit land is part of the Wakf Estate No. 123 as claimed by the plaintiffs and is in their possession as such or the defendants have got exclusive title and possession over the same.

18. The suit land is 9.8 acres of land in Cadastral Survey Plot No. 310 of Khata No. 191. The plaintiffs have averred in paragraph 5 of the plaint that the two Mahomedan ladies namely Bibi Mahboob Bux and Bibi Sahebjan acquired the suit land alongwith the other lands by registered sale deed dated 21.05.1816 and thereafter they endowed the suit land alongwith other lands by a registered deed of public Wakf dated 29.10.1833. The defendants, however, have come out with the case that the suit land is their ancestral land and the same has never been the subject matter of the sale deed dated 21.05.1816 in favour of the two Mahomedan ladies namely Bibi Mahboob Bux and Bibi Sahebjan and it has also not been included by them in the registered deed of Wakf dated 29.10.1833. The plaintiffs have not brought on record the registered deed of sale or the registered

deed of Wakf to establish their case of title of the two Mahomedan ladies namely Bibi Mahboob Bux and Bibi Sahebjan over the suit land. There is also no explanation on behalf of the plaintiffs in this regard for not obtaining and producing the certified copies of those two registered deeds which are direct evidence to this fact.

19. The defendants have adduced in evidence the audit report (Ext. J Series) from which it appears that the audit of the accounts of the Wakf No. 123 had been made by the auditor of the Bihar Sunni Majlis-E-Wakf and in the Audit Report No. 30/70-71, the auditor had suggested that the deed of Wakf be obtained and produced in the next audit. The defendants have also pointed out that in Ext.6 which is the order passed by the Deputy Collector Land Reforms in Mutation Appeal No. 04/1992-93 and in Ext.9 which is the order passed by the Special Officer, Ara Municipality in Mutation Case No. 455/91-92, it has been mentioned that the photo copy of the Wakf deed dated 29.10.1833 has been produced in the said proceeding on behalf of the plaintiffs and the said document appears to have been also relied upon by the authorities for passing the orders in favour of the plaintiffs.

20. The learned counsel for the appellants in this regard, however, has relied upon the judgment by the Division Bench of Hon''ble Calcutta High Court in F.A. No. 193 of 1891, reported in ILR 20 Calcutta 810 in support of the claim regarding the existence of the Wakf in question. From this judgment it is clear that a Wakf has been created for Maula Bagh property. But the existence of the Wakf with regard to Maula Bagh property is not in issue between the parties as the defendants have also admitted the existence of the said Wakf. The discord between the parties is with regard to the inclusion of the suit land in the said Wakf. The judgment by the Hon''ble Calcutta High Court does not contain the details of property subject matter of the endowment in question in that case and it cannot at all be gathered from the said judgment that the suit land was the subject matter of the Wakf in question i.e. Maula Bagh endowment in that case. The plaintiff No. 2 Md Raza Khan as P.W.6 has also accepted in his deposition in paragraph 34 that the suit land has not been mentioned in the Title Suit No. 01/1890 and in the judgment of the Hon''ble Calcutta High Court. The plaintiff No. 2 has also stated in the paragraph 31 of his deposition that he has not seen the sale deed dated 21.05.1816 by the East India Company in favour of the two ladies namely Bibi Mahboob Bux and Bibi Sahebjan. He has further deposed that he has also not seen the deed of Wakf dated 29.10.1833 and further that the said deed is not even with the Wakf Board. It would be pertinent to mention here that no body has been examined in the suit on behalf of the plaintiff No. 1-Wakf Board. The aforesaid statements by the plaintiff No. 2 in his deposition leave no room for doubt that the plaintiffs have based their claim of title over the suit land as the land subject matter of Wakf without having verified the said fact either from the Wakf deed or the sale deed of the two ladies namely Bibi Mahboob Bux and Bibi Sahebjan. There is thus substance in the submission on behalf of the defendant-respondents that there is no evidence prior to 1948, supporting the

claim of the plaintiffs, regarding the inclusion of the suit land in the Wakf of the two ladies.

21. The plaintiff-appellants have claimed that then Mutwali S.S. Salihuddin Ahmad got the Wakf registered with the Bihar State Sunni Majlis -E- Wakf in the year 1948 in accordance with the provision of the Bihar Wakf Act 1947. In support of the said fact the Ext. 10B has been brought on record which is the certified photo copy of the entries made in the register. The perusal of this Ext. 10 B shows that the entries made therein in Form 1 bears the verification by S.S. Salihuddin Ahmad on 19.10.1948 as Mutwali, Maula Bagh Wakf. In column 6 of this document, requiring mention of the properties of the Wakf, the names of three villages and Taujis have been mentioned. The three villages and Taujis numbers are village-Barbatra Tauji No. 71, Village-Pakri Tauji No. 534 and village-Sandia Tauji No. 651. In column 4, the Ara Municipal Khata No. 39 has been mentioned. It is evident, however, that there is no mention of the suit plot No. 310 of Khata No. 191 of village- Pakri. It has been faintly submitted on behalf of the plaintiff-appellants in this regard that the suit plot is included in Tauji No. 534 of village-Pakri. This submission is clearly misconceived as the mention of a Tauji Number as a property only indicates the proprietary or intermediary interest held therein and it can never mean that any land of the said Tauji would become the exclusive "khas" property of such proprietor or intermediary for which specific pleading and evidence would be required. This aspect is further corroborated by the audit report (Ext. J Series) where, in the report of the year 1961 for the period 1956-57 to 1960-61, it has been clearly mentioned that the aforesaid Taujis have vested in the government of Bihar according to provisions of the Land Reforms Act, 1950 and the Mutwali had claimed compensation of Rs. 4693-14-3(including L.R.) and cess Rs. 703-9-0 after the vesting. It is not the case of the plaintiffs that the suit land in the concerned tauji was in khas possession of the Wakf and was thus deemed to have been settled with the Wakf in accordance with Section 6 of the Bihar Land Reforms Act 1950. To the contrary, the plaintiff No. 2 as P.W. 6 has accepted that the Jamabandi for the suit land has been created in the name of the predecessor in interest of the defendants whose name has been mentioned in the Register II. The defendants have also brought on record Ext. C which is the duly certified application for information and it shows that the Register II for the suit land has been prepared in the name of S.S. Salihuddin Ahmad and after his death the names of his heirs i.e. defendant Nos. 1 to 10 have been entered after expunging his name. The defendants have also adduced in evidence the rent receipts Ext A Series which show that the Jamabandi has been running in the name of S.S. Salihuddin Ahmad for the suit land area 9.8 acres. Thus there is no force in the submission that the suit land would be deemed to have been included in the Wakf property as Village-Pakri Tauji No. 534 has been mentioned as one of the Wakf properties.

22. At this juncture, however, strong reliance has been placed on behalf of the plaintiff-appellants on Ext. 10A which is the certified copy of the register of Wakf u/s 26 of the Central Wakf Act 1954. This certified copy has been issued on

07.09.2011 and in its column No. 13, the particulars of the Wakf property (immovable) have been mentioned which includes besides Tauji No. 72 village-Barbatra, Tauji No. 534 Village- Pakri and Tauji No. 651 Village-Sandia(mentioned as Imydia), the Suit Plot No. 310 of C.S. Khata No. 191 and also the different plots of C.S. Khata No. 256 and 356. The corresponding new Khata No. 397 with new plots have also been mentioned.

23. The learned senior counsel on behalf of the defendant-respondents have strongly disputed the authenticity of the entries of the suit plot alongwith other plots in this register (Ext. 10A) and has pointed out that earlier also the certified copy of the entries in the register of Wakf maintained u/s 26 has been brought on record on behalf of the plaintiff-appellants in this appeal on affidavit, in support of their prayer for injunction as made in I.A. No. 6182/10, and the entries in the two certified copies substantially differ. In this regard, it appears from the record that I.A. No. 6182/10 was filed in this appeal by the appellants praying for injunction against the defendant-respondents and in support of the I.A. No. 6182/10, an affidavit had been filed on behalf of the appellant No. 1 on 01.09.2010. The said affidavit had been sworn by one Md Aftab Alam an assistant in the Bihar Sunni Wakf Board. In this affidavit besides annexing the copies of the judgment of T.S. No. 01/1890 and judgment of Hon'ble Calcutta High Court in F.A. No. 193/1891, the two separate copies of the entries in the register as maintained u/s 26 of the Central Wakf Act have also been annexed as Annexure-3. From perusal of these documents it transpires that they are the photo copies of certified copies of the entries in the said register issued by the Wakf Board on 22.09.1993 and also on 17.08.2002. The entries in the first copy in Annexure-3 are similar to the entries made in the Ext. 10A. But curiously enough the another copy in Annexure-3 of the same register of Wakf u/s 26 of the Central Wakf Act 1954 depicts altogether different picture. This another certified copy remarkably contains the mention of only three Taujis in the Column No. 13 meant for mentioning the particulars of the immovable property of the Wakf. These facts lead to a situation where on behalf of the plaintiff-appellants, the three separate certified copies of the register of Wakf maintained u/s 26 of the Central Wakf Act 1954 have been brought before the court. The first such copy is the certified copy issued by the Wakf Board on 22.09.1993 and annexed as Annexure-3 to the affidavit dated 01.09.2010 filed in I.A. No. 6182/10; the second such copy is the certified copy issued by the Wakf Board on 17.08.2002 which has also been annexed as Annexure-3 to the abovesaid affidavit and the third such copy is the certified copy issued by the Wakf Board on 07.09.2011 and this copy has been adduced as additional evidence and marked as Ext. 10A.

24. The suit has been filed in the year 1996 and the copy of the register of Wakf, issued on 22.09.1993 as abovementioned, is prior to the institution of the suit. In this document there is no mention of the suit plot or even other plots in its column No. 13 where the particulars of Wakf property were to be mentioned and only the description of the three Taujis has been given therein. Noticeably after the description of the three Taujis, there is a big cross (x) mark in the column

No. 13 meaning thereby that no other entries could have been made therein. The Ext.10A as well as the another certified copy of the entries in the register of Wakf have been issued on 07.09.2011 and 17.08.2002 respectively which dates are definitely after the institution and decision of the suit and during the pendency of this appeal. There is no plausible explanation on behalf of the plaintiff-appellants with regard to the abovementioned definite vital discrepancy in the three certified copies of the entries of the same register of Wakf, produced by them. It has not been denied on behalf of the appellant No. 1 that the affidavit has been filed on 01.09.2010 on behalf of the appellant No. 1 in support of I.A. No. 6182/10 and in that affidavit the two certified copies of the register of Wakf have been annexed. It has also not been denied by the appellant No. 1-Wakf board that the above three copies of the register of Wakf have been issued by the Wakf Board with the certification of being the true copies. It will also be apposite to note here that the plaintiff-appellant No. 2 Md Raza Khan in his deposition as P.W.6 has also accepted that the suit land has not been mentioned in the register of Wakf maintained u/s 26 of the Wakf Act, 1954. This factual scenario pronouncedly reveals that the suit land was not mentioned as Wakf property in the register of Wakf maintained by the plaintiff-appellant No. 1 in the year 1993 i.e. prior to the suit and the same has been included in the said register as Wakf property after the suit was decided against the plaintiffs. There is, thus, no scintilla of doubt left that the certified copies of the register including Ext.10A issued after the disposal of the suit are shrouded by suspicion and therefore not worth reliance. The learned senior counsel for the defendant-respondents is, therefore, right in his submission that the certified copy of the register of Wakf issued on 22.09.1993 prior to the institution of the suit by the Wakf Board itself and also produced on behalf of the Wakf Board on affidavit in this appeal cannot be ignored, and no reliance should be placed on the copy of the register of Wakf marked as Ext.10A by way of additional evidence.

25. On behalf of the plaintiff-appellants the reliance has been placed on the petition said to have been filed by S.S. Salihuddin Ahmad in the land acquisition case No. 04/1963-64 in support of the submission that the nature of the suit land as Wakf property stands admitted. In paragraph 9 of the plaint, the plaintiffs have stated that the then Mutwali S.S. Salihuddin Ahmad who was the father of defendant Nos. 1 to 10, had raised objection on 30.09.1964 and 02.01.1967 u/s 5A of the Land Acquisition Act in L.A. Case No. 04/1963-64 praying for release of the suit land from acquisition. The defendant Nos. 1 to 10 in paragraph 20 of their written statement, in reply, have categorically denied the filing of any such petition by S.S. Salihuddin Ahmad in L.A. Case No. 04/1963-64. In his deposition also the deposing defendant S.S. Ashraruddin Ahmad as D.W.7 in paragraph 24 has supported the said fact. The plaintiff No. 2 Md Raza Khan who deposed as P.W. 6 however in his deposition has not made any statement supporting the fact of filing of objection by S.S. Salihuddin Ahmad in the land acquisition case. The copies of the petition dated 30.09.1964 and 02.01.1967 said to have been filed by S.S. Salihuddin Ahmad have been brought on record as additional evidence

and marked as Ext. 13 and 13/A. It further transpires from the record that the original records of the land acquisition case were also called for and received in the court below. However, in spite of the availability of the original record and the specific denial by the defendants, the plaintiffs did not make any prayer for examination of the handwriting/signature of S.S. Salihuddin Ahmad on those petitions by a handwriting expert to corroborate their case. In view of the principle laid down by the Apex Court in the case of Joseph John Peter Sandy Vs. Veronica Thomas Rajkumar and Another, the burden was clearly upon the plaintiffs who have propounded that the objection petitions (Ext. 13 and Ext. 13A) were filed by the S.S. Salihuddin Ahmad to prove the said fact, and not upon the defendants who denied the said fact, to prove the negative. The plaintiffs have thus failed to discharge their burden of proof in this regard and therefore cannot rely upon these two documentary evidence (Ext. 13 and Ext. 13 A) in support of their case.

26. The plaintiff-appellants have also relied upon the order dated 28.10.1991 passed in Objection Case No. 218/89 in the municipal survey proceeding. The said order has been brought on record as Ext.5 by way of additional evidence. It has been pointed out by the learned counsel for the appellants that the defendant No. 1 S.S. Takiuddin Ahmad had accepted before the survey authority that the suit land was the property of the Wakf and the order was passed on the basis of this admission. The learned counsel for the appellants has further also relied on the deposition of the defendant No. 1 S.S. Takiuddin Ahmad, marked as Ext.8 by way of additional evidence, and on the basis of these two documents has submitted that the statement by the defendant No. 1 Takiuddin Ahmad must be accepted as admission on behalf of the defendants of the plaintiffs' title over the suit land. From the scrutiny of the deposition (Ext.8) of the defendant No. 1 S.S. Takiuddin Ahmad it does not appear as to in which proceeding or before which court/tribunal/authority the said deposition has been made. There is no case number mentioned on Ext.8 nor the description of the court/tribunal/authority has been mentioned before whom the said statement was made and recorded. Further from the perusal of the order (Ext. 5) passed in the municipal survey proceeding it does not appear that besides the defendant No. 1 S.S. Takiuddin Ahmad, any other defendants were impleaded as parties and the said statement by the defendant No. 1 was made in presence of the other defendants. Admittedly the defendant Nos. 2 to 10 alongwith defendant No. 1 have succeeded by inheritance to the properties of their father S.S. Salihudin Ahmad after his death. There is no concept of jointness in the Mohemdan law and the property devolves after the death of the title holder on each of his heirs in individual capacity. It is also not the case of the plaintiffs that the other defendants were parties in those proceedings alongwith defendant No. 1 Sah Takiuddin Ahmad. Examining this aspect from another angle also, the defendants have specifically alleged in the written statement that the plaintiff No. 2 prevailed upon the defendant No. 1 S.S. Takiuddin Ahmad by making illusory promises to him and had obtained his signatures and statements fraudulently and used the

same in obtaining orders in his (plaintiff No. 2) favour. This allegation of the defendants also finds support from the averments made in the plaint particularly the statements made in paragraph 12, 13, 16 and 26. It has been averred in these paragraphs that the plaintiff No. 2 had convinced the defendant No. 1 and made him understand the real facts which led to the cancellation to the power of attorney and further also that after the order passed in the survey proceeding on 28.10.1991 the defendant No. 1 stopped functioning as Mutwali and the plaintiff No. 2 had begun to function as de facto Mutwali of the Wakf Estate in question. There is no case by the plaintiffs that the plaintiff No. 2 has been appointed Mutwali of the Wakf in place of the defendant No. 1. The statement made in paragraph 26 also shows that the defendant No. 1 is continuing as the Mutwali of the Wakf Estate and a show cause notice has been issued to him for his removal from the post of Mutwali. These facts lead to the inference that the statement if any said to have been made by the defendant S.S. Takiuddin Ahmad in survey or mutation proceedings was not a voluntary statement and cannot be accepted as admission of the title of the plaintiffs and in any view of the matter, can not be binding on his brothers and sisters who were not parties in those proceedings. The explanation submitted in this regard on behalf of the defendants appears to be plausible and valid. The submission of the plaintiff-appellants for accepting the statement of defendant No. 1 Sah Takiuddin Ahmad as made in Ext.5 and Ext.8 as admission is further dented when it transpires from Ext.6 and Ext.9(the orders passed in Anchal and municipal mutation proceeding) that the defendants including the defendant No. 1 S. Takiuddin Ahmad had continued to resist the claim of the plaintiffs over the suit land by asserting the same to be their ancestral property.

27. The plaintiff-appellants have also relied upon the orders passed in their favour by the state revenue appellate and revisional authorities as well as municipal authorities in mutation proceedings. But these orders cannot be accepted as evidence of title as claimed by the plaintiffs over the suit land as it is well settled by the Apex Court in Smt. Sawarni Vs. Smt. Inder Kaur and Others, that the mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. Further it is also well established that a survey entry also does not create or extinguish title. Therefore it is not too far to hold that the orders passed in the survey proceeding or the revenue proceedings in favour of the plaintiffs cannot be the decisive factors for the advancement of the claim of title of the plaintiffs over the suit land.

28. The definite case of the defendants is that the properties of the Wakf Estate No. 123 are situated adjacent north to the suit land and the suit land has a distinct identity. It is also the case of the defendants that the suit land has been recorded separately in C.S. Khata No. 191 in the name of their grandfather with entry in the raiyati column as "Bakas Mafidar". On behalf of the defendants the cadastral survey khatian of Khata No. 191 has been adduced in evidence as Ext.B. This document has also been produced on behalf of the plaintiffs as Ext.4. Before adverting to the probative value of this document it would be pertinent to

take into notice the statements made in his deposition by the plaintiff No. 2, examined as P.W.6, as follows:--

29. The aforesaid statement in the deposition by the plaintiff No. 2 clearly supports the case of the defendants that the suit land in plot No. 310 of Khata No. 191 is a distinct plot in Mauja Pakari and has no concern with the plot Nos. 311 to 319 of Wakf Estate No. 123 in Mauja Maula Bagh. Although on behalf of the plaintiffs, the Khatian of the survey plot Nos. 311 to 319 have not been brought on record as evidence but the fact that the lands of Wakf Estate No. 123 have been entered into separate khata is apparent from the order dated 18.08.1993 (Ext. 6) passed in the mutation appeal wherein the order has been passed for mutation of the lands of Khata Nos. 356 and 357 also alongwith the land of Khata No. 191 which is the suit land. Even in Ext.10A (copy of the entries in the register maintained u/s 26) filed on behalf of the appellants as additional evidence, two more khata, besides the suit khata No. 191 have been mentioned as Wakf properties. These facts leave no room for doubt that the cadastral survey records of rights have been separately prepared on the one hand for the lands included in the Wakf created by two Mahomedan ladies Bibi Mahboob Bux and Bibi Sahebjan, and on the other for the suit land which has been prepared in the name of the grandfather of the defendants and such entries in the khatian continued till 1991 without objection from the plaintiffs or from anyone else till the order dated 28.10.1991 (Ext.5) is said to have been passed on the consent of the defendant No. 1 by the municipal survey authority. The simultaneous existence of separate records of rights for the suit land and for the Wakf properties is more in consonance with the case of the defendants and is suggestive of their separate independent identities. There is nothing in the entries of the khatian (Ext.B) to connect it with the Wakf property and the non-production of the khatians by the plaintiff of the plots admittedly included in the Wakf property, in order to show that similar entries are there too, only goes against the plaintiffs themselves.

30. The plaintiffs have stated in the plaint in paragraph 8 that at the time of vesting of the Jamindari in the State of Bihar under the Bihar Land Reforms Act in 1956, the return with regard to the suit land was submitted in the name of the Wakf Estate. However no copy of such return has been brought in evidence to support the said fact. To the contrary the deposing plaintiff No. 2 has accepted in paragraph 33 that The plaintiff No. 2 has further in his examination-in-chief in paragraph 16 has accepted the possession of the defendants over the suit land and has also accepted the fact that the remaining plots of Khata No. 191 have been sold away by the predecessor of the defendants and the purchasers are in possession after constructing their houses over their purchased portions. The plaintiff No. 2 in his deposition has further also accepted in paragraph 16 that the Masjid, Imambara, Musafirkhana, Majar are in Bari Karbala and in a dilapidated condition and he has admitted that Bari Karbala and the suit land are distinct and separate.

31. The documentary evidence adduced on behalf of the defendants clearly show that the rent has been paid for the suit land by the defendants and rent receipts (Ext.A Series) have been granted in their names and further that the suit land has been dealt with by the defendants through transfer by sale (Ext.G Series). These facts when considered alongwith other evidence on record as well as the admission by the plaintiff No. 2 in his deposition inevitably lead to the conclusion that the suit land has never been the part of the Wakf, created by the two Mahomedan ladies Bibi Mahboob Bux and Bibi Sahebjan and registered with the Wakf Estate No. 123, and has been the ancestral property of the defendant Nos. 1 to 10 who have got title and possession over the same as owners.

32. It is also the case of the defendants that it is the plaintiff No. 2 Md Raza Khan who has actually filed the present suit and the Wakf Board has never actively pursued the suit. It has been alleged that the plaintiff No. 2, by taking benefit of the fact that the defendant Nos. 1 to 10 are not local residents, has been scheming to grab their land in the name of Wakf. This allegation finds support from the statement made by the plaintiff No. 2 in his deposition in paragraph 24 that He has further stated in paragraph 20 that the This fact is further corroborated when no body has been examined on behalf of the plaintiff No. 1-Wakf Board to support the claim as made in the plaint nor any evidence has been brought to show the decision/resolution of the Board to institute the present suit, even in face of the fact that the plaintiff No. 2 has been described as only a proforma plaintiff in the plaint. These facts and circumstances corroborate the assertion of the defendant that the suit has not been filed bonafidely.

33. On the basis of scrutiny of the pleadings and evidence before it, the learned court below has rightly come to the conclusion that the plaintiffs have failed to establish that the suit property is part of the Wakf created by two Mahomedan ladies Bibi Mahboob Bux and Bibi Sahebjan which has been registered as Wakf Estate No. 123 with the plaintiff No. 1 Wakf Board. Even by adducing additional evidence also as discussed hereinbefore, the plaintiffs have not succeeded in establishing the said fact and the preponderance of probabilities is definitely in favour of the defendants. As such I find and hold that the suit land is not the part of the Wakf created by the two Mahomedan ladies Bibi Mahboob Bux and Bibi Sahebjan and registered as Wakf Estate No. 123 with the plaintiff No. 1 Wakf Board. Accordingly, I do not find any illegality in the impugned judgment and decree passed by the learned court below. In the result, this appeal is dismissed and the impugned judgment and decree passed by the learned court below is upheld. In the facts and circumstances, however, there shall be no order as to cost.