

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 5953 of 2009

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Masjid and Madarasa Committee, Amri through its President Md. Shamsul Haque Ansari, son of Md. Muslim Ansari, resident of Village-Amri, P.S. Sasaram, District Rohtas (Sasaram).

.... Petitioner

Versus

1. The State of Bihar
2. The District Collector, Rohtas (Sasaram)
3. The Additional Collector, Rohtas (Sasaram)
4. The Deputy Collector Land Reforms, Sasaram
5. The Anchaladhikari, Sasaram.
6. Ramayan Ram
7. Ganga Ram
8. Nirala Ram, No 6 to 8 sons of late Kailash Ram.
9. Nathuni Ram
10. Bigan Ram
11. Hari Kishun Ram, No. 9 to 11 sons of Late Jhapasi Ram
12. Chandrama Ram, Son of Late Bhagan Ram
13. Banwari Ram, Son of Late Jagan Ram
14. Mahendra Ram, Son of Late Jagan Ram.

Nos. 6 to 14 all resident of Village-Amari, P.S. Sasaram, District Rohtas (Sasaram)

15. The Village Panchayat Amari, through the Mukhiya, Anchal Sasaram, P.S. Sasaram, District Rohtas (Sasaram).

.... Respondents

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Appearance :

For the Petitioner/s	:	Mr. Khatim Reza, Adv.
For the State	:	Jahan Ara, AC to GP-14
For Respondent No. 6 to 14	:	Mr. Aditya Nr. Singh-1, Adv.
For Respondent No. 15	:	Mr. Ramakant Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

CAV JUDGMENT

Date: 03-07-2017

1. This petition under Article 226 of the Constitution of India has been preferred by the petitioner for setting aside the order dated 30.09.2008 passed by Additional Collector, Rohtas in Dakhil Kharij Revision Case No. 43 of 2005/ 22 of 2008-09 by which and



whereunder he set aside the order dated 03.12.2002/ 09.09.2003 passed by the Circle Officer, Sasaram in Mutation Case No. 22 of 2003-04 remitting the matter to the court of Circle Officer with a direction to examine the matter afresh and pass a fresh order in accordance with law.

2. The brief facts are that the petitioner applied for mutation of Old Khata No. 108, Plot No. 246, area 41 decimal of village Amri on the ground that the aforesaid land was of wakf property. The Circle Officer, Sasaram passed the order of mutation on 03.12.2002/ 09.09.2003 on the basis of report of Halka Karamchari and Circle Inspector. The private respondents challenged the aforesaid order dated 03.12.2002/ 09.09.2003 before the D.C.L.R, Sasaram in Dakhil Kharij Appeal Case No. 67 of 2004-05 which was disposed of by the D.C.L.R., Sasaram vide order dated 31.12.2004 directing the parties to seek relief before the Wakf Tribunal as the only Wakf Tribunal was competent to decide the issue in question. The aforesaid order dated 31.12.2004 passed by the D.C.L.R. was challenged by the private respondents before the Collector, Sasaram in Mutation Revision Case No. 43 of 2005/ 22 of 2008-09 which was disposed of by the Additional Collector passing order dated 30.09.2008 in the manner as stated above and against the impugned order dated 30.09.2008 the petitioner has preferred this writ petition.



3. The case of the petitioner is that C.S. Khata No. 108, Plot No. 246 measuring 41 decimal of lands of village Amri was recorded as “Ghair Mazarua Aam Shamilat Malikan” and in remarks column, the same was mentioned as Khaliyan showing joint possession of Abdul Ghani and Noorul Hasan as malikan of Khewat No. 8. The cadastral survey khatian was published in the year 1913 and as per claim of the petitioner, just after publication of cadastral survey khatian, the landlords of the aforesaid land orally gifted 41 decimals of C.S. Plot No. 246 to one Qutub Ali for establishing a Madarsa and Mosque for local Muslims. The aforesaid Qutub Ali was appointed Mutawalli and accepted the oral gift in the year 1914. Subsequently, in the year 1915, a deed of memorandum regarding the aforesaid oral gift was prepared on 11.05.1916. However, further case of the petitioner is that in the year 1915, Mosque and Madarsa were built on some portion of the aforesaid lands and the local Muslim community started their religious rituals uninterrupted and the remaining part of the aforesaid lands are being used as sehan land of the Mosque and Madarsa since the year 1915. The ex-landlords granted rent free receipts. In revisional survey, the three revisional khataes i.e. Khata No. 201 having revisional survey Plot No. 209 and 310, Khata No. 102 having revisional survey Plot No. 308, Khata No. 73 having revisional survey Plot No. 311 were carved out from C.S.



Plot No. 246 and accordingly, Khata No. 201 containing R.S. Plot No. 309 and 310 were recorded as “Anabad Sarv Sadharan” whereas the nature of Plot No. 309 area 12 decimal was shown as Mosque and Plot No. 310 area 21 decimal was shown as Purani Parti but the survey officials wrongly recorded khata no. 102, Plot No. 308 area 5 decimal in the name of Bhagan and Jagan as well as Khata No. 73, Plot No. 311 area 3 decimal in the name of Jhapsi Chamar and in remarks column, the respective houses of aforesaid persons were wrongly shown by the survey officials though the aforesaid lands belong to wakf property. Further the case of the petitioner is that the aforesaid Bhagan and Jagan had their houses over R.S. Plot No. 304 and 306, Khata No. 52 which are adjacent to R.S. Plot No. 308 but taking the survey officials in their connivance, they got entered their house over Plot No. 308 and similarly, Jhapsi Chamar had built his house over R.S. Plot No. 295, Khata No. 74 but the survey officials in connivance with Jhapsi Chamar made entry of his house in R.S. Plot No. 311 though the said plot belongs to petitioner. Further case of the petitioner is that R.S. Plot No. 309 having an area of 12 decimals of land was registered in the Wakf Board in the year 1987 whereas 29 decimal of remaining area of C.S. Plot No. 246 was registered in the Wakf Board in the year 1994. Further case of the petitioner is that the descendants of Jhapsi Chamar and Bhagan and Jagan filed Title Suit



No. 28 of 1987 against the members of Muslim community who were representing the petitioner in respect of the disputed plots but the aforesaid suit was dismissed for default which had attained finality and thereafter, Bihar State Sunni Wakf Board on 16.11.1994 directed the petitioner to get his name mutated in records of right and thereafter, petitioner filed petition before the Circle Officer, Sasaram who allowed the mutation petition and pass order of mutation in favour of the petitioner.

4. Counter affidavit has been filed on behalf of the private respondents no. 6 to 14 pleading therein that mosque was built over Plot No. 309 measuring an area of 12 decimal and so far as Plot No. 310 of Khata No. 201 is concerned, the same is a parti land and the aforesaid land is being used by the villagers and private respondents as Rasta since the preparation of cadastral survey but for the first time, the petitioner and other members of Muslim community created hurdle in using the aforesaid land as Rasta somewhere in the year 1993 and thereafter, to resolve the dispute a meeting was held which was presided by the local S.D.O. Sasaram and other officials and in the said meeting, it was decided that mosque situated over Plot No. 309 area 12 decimal shall be bounded from all the sides and the Plot No. 310 shall be used by the villagers and others as Rasta.

5. It has also been averred in the counter affidavit that



houses of the private respondents are situated over Plot No. 308 area 5 decimal and Plot No. 311 area 2 decimal respectively since the time immemorial and in revisional survey, the houses of the petitioners were found over the aforesaid plots. It has also been pleaded that in the register of Bihar Wakf Board, only 12 decimal of land was shown as wakf property and so far as the remaining area is concerned, the same was, later on, fraudulently entered in the wakf register in the year 1997 and as a matter of fact, except 12 decimal of land remaining area of old Plot No. 246 was never a wakf property.

6. Learned counsel appearing for the petitioner submitted that admittedly, C.S. Khata No. 108 containing C.S. Plot No. 246 area 41 decimal was recorded in C.S. khatian as “Ghair Mazarua Aam Shamilat Malikan” and the ex-landlords of the aforesaid C.S. Khata No. 108 were Abdul Ghani and Noorul Hasan who later on made oral gift of entire 41 decimal land of Khata No. 108 for construction of Mosque and Madarsa in the year 1914 and thereafter in the year 1916, a memorandum of aforesaid gift was prepared which is Annexure-2 to this petition. He would further submit that ex-landlords also granted receipts of the gifted lands which is evident from perusal of Annexure-3 to the petition but due to fault of revenue officials wrong entry of the houses of private respondents was made in revisional survey khatian though the entire 41 decimal of old Plot No. 246 was



of wakf property. He would further submit that entire 41 decimals of land of old Plot No. 246 was entered into wakf register which is evident from perusal of Annexure-9 series and moreover, under Section 54 of the Wakf Act, 1995 show cause notice was given to private respondents treating them encroachers but they failed to explain their possession before the competent authority and lastly, order under Section 55 of the Wakf Act, 1995 was passed and the said order has already attained its finality. He would further submit that ancestors of private respondents made attempt to restrain the petitioner from enjoying the peaceful possession of the lands in question but they failed to obtain favourable order as after dismissal of the title suit they did not take any step.

7. Learned counsel for the petitioner would further submit that after coming into force of the Wakf Act 1995, the present application is not maintainable as only the Wakf Tribunal constituted under Section 83 of the Wakf Act 1995 can only decide the dispute of the wakf property. Learned counsel for the petitioner relied upon decision of Board of Wakf, West Bengal vs. Anis Fatma Begum & Anr. reported in 2010(7) Supreme 1059 wherein the Hon'ble Apex Court has held that **"All matters pertaining to Wakfs should be filed in first instance before the Wakf Tribunal constituted under Section 83 of the Wakf Act, 1995 and should not be entertained by the Civil Court or by the High**



Court straightway under Article 226 of Constitution of India.”

8. Learned counsel for the petitioner would further submit that once a wakf is created, the nature of wakf property cannot be changed or extinguished subsequently and in the present case, the ex-landlords created a wakf and for that purpose they gifted the entire 41 decimals of old Plot No. 246 and, therefore, even after creation of the wakf, the ancestors of the private respondents came in possession and got constructed their houses over some portion of land of old Plot No. 246, then also, the nature of aforesaid land remained as wakf property. Learned counsel for the petitioner relied upon the decision of **Chhedi Lal Misra (Dead) through LRs vs. Civil Judge, Lucknow and others** reported in 2007(2) Supreme 236 wherein His Lordships held that **“Once a wakf is created it continues to retain such character which cannot be extinguished by any act of the Mutawalli or anyone claiming through him.”**

9. Learned counsel for the petitioner would further submit that moreover, the ancestors of private respondents lost their claim before the civil court as even after dismissal of their suit as well as dismissal of miscellaneous appeal, they did not challenge the dismissal order before the higher court and therefore, the private respondents have no right to claim their right, title and possession in respect of the disputed lands. He would further submit that moreover,



some entry in khatian neither creates right nor title and, therefore, even if in revisional survey khatian the name of ancestors of the private respondents entered, then also, the aforesaid entry does not confer any right and title to the private respondents. The learned counsel relied upon decision of **Union of India and others vs. Vasavi Co-operative Housing Society limited and others** reported in 2014(1) Supreme 1.

10. On the other hand, learned counsel appearing for the private respondents would submit that admittedly, the old Khata No. 108 pertaining to old Plot No. 246 area 41 decimal was recorded as “Ghair Mazarua Aam Shamilat Malikan” and in remarks column the nature of land was shown as khaliyan and, therefore, the aforesaid entry in cadastral survey khatian goes to show that the ex-landlords of the aforesaid land had no right to transfer the aforesaid lands to any person. He would further submit that at the time of preparation of revisional survey khatian, which was prepared somewhere in the year 1970, the aforesaid old Khata No. 108 pertaining to old Plot No. 246 was divided in three khata and admittedly, the mosque was shown in Plot No. 309 area 12 decimal which was recorded in the name of “Anabad Sarv Sadharan” under Khata No. 201. Plot No. 310 area 21 decimal was shown as purana parti whereas Plot No. 308 area 5 decimal of new khata was recorded in the name of Bhagan and



Jagan and their houses cum sahan was shown in remarks column. Similarly, the Plot No. 311 of area 3 decimal Khata No. 73 was prepared in the name of Jhapsi Chamar and his house cum sahan was shown in remarks column but the aforesaid entries were never challenged by the petitioner and moreover, in the year 1987 only plot no. 309 area 12 decimal of village Amri was shown as mosque in the register of Wakf Board prepared under Section 26 of Central Wakf Act, 1954. However, subsequently, old Khata No. 108 containing old Plot No. 246 area 29 decimal were also entered in the said register and it is said that aforesaid entry was made somewhere in the year 1994 and, therefore, the aforesaid fact goes to show that above stated entry was made when the dispute between the parties in respect of land in question started. He would further submit that no doubt, after coming into force of the Wakf Act, 1995, only Tribunal can decide the dispute of the wakf property but in the present case, matter relates to mutation and not the title of the parties and, therefore, the Wakf Tribunal has got no jurisdiction to decide the dispute of the present case. He would further submit that moreover, learned Additional Collector has remanded the matter to the Circle Officer for passing fresh order after giving the opportunity of hearing to all the concerned parties as the Circle Officer had passed the order of mutation in favour of the petitioner in camp court without giving any proper notice to the



private respondents. He would further submit that no doubt, ancestors of private respondents had filed title suit but the aforesaid title suit relates to another plot and not the plots in question and, therefore, even if the ancestors of private respondents did not carry out the aforesaid litigation of title suit to High Court, then also the said decree does not make any difference in the present dispute.

11. Having heard the rival contentions of both the parties, I have gone through the record. It is an admitted position that mosque is situated over Plot No. 309 area 12 decimal and the private respondents are not making any claim in respect of the aforesaid area of 12 decimal of Plot No. 309. The main dispute relates to Plot No. 310 area 21 decimals, Plot No. 308 area 5 decimal and Plot No. 311 area 3 decimal. It is also an admitted position that house of private respondents were found over five decimal of Plot No. 308 as well as 3 decimal of Plot No. 311 respectively at the time of preparation of revisional survey khatian and, accordingly, an entry regarding the aforesaid fact was made and the revisional survey khatian of Khata No. 102 having Plot No. 308 of area 5 decimal was recorded in the name of Bhagan and Jagan who happened to be ancestor of private respondents and similarly, Khata No. 73 having Plot No. 311 area 3 decimal were prepared in the name of Jhansi Chamar who happened to be ancestor of private respondents. It is also an admitted position



that for the first time the entry regarding mosque in question was made in wakf register in the year 1987 and at the time of aforesaid entry, only Khata No. 201 containing Plot No. 309 area 12 decimal was shown and entered as wakf property in the wakf register. However, subsequently, somewhere in the year 1994 the old Khata No. 108 containing old Plot No. 246 area 29 decimal land was shown as wakf property in wakf register. The photostat copy of wakf register has been brought on record as Annexure-7 to this petition. Perusal of Annexure-7 goes to show that initially, only Khata No. 201 containing Plot No. 309 area 12 decimal was shown as mosque in the aforesaid register and furthermore, it is also obvious that later on, old Khata No. 108 containing old Plot No. 246 area 29 decimal was entered in wakf register after deducting 12 decimal area from total area of 41 decimal of old plot no. 246. So the aforesaid fact goes to show that entry of old Khata No. 108 containing old Plot No. 246 was subsequently made in the wakf register.

12. Here, I would like to say that petitioner has claimed that Annexure-7 was prepared under Section 25 of Wakf Act, 1954 which says that **“Every wakf whether created before or after the commencement of this Act shall be registered at the office of the Wakf Commissioner and for registration of the aforesaid wakf the Mutawalli or his descendants or a beneficiary of the wakf or any Muslim belonging to the sect to which the wakf belongs may make an application before the Wakf**



Commissioner and after that the Wakf Commissioner shall make necessary enquiries and after proper enquiry he shall register the wakf property in the wakf register.” However, I would like to refer Section 4 of Wakf Act, 1954 which says that “The State Government, may, appoint a Survey Commissioner of Wakfs and Additional or Assistant Survey Commissioners of Wakf for making a survey of wakf properties and Survey Commissioner after making such enquiry shall submit his report to the State Government giving details of wakf properties and after receipt of the aforesaid report, the State shall forward a copy of the aforesaid report to the Board and after examination of the aforesaid report, the Board shall get a list of wakf publish in the Official Gazette.

13. Therefore, the aforesaid provision states about the procedure for identification of the wakf property. Moreover, in supplement to the aforesaid Section 4, Section 25 of the Wakf Act 1954 gives liberty to Mutawalli as well as others to get the wakf property register in the office of Wakf Commissioner who having receipt any such application shall make an enquiry and register the property and having been satisfied register the property in wakf register.

14. In the present case, admittedly, for the first time, the entry of new Khata No. 201 containing plot no. 309 area 12 decimal of Amri village was shown as wakf property in wakf register and the aforesaid entry was made on 17.07.1987 i.e. before commencement of



the Wakf Act, 1995. Therefore, it is obvious from the aforesaid fact that first entry was made either after report of survey officer or on the basis of application filed by any interested person. However, it is not clear as to how the subsequent entry of old Khata No. 108, old Plot No. 246 area 29 decimal of Amri village was made in wakf register. Moreover, I do not think it proper to make any comment on the aforesaid entry in this writ petition because the present dispute relates to mutation and admittedly, the petitioner applied for mutation on the direction of the Secretary of Bihar State Sunni Wakf Board, Patna which is evident from perusal of Annexure-9 series.

15. No doubt, Section 83 of Wakf Act, 1995 says about the constitution of Tribunal for determination of any disputed question or other matter relating to a wakf or wakf property and the aforesaid Act bars the jurisdiction of courts to entertain the dispute relating to wakf or wakf property but the dispute in the present matter does not relate to the right and title as well as nature of wakf property rather it relates to mutation proceeding and admittedly, the wakf Tribunal has got no power to pass an order of mutation because the aforesaid power lies with revenue officials. Therefore, in my view, learned counsel appearing for the private respondents rightly submitted that learned Additional Collector was right in passing the impugned order.

16. On the basis of aforesaid discussions, I am of the



opinion that this writ petition does not have any merit and liable to be dismissed. Accordingly, this writ petition stands dismissed on admission stage itself. However, it is made clear that findings/ observations given in this order shall not cause prejudice in future litigation in respect of the disputed lands.

(Hemant Kumar Srivastava, J)

SHAHZAD/-

AFR/NAFR	NAFR
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