

Board Of Muslim Wakfs vs Smt. Hadi Begum And Others on 24 March, 1992

Equivalent citations: AIR1992SC1083, JT1992(2)SC385, 1992(1)SCALE706, 1993SUPP(1)SCC192, 1992(1)UJ627(SC), AIR 1992 SUPREME COURT 1083, 1992 AIR SCW 968, 1992 (1) UJ (SC) 627, (1992) 2 JT 385 (SC), 1993 (1) SCC(SUPP) 192, 1992 (2) JT 385, (1992) 2 SCJ 139, (1992) 2 CIVLJ 347

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Bench: S.C. Agrawal

ORDER

S.C. Agrawal, J.

1. In the year 1869, the ruler of the former State of Jaipur made a grant of land measuring 25 bighas Kham in the City of Jaipur to late Nawab Zainul Abdin Khan alias Nawab Kallan Khan. Some time later, Nawab Kallan Khan acquired some more land measuring 8 bighas Kham and the entire land measuring 33 bighas Kham was known as Bagh Nawab Kallan Khan. A makbara to perpetuate the memory of his wife was constructed by Nawab Kallan Khan in the said Bagh and the later Nawab and his three sons were also buried by the side of the said makbara. A mosque was also constructed in the Bagh. The makbara and the mosque cover an area of 1 bigha and 17 biswas. In 1944, proceedings for acquisition of the land comprised in Bagh Nawab Kallan Khan were initiated under the provisions of Jaipur Land Acquisition Act, 1943. In those proceedings, the Land Acquisition Officer submitted a report dated October 11, 1944 to the Secretary in the Public Work Department of the former State of Jaipur wherein compensation was proposed in respect of certain constructions existing on the land and as regards the rest of the land, it was stated that the question of granting land in exchange to Sahibzada Zafar Jang Khan, the grandson of Nawab Kallan Khan, would be considered after the decision of the Matmi case which was pending in the Revenue Department. It appears that nothing further happened in the matter till 1955 when the Urban Improvement Board, Jaipur started proceedings to sell the land by dividing it in small plots. Sahibzada Zafar Jang Khan filed a writ petition (D.D. Civil Writ Petition No. 115 of 1955) in the High Court wherein he claimed that he was in possession of the land in dispute and that the State was threatening to disturb his possession. The said writ petition was contested by the State who claimed that the possession over land in dispute had been taken as far back as in the year 1945 and the land had vested in the State according to law in view of the acquisition proceedings and that the Urban Improvement Board, Jaipur, was justified in taking steps to sell the land. The said writ petition was decided by the High

Court by its judgment dated March 11, 1957. The High Court did not go into the disputed question of fact as to whether the possession of the land had been taken over by the State in the year 1945 as alleged and proceeded to deal with the matter on the assumption that the State had taken possession of the land in dispute in 1945. The High Court was of the view that under the provisions of the Jaipur Land Acquisition Act, the land could vest in the State only under Sections 16 and 17 and that it was not the case of the State that any action under Section 17 was taken in the case and therefore the only section which could be invoked was Section 16 and that under Section 16 mere taking of possession by the State did not vest the land in the State and it was necessary that the said possession must be taken after an award under Section 11. The High Court, therefore, considered the question whether there was an award under Section 11. After examination the report of the Land Acquisition Officer dated October 11, 1944, the High Court held that the said report could not be treated as an award under Section 11 because it showed that no compensation in the shape of cash or in the shape of land to be given in exchange for the land in dispute was fixed and all that the Land Acquisition Officer did in October, 1944 was to postpone making of the award. The High Court, therefore, held that in spite of the proceedings under the Jaipur Land Acquisition Act, 1943, the land could not be said to have been vested in the State under Section 16. While considering the matter of granting of relief to Sahibzada Zafar Jang Khan, the petitioner in the said writ petition, the High Court observed that the remedy of quashing the proceedings and prohibiting the State from depriving him of the possession of the land could not be granted and all that the petitioner could ask was that the postponed compensation should now be worked out and paid to him. The High Court, therefore, while allowing the writ petition, directed the Collector of Jaipur to work out the compensation under the law and award the same subject to whatever be the result of the Matmi proceedings.

2. In the meanwhile, in 1954, the Wakf Act, 1954 (hereinafter referred to as 'the Act') was enacted by Parliament with a view to provide for the better administration and supervision of wakfs. 8.9 of the Act makes provision for establishment of the Board of Wakfs (hereinafter referred to as 'the Board') in a State by the State Government. Chapter II, (comprising Sub-section 4 to 8), makes provisions for survey of wakfs. Section 4 provides for preliminary survey of wakfs. Sub-section (1) of Section 4 provided for appointment of a Commissioner of Wakfs and Additional or Assistant Commissioners of wakfs for the purpose of making a survey of wakf properties existing in the State at the date of commencement of the Act. In Sub-section (3) of Section 4, it was provided that the Commissioner shall, after making such inquiry as he may consider necessary, submit his report to the State Government containing the particulars mentioned in Clauses (a) to (f) which, inter alia, include particulars with regard to the gross income of the property comprised in each wakf. Sub-section (4) of Section 4 provided that the Commissioner shall, while making any inquiry, have the same powers as are vested in a civil court under the CPC in respect of matters specified in Clauses (a) to (f). Section 5 provided for publication of list of wakfs. Under Sub-section (1), the State Government was required to forward the report submitted by the Commissioner under Sub-section (3) of Section 4 to the Board. Sub-section (2) of Section 5 provided that the Board shall examine the report forwarded to it under Sub-section (1) and publish, in the Official Gazette, a list of wakfs existing in the State. Section 5 deals with disputes regarding wakfs. In Sub-section (1) of 6, it was provided that if any question arises whether a particular property is a wakf property or not or whether a wakf specified in such list is a Shia Wakf or Sunni Wakf, the Board or the Mutawalli of the wakf or any person

interested therein may institute a suit in a civil court, of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final. In the proviso to Sub-section (1), it was provided that no such suit shall be entertained by the civil court after the expiry of one year from the date of the publication of the list of wakfs under Sub-section (2) of Section 5. Sub-section (4) of Section 6 provided that the list of wakfs published in Sub-section (2) of Section 5 shall, unless it is modified in pursuance of a decision of the civil court under Sub-section (1), be final and conclusive.

3. In 1957, some persons styling themselves as members of the Wakf Committee made an application to the Commissioner of Wakfs stating that the mosque, makbara and the land belonging to Sahibzada Zafar Jang Khan were wakf property. On the said application, the Commissioner of Wakfs summoned Sahibzada Zafar Jang Khan and recorded his statement in which he denied that the property was wakf property and on the strength of the said statement, the Assistant Commissioner of Wakfs came to the conclusion that the said property was not wakf property and the papers were filed on May 19, 1958. Sahibzada Zafar Jang Khan died on October 29, 1959 and after his death the same persons who called themselves the members of the Wakf Committee, again moved the Commissioner of Wakfs to reopen the matter. A notice of that application was served on Smt. Hadi Begum, widow of Sahibzada Zafar Jang Khan and an application was submitted on behalf of the widow before the Commissioner that the property was not wakf property. The Commissioner of Wakfs passed an order requiring the Chairman of the so-called Wakf Committee to produce evidence of the property being wakf property. It appears that an enquiry was conducted by the Commissioner of Wakfs on the question whether the property was wakf property and during the pendency of the said enquiry, the Assistant Commissioner, Devasthan-cum-wakfs, Jaipur Division was appointed as an officer to protect, supervise and manage the properties and to collect the rents and other income accruing therefrom. In pursuance of the said order, the Assistant Commissioner informed all the tenants not to pay the rent to the heirs of Sahibzada Zafar Jang Khan. Feeling aggrieved by the said order of the Assistant Commissioner, the widow and other legal representatives of Sahibzada Zafar Jang Khan (hereinafter referred to as 'the petitioners') filed a writ petition (No. 528 of 1961) in the High Court. During the pendency of the said writ petition, the Commissioner of Wakfs passed an order dated July 9, 1962 holding that the disputed property known as Makbara or Bagh Nawab Kallan Khan comprising 33 Bighas of land and consisting of Mosque, Makbara and graveyard is a wakf property. A second writ petition (No. 334 of 1962) was filed by the petitioners to challenge the validity of the said order dated July 9, 1962. While both these writ petitions were pending, the Board, appellant herein, issued a list of wakf properties in the State under Section 5(2) of the Act on December 2, 1965 wherein the mosque and the makbara in Bagh Nawab Kallan Khan were shown as wakf property as items Nos. 360 and 361 of the said list. By way of corrigendum the Board issued another list on June 29, 1967 whereby corrections were made in items Nos. 360 and 361 and the words "with land 33 bighas" were added in item No. 361. Thereupon Writ Petition No. 334 of 1962 was amended by the petitioners and the Board was impleaded as a respondent and in the reliefs, para (ii-A) was added and it was prayed that a writ, direction or order be issued against the respondents ordering them to get the petitioner's property mentioned at Nos. 360 and 361 in the list of wakfs published in the Rajasthan Rajpatra be expunged and deleted therefrom by getting a corrigendum issued in the Rajasthan Rajpatra and it be also declared that the inclusion in the list of wakfs by the respondent and published in the Rajasthan

Rajpatra dated December 2, 1965 is totally void and ineffective.

4. Soon after the passing of the order dated July 9, 1962 by the Wakfs Commissioner, the Land Acquisition Officer made the award in the land acquisition proceedings in relation to the disputed land on July 30, 1962 and the compensation payable in respect of the disputed land was determined. Since there was a dispute among the claimants as to the title to receive the amount of compensation and the apportionment thereof the matter was referred for determination to the civil court under Section 18 read with Section 31(2) of the Jaipur Land Acquisition Act.

5. The ground on which the petitioners challenged the validity of the order of the Wakfs Commissioner passed under Section 4(3) and the list issued by the Board under Section 5(2) was that while exercising his powers under Section 4 of the Act, the Commissioner had no jurisdiction to go into the question whether a particular property is wakf property or not and that the said question could be determined only by instituting a suit in the civil court of competent jurisdiction under Section 6(1) of the Act. It was also submitted that, the Wakfs Commissioner had erroneously found the land in dispute to be wakf property.

6. The writ petition was contested by the Board as well as the State Government. In the reply that was filed on behalf of the Board, it was asserted that the entire Bagh Nawab Kallan Khan was wakf property and had been treated as such by late Nawab Kallan Khan, then grandfather of Sahibzada Zafar Jang Khan. It was also submitted that the order passed by the Wakfs Commissioner was not without jurisdiction as he had the power to make an enquiry as to whether the property was wakf property or not and that after making detailed enquiry the Wakfs Commissioner came to conclusion that the property was a wakf property and on a very good basis.

7. The reply that was filed on behalf of the State Government was on the same lines and it was asserted that the property in question was wakf property and was neither under the ownership or possession of Sahibzada Zafar Jang Khan and that the mosque is a public mosque where members of the Muslim public go to offer Namaz as a right without any let or hindrance. It was also stated that the Wakfs Commissioner had complete authority and jurisdiction under Section 4(4) to make an enquiry whether in fact the property is a wakf property or not and that he did not exceed his jurisdiction in passing the impugned order and that any person feeling aggrieved by the said decision of the Wakfs Commissioner is required to file a civil suit to challenge the decision of the Wakfs Commissioner. It was further stated in the said reply that the observations made by the Wakfs Commissioner in his order dated July 9, 1962 are based on orders passed by the Government of the then Jaipur State which clearly and prima facie show the nature of the property in question being essentially a wakf property. It was asserted that the property had been consistently shown and treated and even held as wakf property from the very inception. In the said reply, reference was also made to the order of the Land Acquisition Officer dated July 30, 1962 whereby a reference has been made to the District Judge, Jaipur, for deciding the dispute with regard to the title of the claimant to receive the amount of compensation and that the said matter was pending before the District Judge, Jaipur who had framed the following issues:

- 1) Who are the heirs of late Nawab Zafar Jung deceased who are entitled to receive compensation?
- 2) Whether the Board is entitled to the entire compensation to the exclusion of all others?
- 3) Whether the amount of compensation as determined by the L.A.O. is inadequate?

When the writ petitions came up for hearing before the learned Single Judge of the High Court, the counsel for the petitioners in the writ petitions placed on record the plaint in Suit No. 15 of 1968 Rajasthan Sarkar v. Board of Wakf, Jaipur pending before the District Judge, Jaipur city. In para 14 of the said plaint, it was stated that at the time when the reply to Writ Petition No. 334 of 1962 was prepared and filed on behalf of the State, all the relevant record pertaining to the question whether the whole property was the wakf property or only a small portion of the land on which there was a mosque and makbara constituting only as the wakf property was not available and as a result true and correct facts could not be presented in the reply and that State was taking steps to amend the reply and place all the correct facts. No steps were, however, taken by the State to amend its reply in Writ Petition No. 334 of 1962 and at the time of the arguments the learned Deputy Government Advocate submitted before the learned single judge that in view of what had been mentioned in the plaint referred to above, it was difficult for him to argue the case on the basis of the facts mentioned in the reply to the writ petition and he urged that the petitioners could get their dispute determined by the District Judge, Jaipur before whom the matter had been referred under Section 18 of the Land Acquisition Act and that in view of the alternative remedy available to the petitioners, this matter could not be pressed before the Court in its extraordinary jurisdiction.

8. The learned Single Judge considered the matter in the light of the decision of the Division Bench of the High Court in Radha Krishna and Ors. v. State of Rajasthan and Anr. wherein, after considering the true scope of Chapter II of the Act and the powers conferred on the Wakfs Commissioner under Section 4 of the Act, it was held that Commissioner of Wakfs had no jurisdiction to adjudicate whether a particular property was a wakf property or not and that the only jurisdiction that is conferred on the Commissioner of Wakfs under Section 4 was to make a survey of wakf property existing in the State at the date of the commencement of the Act and to make a report of survey to the State Government and that he was not required to make a survey of wakf properties which have already become extinct as such. Following the aforesaid decision in the Radha Krishna's case (supra), the learned single judge held that the order dated July 9, 1962 passed by the Wakfs Commissioner holding that the disputed property is wakf property was without jurisdiction and the said order could not form the basis for preparing the list by the Board to be published under Section 5(2) of the Act. The learned Single Judge, therefore, allowed the writ petitions and set aside the order dated July 9, 1962 passed by the Commissioner of Wakfs and declared that the inclusion of the disputed property in the list of wakf property in the Rajasthan Rajpatra dated December 2, 1965 as amended by the subsequent order of the Board dated June 29, 1967 could not be binding on the petitioners in the writ petitions and that if the Board thinks that the property is a wakf property, it can take such action in the matter as may be available to it under the provisions of the Act.

9. The Board filed Special Appeals Nos.44 and 45 of 1970 against the said judgment of the learned Single Judge which were heard and disposed of by a Division Bench of the High Court by judgment dated February 13, 1980. By the time the said appeals came up for hearing before the Division Bench of the High Court, this Court, in Board of Muslim Wakfs, Rajasthan v. Radha Krishna and Ors. had considered the correctness of the decision of the Division Bench of the Rajasthan High Court in Radha Krishna's case (supra) on which reliance was placed by the learned single judge. Disagreeing with the view of the Division Bench of the Rajasthan High Court in Radha Krishna's case (supra) on the ambit and scope of enquiry by the Wakfs Commissioner under Section 4(3) of the Act this Court has held that the enquiry that the Wakfs Commissioner makes for the purpose of submission of his report under Section 4(3) while making a survey of the existing wakf properties in the State under Sub-section (1) is not purely of an administrative nature but partakes of a quasi-judicial character in respect of the persons falling within the scope of Sub-section (1) of Section 6. It was observed that it would be illogical to hold that while making a survey of wakf properties existing in the State, a Commissioner of Wakfs appointed by the State Government under Sub-section (1) of Section 4, should have no power to enquire whether a particular property is wakf property or not. As regards the scope of Section 6, this Court agreed with the view of the High Court that the purpose of Section 6 is to confine the dispute between the Board, the Mutawalli and a person interested in the wakf and unless a suit was filed in a civil court of competent jurisdiction within one year of the date of the publication of the list of wakfs for decision of the question whether a particular property is a wakf property or not or whether a wakf is a Shia wakf or a Sunni wakf, the list so published would be final and conclusive between them. The right, title and interest of a person who is non-muslim and is in possession of certain property is not put in jeopardy simply because that property is included in the list published under Sub-section (2) of Section 5 and he is not required to file a suit in a civil court for declaration of his title within the period of one year and the list would not be final and conclusive against him. Sub-section (4) of Section 6 makes the list final and conclusive only between the Board, the mutawalli and the person interested in the wakf.

10. In view of the aforesaid decision of this Court, in Board of Muslim Wakfs. v. Radhakrishna and Ors. (supra), the Division Bench of the High Court held that neither the decision of the Commissioner of Wakfs nor the publication of list under Sub-section (2) of Section 5 of the Act is binding on the State Government nor the rights of the State Government could be put in jeopardy because of the decision of the Commissioner of Wakfs and the consequent publication of the list by the Board. The learned Judges have, however, held that much before the Commissioner of Wakfs came to consider the matter or even the Board was established, the land in dispute had been acquired by the State Government in land acquisition proceedings and only the question of compensation in respect thereof remained to be determined and paid to the person entitled thereto and that land measuring 1 bigha and 17 biswas on which the mosque and the makbara are situated was expressly left out of the acquisition proceedings. The learned Judges, therefore, observed that whatever may be the dispute between the Commissioner of Wakfs and the Board on the one hand and the petitioners on the other hand, in respect of such land on which the mosque and the makbara are situated, the said dispute is only confined to 1 bigha and 17 biswas of land and as regards the remaining land comprised in Bagh Nawab Kallan Khan, apart from 1 bigha and 17 biswas, which may or may not be the wakf property, the Wakfs Commissioner had no jurisdiction to decide the nature of the property as it was not the allegation of any of the parties that the remaining land was

ever wakf property and moreover, the said land, excluding 1 bigha and 17 biswas land, had already been acquired by the State Government and possession thereof was also taken as early as in the year 1945. According to the learned Judges of the High Court, the petitioners and the Wakfs Commissioner or the Board might raise a dispute now as to who was entitled to receive the compensation in respect of such land, if any such dispute could legitimately be raised and in this context, the High Court has mentioned about the reference being made in the aforesaid land acquisition matter wherein the question of payment of compensation was pending and wherein the question of payment of compensation was pending and wherein the Board has also slaked its claim for compensation of such land and any part thereof. After arriving at the said finding, the learned Judges of Division of the High Court proceeded to examine the documentary and other evidence on the basis of which the Wakfs Commissioner had held that not only the land comprised in 1 bigha and 17 biswas on which the mosque and the makbara are situated were wakf properties but the entire land included in the Bagh Nawab Kallan Khan was also wakf property. After considering the said documents and the evidence of record, the learned Judges observed that the entire evidence on record goes to show that in the Bagh Nawab Kallan Khan, the mosque and makbara were constructed but there is nothing on the record to show that the entire land contained in the Bagh Nawab Kallan Khan, comprising of 33 bighas of land, was wakf property. According to the High Court so far as the land comprised in 1 bigha and 17 biswas, on which the mosque and makbara are situated, there may be a genuine dispute between the parties as to whether the same was impliedly or by user dedicated for pious, religious or charitable purposes but insofar as remaining land is concerned, which was acquired by the State Government in pursuance of land acquisition proceedings initiated in the year 1945, there was total lack of material to show that it was ever given expressly or impliedly, or held or used for pious, religious or charitable purposes. The learned Judges, therefore, concluded that the order of the Wakfs Board suffers from an error apparent on the face of the record and that there was total lack of jurisdiction in the Wakfs Commissioner insofar as he proceeded to declare as wakf property the remaining land of Bagh Nawab Kallan Khan apart from 1 bigha and 17 biswas of land on which the mosque and the makbara are situated and since the Wakfs Commissioner suffered from lack of initial jurisdiction in the matter, he had no right to include the land in dispute measuring 31 bighas 3 biswas kham in his report submitted under Sub-section (3) of Section 4 of the Act, more particularly since the said land stood acquired by the State Government under the provisions of the Land Acquisition Act. The High Court further found that the proceedings before the Wakfs Commissioner in respect of such land were even contrary to the basic principles of natural justice, inasmuch as the State Government was not made a party to those proceedings nor an opportunity was given to the State Government in those proceedings to show that the land already stood acquired and was also taken possession of. For the aforesaid reasons the Division Bench of the High Court arrived at the same conclusion as was reached by the learned Single Judge, although on different grounds, and held that the order passed by the Wakfs Commissioner dated July 9, 1962 deserved to be set aside, except in respect of 1 bigha and 17 biswas of land over which the mosque and the makbara are standing and it was also declared that the inclusion of the aforesaid land measuring 31 bighas and 3 biswas in the list of wakf properties published in the Rajasthan Gazette dated December 2, 1965, as amended by the subsequent notification dated June 29, 1967, and all other orders passed by the Wakfs Commissioner or the Board will also be invalid so far as aforesaid land, which had been acquired by the State Government in the land acquisition proceedings, was concerned.

11. In support of the appeals, Shri S.M. Jain, the learned Counsel appearing for the Board, has submitted that in view of the decision of this Court in Board of Muslim Wakfs, Rajasthan v. Radha Krishna and Ors. (supra), it cannot be said that the Wakfs Commissioner had no jurisdiction to go into the question as to whether the entire land forming part of Bagh Nawab Kallan Khan measuring 33 bighas kham is wakf property or not and on the basis of such a determination by the Wakfs Commissioner in its order dated July 9, 1962, the Board was entitled to publish the list under Sub-section (2) of Section 5 of the Act and the only remedy available against the publication of the said list was that the Board or the Mutawalli of the Wakf or any person interested in the wakf could institute a suit in a civil court of competent jurisdiction within a period of one year of the publication of the list and any other person could file such a suit even after the expiry of one year from the date of such publication. The submission of Shri S.M. Jain is that the Division Bench of the High Court have erred in setting aside the order dated July 9, 1962 passed by the Wakfs Commissioner and the list of wakf properties published by the Board in the Rajasthan Gazette dated December 2, 1965, as amended by the subsequent notification dated June 29, 1967, in relation to 31 bighas and 3 biswas of land in Bagh Nawab Kallan Khan on the view that there was total lack of jurisdiction in the Wakfs Commissioner insofar as he proceeded to declare the said land as wakf property. Shri. S.M. Jain has urged that the said conclusion of the Division Bench of the High Court is based on a mistaken view that the said land had stood acquired by the State Government in pursuance of land acquisition proceedings initiated in the year 1944 long before the enactment of the Act and the Constitution of the Board. He has urged that the learned Judges of the High Court have not properly appreciated the effect of the earlier decision dated March 11, 1957 in D.B. Civil Writ Petition No. 115 of 1955. The submission of Shri S.M. Jain is that the said decision of the High Court indicates that the said decision of the High Court indicates that vesting of the property in the State Government in pursuance of land acquisition proceedings could take place only after the award was given in those proceedings and that the said award was given only on July 30, 1962 and prior to that the Wakfs Commissioner had passed the order dated July 9, 1962 and, therefore, it cannot be said that on the date when the Wakfs Commissioner passed the order, the property had vested in the State Government in pursuance of land acquisition proceedings and the Wakfs Commissioner had no jurisdiction to hold an enquiry as to whether the property was wakf property. Shri S.M. Jain has also assailed the validity of the land acquisition proceedings as well as the award dated July 30, 1962, and has urged that in view of Section 58 of the Act, it was incumbent upon the Land Acquisition Officer to stay the land acquisition proceedings and issue a notice to the Board to enable the Board to appear and plead as a party to the said proceedings and that the award dated July 30, 1962 given by the Land Acquisition Officer without issuing such a notice to the Board was void.

12. Shri A.K. Sen, appearing for the State, has urged that the effect of the earlier decision of the High Court dated March 11, 1957 in D.B. Civil Writ Petition No. 115 of 1955 was that the land in dispute stood acquired by the State Government in the land acquisition proceedings initiated under the Jaipur Land Acquisition Act, 1944 and the only question left for consideration was payment of compensation for the lands that were acquired and that in view of the said decision of the High Court, it was not permissible for the Wakfs Commissioner to go into the question whether the land in dispute is wakf property or not. It has been contended by the learned Counsel that the matter with regard to the entitlement for payment of compensation for the lands which were acquired is under consideration in the reference made by the Land Acquisition Officer to the Civil Court. The

submission of the learned Counsel is that inter se disputes of claimants for compensation have to be decided under the Land Acquisition Act through a reference under Section 18 and such disputes cannot be raised in a separate suit or other proceeding.

13. Shri K.K. Jain learned Counsel appearing for respondents Nos. 2 to 6 and 8, has supported the view of the Division Bench of the High Court that wakf property is confined to 1 bigha and 17 biswas of land covered by the mosque and the makbara, and the remaining land in Bagh Nawab Kallan Khan is not wakf property.

14. At this stage, it may be mentioned that the challenge to the order of the Wakfs Commissioner passed under Section 4 of the Act and the lists of wakf properties under Section 5(2) of the Act was made in proceedings under Article 226 of the Constitution. In view of the fact that a civil suit is maintainable to challenge the list published under Section 5(2), the scope of challenge to the said list in proceedings under Article 226 of the Constitution would be confined to cases where the order of the Wakfs Commissioner passed under Section 4 of the Act suffers from want of jurisdiction and since the list issued under Section 5(2) is based on the order of the Wakfs Commissioner, the lack of jurisdiction in the Wakfs Commissioner to make the order would invalidate the list. The learned Single Judge proceeding on that basis set aside the order of the Wakfs Commissioner dated July 9, 1962 and the list of Wakf properties dated December 2, 1965, as amended on June 29, 1967 on the ground that while holding an enquiry under Section 4 of the Act, the Wakfs Commissioner had no jurisdiction to determine whether particular property was wakf property. The said basis for interference was not available to the Division Bench of the High Court in view of the decision of this Court in Board of Muslim Wakfs v. Radha Krishna and Ors. (supra). The Division Bench of the High Court, has found that there was total lack of jurisdiction in the Wakfs Commissioner insofar as he proceeded to declare as wakf property the remaining land in Bagh Nawab Kallan Khan after excluding 1 bigha and 17 biswas of land covered by the mosque and the makbara, on the ground that the said land stood acquired by the State Government in the land acquisition proceedings initiated under the Jaipur Land Acquisition Act the State Government had taken possession of the said land as early as in the year 1945. In arriving at the said finding, the learned Judges have placed reliance on the earlier decision of the High Court dated March 11, 1957 in D.B. Civil Writ Petition No. 115 of 1955. We are unable to read the judgment of the High Court dated March 11, 1957 in the manner as read by the learned Judges of the High Court. In the earlier judgment dated March 11, 1957, the High Court noticed that there was dispute between the parties on the question as to whether possession of the land had been taken in 1945 because while the case of the petitioner in that writ petition (Sahibzada Zafar Jang Khan) was that he was still in possession of the land, the stand of the State Government was that possession had been taken in 1945. Without going into the said disputed question of fact, the High Court proceeded to deal with the matter on the assumption that the State Government had taken possession of the disputed land in 1945 as alleged by it. Examining the matter on that basis, the High Court observed that under the provisions of the Jaipur Land Acquisition Act, the land could vest in the State Government either under Section 16 or under Section 17 and that it was not the case of the State that any action under Section 17 was taken in the case and the only provision which could, therefore, be invoked was Section 16. The High Court, examined whether an award under Section 11 had been made and whether the report of the Land Acquisition Officer dated October 11, 1944 could be treated as an award under Section 11, after

observing that an award must contain the compensation which in the opinion of the Land Acquisition Officer should be allowed, and that in the report dated October 11, 1944, no compensation had been mentioned in respect of the land in question and all that the report says is that when the Matmi case of Sahibzada Zafar Jang Khan was decided the land will be given to him in exchange. The High Court found that the so-called award postpones the payment of compensation till the Matmi order was passed and no compensation was fixed in October, 1944 either in the shape of cash or in the shape of land to be given in exchange. In the view of the High Court there was no award so far as this land was concerned under Section 11 and all that the Land Acquisition Officer did in 1944 was to postpone the making of the award and it was concluded: "Therefore, in spite of the proceedings under the Jaipur Land Acquisition Act in 1944, the land cannot be said to have been vested in State". While dealing with the relief which could be granted to the petitioner in that case, the High Court observed that the proceedings could not be quashed and the State should not be prohibited from depriving him of the possession of the land and that all that the applicant could ask was that the postponed compensation should now be worked out and paid to him. The High Court, therefore, while allowing the writ petition, directed the Collector of Jaipur to work out the compensation in that case under the law and award it subject to whatever be the result of Matmi proceedings. It is this evident that in the said judgment dated March 11, 1957, the High Court found that inspite of the proceedings under the Jaipur Land Acquisition Act in 1944, the land could not be said to have been vested in the State under Section 16. This position continued till the award was made by the Land Acquisition Officer on July 30, 1962. It was, therefore, not correct for the Division Bench of the High Court in the judgment under appeal to say that at the time when the Wakfs Commissioner conducted the enquiry and passed the order July 9, 1962, the land in dispute had already vested in the State Government under the land acquisition proceedings under the then Jaipur Land Acquisition Act in 1944. The order dated July 9, 1962 passed by the Wakfs Commissioner cannot, therefore, be held to be an order passed without jurisdiction on that account.

15. The learned Judges of the Division Bench of the High Court have also held that the order of the Wakfs Commissioner dated July 9, 1962 was passed in contravention of the principles of natural justice inasmuch as the State Government was not made a party to the proceedings and no opportunity was given to the State Government. In taking this view, the learned Judges have again proceeded on the basis that the land in question had already vested in the State Government under the land acquisition proceedings and the State Government had an interest in the said property. Since we are of the view that at the time when the Wakfs Commissioner was conducting the enquiry the property had not vested in the State Government under the land acquisition proceedings, it was not incumbent upon the Wakfs Commissioner to issue any notice to the State Government in those proceedings and the said proceedings could not be held to have been vitiated on that account.

16. The other infirmity that has been pointed out by the learned Judges of the Division Bench of the High Court in the order of the Wakfs Commissioner dated July 9, 1962 is that there was total lack of material to show that the land was ever given expressly or impliedly, or held or used for pious, religious or charitable purposes and that the wakf was confined only to the land measuring 1 bigha and 17 biswas of land on which the mosque and the makbara are situated. This finding of the High Court is based on the construction of the orders of the former Government of Jaipur dated December 2, 1895, October 30, 1898 and January 6, 1930 as well as the statements of the witnesses.

In our opinion, the question whether the wakf property covered the entire 33 bighas of land of Bagh Nawab Kallan Khan or was confined to 1 bigha and 17 biswas of land on which the mosque and the makbara are situated had to be determined on the basis of appraisal and appreciation of evidence/documentary as well as oral, that was produced before the Wakfs Commissioner during the course of enquiry. The Wakfs Commissioner was vested with the jurisdiction to arrive at a decision on this question on a consideration of the said evidence and such a determination by the Wakfs Commissioner could not be held to be vitiated on the ground of lack of jurisdiction for the reason that the Wakfs Commissioner had committed an error in construing the documentary evidence produced before him. The order dated July 9, 1962 passed by the Wakfs Commissioner and the list of wakf properties dated December 2, 1965 as amended by notification dated June 29, 1967, published under Sub-section (2) of Section 5 of the Act were not open to challenge before the High Court under Article 226 of the Constitution on the ground that the finding recorded by the Wakfs Commissioner was not supported by the evidence on record.

17. For the reasons aforesaid, we are of the view that the judgment of the Division Bench of the High Court setting aside the order of the Wakfs Commissioner dated July 9, 1962 and declaring as invalid the inclusion of the land measuring 31 bighas and 3 biswas, in excess of land measuring 1 bigha and 17 biswas on which the mosque and the makbara are situated, in the list of wakf properties published in the Rajasthan Gazette dated December 2, 1965, as amended by the subsequent notification dated June 29, 1967, cannot be upheld and must be set aside.

18. We do not propose to go into the question as to the effect of the award dated July 30, 1962 on the list of wakf properties published under Sub-section (2) of Section 5 of the Act in the Rajasthan Gazette dated December 2, 1965, as amended by the subsequent notification dated June 29, 1967. Nor do we propose to go into the validity of the said acquisition proceedings. We leave it open for the parties to agitate this issue, if so advised, in an appropriate forum. We also wish to make it clear that the respondents Nos. 2 to 8 will not be precluded from questioning the validity of the list of wakf properties insofar they relate to the wakf in question as published in the Rajasthan Gazette dated December 2, 1965, as amended by the subsequent notification dated June 29, 1967, in any proceedings which they initiate in accordance with the provisions of law.

19. In the result, the appeals are allowed, the judgment of the Rajasthan High Court dated February 13, 1980 in D.B. Civil Special Appeals Nos. 44-45 of 1970 is set aside and civil writ petitions Nos. 528/61 and 339/62 are dismissed. The parties are left to bear their own costs.