Maharashtra State Board Of Wakfs vs Shaikh Yusuf Bhai Chawla on 20 October, 2022

Author: K.M. Joseph

Bench: Hrishikesh Roy, K.M. Joseph

'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 7812-7814 OF 2022
(Arising out of SLP (C) Nos. 31288-31290 of 2011)

MAHARASHTRA STATE BOARD OF WAKFS Appellant (s)

VERSUS

SHAIKH YUSUF BHAI CHAWLA & ORS. Respondent(s)

WITH

CIVIL APPEAL NO. 7930 OF 2022
(Arising out of SLP(C) No. 12296 of 2013)

CIVIL APPEAL NO. 7929 OF 2022
(Arising out of SLP(C) No. 12295 of 2013)

CIVIL APPEAL NO. 7928 OF 2022
(Arising out of SLP(C) No. 12291 of 2013)

CIVIL APPEAL NO. 7927 OF 2022
(Arising out of SLP(C) No. 12293 of 2013)

CIVIL APPEAL NO. 7926 OF 2022
(Arising out of SLP(C) No. 12290 of 2013)

CIVIL APPEAL NO. 7925 OF 2022
(Arising out of SLP(C) No. 12288 of 2013)

CIVIL APPEAL NO. 7924 OF 2022
(Arising out of SLP(C) No. 35198 of 2011)

CIVIL APPEAL NO. 7923 OF 2022

(Arising out of SLP(C) No. 35196 of 2011)

CIVIL APPEAL NO. 7922 OF 2022
(Arising out of SLP(C) No. 32636 of 2011)

CIVIL APPEAL NO. 7921 OF 2022
(Arising out of SLP(C) No. 16915 of 2012)

CIVIL APPEAL NOS. 7914 - 7920 OF 2022
(Arising out of SLP(C) Nos. 19738-19744 of 2012)

CIVIL APPEAL NOS. 7911 – 7913 OF 2022
(Arising out of SLP(C) Nos. 19721-19723 of 2012)

CIVIL APPEAL NO. 7910 OF 2022
(Arising out of SLP(C) No. 19716 of 2012)

CIVIL APPEAL NO. 7909 OF 2022
(Arising out of SLP(C) No. 19717 of 2012)

CIVIL APPEAL NO. 7908 OF 2022
(Arising out of SLP(C) No. 19920 of 2012)

CIVIL APPEAL NOS. 7898 - 007907 OF 2022
(Arising out of SLP(C) Nos. 19726-19735 of 2012)

CIVIL APPEAL NOS. 7896 - 007897 OF 2022
(Arising out of SLP(C) Nos. 19719-19720 of 2012 (IX)

CIVIL APPEAL NO. 7895 OF 2022
(Arising out of SLP(C) No. 19725 of 2012)

CIVIL APPEAL NO. 7894 OF 2022
(Arising out of SLP(C) No. 19724 of 2012)

CIVIL APPEAL NO. 7893 OF 2022
(Arising out of SLP(C) No. 19759 of 2012)

CIVIL APPEAL NO. 7892 OF 2022
(Arising out of SLP(C) No. 35760 of 2012)

CIVIL APPEAL NO. 7891 OF 2022
(Arising out of SLP(C) No. 19775 of 2012)

CIVIL APPEAL NO. 7890 OF 2022

(Arising out of SLP(C) No. 35759 of 2012)

CIVIL APPEAL NO. 7889 OF 2022
(Arising out of SLP(C) No. 35777 of 2012)

CIVIL APPEAL NO. 7888 OF 2022
(Arising out of SLP(C) No. 35776 of 2012)

CIVIL APPEAL NO. 7887 OF 2022
(Arising out of SLP(C) No. 19781 of 2012)

CIVIL APPEAL NO. 7886 OF 2022
(Arising out of SLP(C) No. 19736 of 2012)

CIVIL APPEAL NOS. 7884 - 7885 OF 2022
(Arising out of SLP(C) Nos. 19776-19778 of 2012)

CIVIL APPEAL NOS. 7872 - 7883 OF 2022
(Arising out of SLP(C) Nos. 19761-19772 of 2012)

CIVIL APPEAL NOS. 7862 – 7871 OF 2022
(Arising out of SLP(C) Nos. 35764-35773 of 2012)

CIVIL APPEAL NOS. 7855 – 7861 OF 2022
(Arising out of SLP(C) Nos. 19782-19788 of 2012)

CIVIL APPEAL NOS. 7853 - 7854 OF 2022
(Arising out of SLP(C) Nos. 35762-35763 of 2012)

CIVIL APPEAL NO. 7852 OF 2022
(Arising out of SLP(C) No. 12259 of 2013)

CIVIL APPEAL NO. 7851 OF 2022
(Arising out of SLP(C) No. 12305 of 2013)

CIVIL APPEAL NO. 7850 OF 2022
(Arising out of SLP(C) No. 12268 of 2013)

CIVIL APPEAL NO. 7849 OF 2022
(Arising out of SLP(C) No. 12303 of 2013)

CIVIL APPEAL NO. 7848 OF 2022
(Arising out of SLP(C) No. 12266 of 2013)

CIVIL APPEAL NO. 7847 OF 2022
(Arising out of SLP(C) No. 12302 of 2013)

CIVIL APPEAL NO. 7846 OF 2022

(Arising out of SLP(C) No. 14169 of 2013)

CIVIL APPEAL NO. 7844 OF 2022
(Arising out of SLP(C) No. 12271 of 2013)

CIVIL APPEAL NO. 7845 OF 2022
(Arising out of SLP(C) No. 12298 of 2013)

CIVIL APPEAL NO. 7843 OF 2022
(Arising out of SLP(C) No. 12260 of 2013)

CIVIL APPEAL NOS. 7840 - 7842 OF 2022
(Arising out of SLP(C) Nos. 12310-12312 of 2013)

CIVIL APPEAL NO. 7839 OF 2022
(Arising out of SLP(C) No. 12307 of 2013)

CIVIL APPEAL NOS. 7836 - 7838 OF 2022
(Arising out of SLP(C) Nos. 14177-14179 of 2013)

CIVIL APPEAL NO. 7835 OF 2022
(Arising out of SLP(C) No. 12281 of 2013)

CIVIL APPEAL NO. 7834 OF 2022
(Arising out of SLP(C) No. 12300 of 2013)

CIVIL APPEAL NO. 7833 OF 2022
(Arising out of SLP(C) No. 14176 of 2013)

CIVIL APPEAL NO. 7832 OF 2022
(Arising out of SLP(C) No. 12304 of 2013)

CIVIL APPEAL NO. 7831 OF 2022
(Arising out of SLP(C) No. 12277 of 2013)

CIVIL APPEAL NO. 7830 OF 2022
(Arising out of SLP(C) No. 1132 of 2017)

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CIVIL APPEAL NOS. 7827 - 7829 OF 2022
(Arising out of SLP(C) Nos. 32129-32131 of 2011)

CIVIL APPEAL NOS. 7815 - 7826 OF 2022
(Arising out of SLP(C) Nos. 19747-19758 of 2012)

JUDGMENT

1. Leave granted.

2. Since the common questions arises in all these appeals, we deem it appropriate to dispose of the same by the following common judgment.

3. The facts leading up to the litigation need to be referred to at the very beginning.

The Parliament enacted Wakf Act, 1995, (hereinafter referred to for the purpose of brevity as, 'the Act'). By order dated 01.12.1997, the Government of State of Maharashtra (hereinafter referred to as the State') appointed a Survey Commissioner purporting to act under Section 4 of the Act. A Wakf Tribunal was constituted at Aurangabad by order dated 30.10.2000. On 04.01.2002, the State incorporated the Maharashtra State Board of Wakfs (hereinafter referred to as Board). Incidentally, it is noticed that four members came to be nominated by very same notification, the details of which shall be evident in the course of the judgment. The State forwarded the survey report which it received to the Board which was constituted on 07.05.2002. The Joint Parliamentary Committee (hereinafter referred to as 'JPC' for brevity) submitted a report on 08.07.2003.

4. At this juncture, it is apposite that we may notice another dimension of the litigation which is the Bombay Public Trust Act, 1950 rechristened as the Maharashtra Pubic Trust Act, 1950. The real lis in this case surrounds the question as to whether the respondents before us who turned out to be the writ petitioners before the High Court are Public Trusts or they are in essence or in substance, Wakfs under the Mohammedan Law.

The Charity Commissioner under the Bombay Public Trust Act, 1950 (hereinafter referred to as '1950 Act' for brevity), makes his entry on the stage by issuing a circular dated 24.07.2003 which reads as follows:

> "Dated: 24.07.2003 Sub: The Muslim Wakfs/Trusts registered with the Charity Commissioner, and as per Section 43 of the Wakf Act, 1995.

CIRCULAR NO. 307 DATED 24.07.2003 According to Section 43 of the Wakf Act, 1995 Wakfs registered as Public Trusts should not be tried under the Bombay Public Trust. Further orders may be awaited.

Sd/-

The Charity Commissioner Maharashtra State, Mumbai 24.07.2003 Sec. 43 of Act is as follows:

> "Sec. 43 Wakfs registered before the commencement of the Act demand to be registered – Notwithstanding anything contained in this Chapter, where any wakf has been registered before the commencement of this Act, under any law for the time being in force, it shall not be necessary to register the Wakf under the provisions of this Act and any such registration made before such commencement shall be deemed to be a registration made under this Act."

> 5. On 13.11.2003, a list of Wakfs was published by the Board. The first writ petition came to be filed by one Anjuman-I-Islam on 28.08.2003. A Challenge was laid to the circular issued by the Charity Commissioner. There was also a challenge thrown to the Constitution of the Board.

The High Court proceeded to stay the circular by order dated 17.11.2003 qua the writ petitioner. A spate of writ petitions followed. They were drawn up in similar vein; orders of stay followed as well.

6. It would appear that there was a meeting held by the Law and Judiciary Department to discuss the problems of the Wakfs. A decision was taken on 11.08.2004 to constitute a Committee of the Charity Commissioner and two members of the Board. The following may be noted at this juncture itself as the result of the meeting which took place on 11.08.2004:

> "Meeting to discuss the problems of Wakfs cases was held today i.e., on the 11.8.2004 at 12.00 noon under the Chairmanship of Hon'ble Minister (Law). The following dignitaries and officers of Government were present in the chamber of Hon'ble Minister (Law):-
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> (1) Hon'ble Minister (Law) (2) Hon'ble Minister, Aukaf (3) Chairman, Wakf Board, Mumbai (4) Hafeezbhai Dhature, M.L.A. & Member of Wakf Board.
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> (5) Principal Secretary & S.L.A. L.& J.D. (6) Charity Commissioner, M.S.Worli, Mumbai (7) Executive Officer, Wakf Board, Mumbai (8) Jt. Secy. R&F.D. (9) shri Yusuf Muchhala, Sr. Counsel, High Court.
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> (10) Shri Viren Merchant, Chartered Accountant (11) Jt. Secy L& J.D. (Shri Gomare) (12) D.S. (Law L& J.D. (Shri Bangale), (13) U.S. (Law), L& J.D. (Shri Patil) So many writ petitions have been filed before the Hon'ble High Court challenging the formation of Wakf Board. The Hon'ble High Court admitted the writ petitions and granted interim relief in favour of the petitioners restraining the Charity Commissioner from transferring the muslim trusts to Wakf Board and granted stay on the Circular dated 24.7.03 issued by the Charity Commissioner. The Wakf Board is also restrained by the Hon'ble High Court from collecting the contribution from the petitioners in these writ petitions. On the basis of the same, Association for Protection of Wakfs and Trusts has made representation to the Government with a request to; (1) direct the Wakf Board to cancel the notification declaring the list of Wakf which are published on 13.11.03, the said notification is not only full of mistakes but highly malicious.
>
> (2) direct the Wakf Board to have a fresh survey done properly ascertaining Shiya and Sunni Wakf Boards and have the Survey monitored by a competent and judicious senior officer. (3) form a fresh Wakf Board after proper survey is concluded. In the meeting it was discussed as to whether the Wakf Board is consituted legally as per the provisions of Wakf Act, 1995 and whether it is possible for the Government and the

Wakf Board to have a fresh survey ascertaining Shiya Wakf and Sunni Wakf and whether it is necessary to form a fresh the Wakf Board.

Following resolutions have been passed in the meeting:

(1) It is decided to constituted a committed under the Chairmanship of Charity Commissioner including the two members from the Wakf Board and two member of Charity Commissioner. This committee will study the work of charity organisations and Wakf Board constituted in Andhra Pradesh, Karnataka and Uttar Pradesh and decide which of the muslim trust registered under the Bombay Public Trusts Act, 1950 are covered under the Wakf Act and which comes under the Bombay Public Trusts Act and that which of the Wakfs are Shiya Wakfs and Sunni Wakfs.

(2) It is not legally possible to extend the period of notification after 13.11.04. But the concerned trusts shall make an application to the said Committee stating their objections, reservations, if any.

(3) Wakf Board will give an advertisement in the newspapers to requesting the muslim trusts and wakfs to give information stating that whether they are trust or Wakf and if it is a wakf, whether it is a Shiya Wakf or Sunni Wakf and the details of income of such Wakfs. (4) Shri Yusuf Muchhala, Sr. Counsel High Court may submit the list of Shiya Wakfs, Sunni Wakfs and Trusts belonging to their Association to the Committee constituted under the Chairmanship of Charity Commissioner. He made his submissions without prejudice to the rights and contentions of the petitioners in diverse writ petitions pending in the High Court at Judicature at Bombay, challenging the constitution of the wakfs Board, the survey commissioner report and the list of Wakfs published by Maharashtra Wakf Board on 13.11.2003.

(5) Mr. Muchhnala will persuade their clients (petitioners) to co-operative with the said committee formed by the State Government and his clients will co-operative without prejudice to their rights and contentions on the issues in the pending writ petitions. (6) To bring uniformity in respect of the contribution collected for administrative fund, the Wakf Board may take administrative fund contribution annually at a rate of 2% for the gross annual income or of the gross annual collection or receipt as the same way in which the public trust administrative fund is being collected by the Charity Commissioner. (7) The Wakf Board shall not take any further action in respect of the notification declaring the list of wakfs which was published on 13.11.2003 until the report of the said Committee is submitted to the State Government.

7. Writ Petition No. 2906 of 2004 came to be filed by Shaikh Yusuf Bhai Chawla, a trustee of the Sir Admji Peerbhoy Sanatorium. Therein, the notification dated 04.01.2002 was sought to be put under a cloud.

8. On 08.02.2005, the Committee which we have just hereinbefore mentioned submitted its report. It referred to the powers of the Board under Section 40 of the Act to decide whether the properties

are Wakf Property or not.

9. On 09.03.2005, the Board passed a resolution. It reads as follows:

> "Charity Commissioner may be requested to transfer bifurcated Wakfs also with records of the Charity Commissioner, numbering 918 from 1Mumbai Co. the Wakf Board and keep with Charity Commissioner 755 Trusts. Also it is resolved to accept the list of Pune District wherein 379 Wakfs are identified and 84 Trust. The Charity Commissioner may be requested to transfer record and proceeding of 379 Wakfs to Wakf Board and keep with his 84 Trust, rest identification may be completed, this transfer is subject to Boards Rights to consider matters under section 40 of the Wakf Act, 1995."

10. The Board, thereafter, issued a corrigendum purporting apparently to act in terms of the resolution dated 09.03.2005. The corrigendum had the effect of abridging the list of Wakfs which was published on 13.11.2003. Most significantly, a number of Wakfs which were included in the List dated 13.11.2003 came to be excluded. On 13.04.2006, the State wrote to the Board referring to the letters of the Charity Commissioner in which the Commissioner presented a new classified list of Wakfs and Trusts. The Lists of Wakfs and Trusts were also forwarded to the Board. The Board passed a resolution on 19.06.2006. It accepted the list of Wakfs given by the Charity Commissioner.

"ANNEXURE-P-19 Maharashtra State Board of Wakfs Dated 19.06.2006 Point No. 46 (reg): Bifurcation of Wakf and Trust as per List finalized by Committee appointed by the government publication of Government Gazette:

> Resolution No.4.6: It is unanimously revolved that the report of Charity Commissioner is received through Government of Maharashtra of all Districts in Maharashtra. In principle it is agreed to publish the lists in Government Gazette, lists of bifurcated Wakfs. Again under section 40 of the Wakfs Act, the Board has power to take remaining Wakfs at any time in its period. Hon'ble Chairman is authorized to take final decision in this regard.
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> (M.Y. Patel) Additional Collector Chief Executive Officer Aurangabad"

> 11. On 31.07.2006, a corrigendum was issued by the Board modifying the earlier list of Wakfs. Thereafter, on 25.04.2007, the Board issued another notification stating that the resolution which was dated 19.06.2006 was cancelled. The reason given was that it was not as per the business rules. It was also decided to cancel the corrigendum issued on 31.07.2006. On 04.09.2008, the Government of Maharashtra appointed seven members to the Board. This notification, in turn, also formed the subject matter of challenge in the High Court.

The membership of the Board stood reduced to four members viz., two of the members who were originally appointed and two who were from the lot who were subsequently appointed. On

23.10.2008, there is yet another summersault by the Board insofar as it purported to cancel the corrigendum dated 05.05.2005 and it was therein declared that the original notification containing the List of Wakfs dated 13.11.2003 was to remain intact:

> "ANNEXURE-P- 25 Maharashtra Govt. Gazette NOTIFICATION DATED 23.10.2008 No.MSBW/REG-240/3805/2008.
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> Dated: 7 .10 .2008 NOTIFICATION By the Chief Executive Officer The list of Wakfs Properties of Mumbai & B.S.D. was published in Government Gazette dated 13.11.2003 as per Board Resolution 3 dated 27.9.2003, under section 5 (1) and sub-section 3 of section 4 of Central Wakf Act, 1995.

The corrigendum to the aforesaid Government Gazette notification was issued on 5.5.2005 with reference to the Maharashtra Stat· e Board of Wakfs. Resolution No. 3 dated 9.3.2005, and the same was published on 5.5.2005.

However, the Resolution No.3 dated 9.3.2005 was cancelled and· deleted by the Board in its meeting vide Resolution No. 17/2008 dated 3.4.2008, and confirmed on 27.5.2008. Hence the Corrigendum No.MSBW/REGISTRATJON -73/ 1068/2005 published on 5.5.2005 stands automatically cancelled. Thus the original notification of List of Wakf Properties published on 13.11.2003 remains as it is.

(S.S.ALI QUADRI) Chief Executive Officer Maharashtra State Board of Wakfs Aurangabad"

12. The JPC gave a report on 23.10.2008 indicating that the list of Wakfs as far as the State of Maharashtra is concerned, was published. The next development is to be noticed in the form of a notification dated 20.10.2010. We may notice its contents at this juncture itself.

"ANNEXURE-P-26, MINORITIES DEVELOPMENT DEPARTMENT Mantralaya, Mumbai 400 042, dated the 20th October 2010 NOTIFICATION WAKF ACT, 1995 No. Wakf-2009/ C.R. 105/Desk-4. Whereas the Government of Maharashtra vide Government Notification, Revenue and Forests Department No. Wakf-1097/CR-95/L-3, dated the 1st December, 1999 and No. WAKF. 1097 /CR-95/L- 3, dated the 29th September 1999 appointed Survey Commissioners, Additional Survey Commissioners and Assistant Survey Commissioners, respectively, for the purpose of making a survey of Wakfs existing. on the 1st day of January 1996 in the State of Maharashtra; And Whereas, the Joint Parliamentary Committee received complaints that the survey was not conducted properly and therefore, the Committee issued directions dated 20th October 2008 to the State Government to conduct resurvey of the Wakfs in the State;

And Whereas, the Government considers it expedient to appoint Divisional Commissioners of Konkan, Nashik, Pune, Aurangabad, Amravati and Nagpur as Survey Commissioner for their respective divisions, District Additional Collectors of Konkan, Nashik, Pune, Aurangabad, Amravati and Nagpur as Additional Survey Commissioners for their respective districts, and Tahsildars as Assistant Survey Commissioner in their respective Talukas, to re-survey the Wakfs in the State of

Maharashtra;

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 4 of the Wakf Act, 1995., the Government of Maharashtra hereby appoints: -

> (1) Divisional Commissioners of Konkan, Nashik, Pune, Aurangabad, Amravati and Nagpur Revenue Divisions, as Survey Commissioner for their respective divisions, (2) District Additional Collectors of Konkan, Nashik, Pune, Aurangabad, Amravati and Nagpur Districts, as Additional Survey Commissioner for their respective Districts, (3) Tahsildars of the Talukas, as Assistant Survey Commissioner for their Talukas, for. conducting re-survey of the Wakfs in the State of Maharashtra.

By order and in the name of the Governor of Maharashtra.

GEETA CHANDE Under Secretary to Government"

13. Writ Petition 357 was of 2011 was filed challenging the said notification.

There were other writ petitions also which were filed. Writ Petition was filed being Writ Petition No. 899/2011 challenging the circular of the Charity Commissioner and also the list of Wakfs were challenged. Pleadings were exchanged. Written notes of arguments were also submitted.

The High Court has allowed the writ petitions. The findings of the High Court may be noticed at this stage.

14. The High Court broadly formulated four issues. The High Court posed the question as to whether the incorporation of the Board was illegal. The contention which was urged before the High Court by the writ petitioners was that here is a case where the cart was put before the horse. The law giver envisaged the conduct of survey of the Wakfs. A survey of Wakfs in terms of the section 4 followed by the publication of the List under Section 5 would reveal among other things, the number of Wakfs in the State. Even more importantly, the survey would yield the necessary inputs so that the duty which was cast on the Government under Section 13 of the Act could be performed. Section 13, it is the finding of the High Court cast a mandatory duty on the Government to form two separate Boards viz., a Sunni Board of Wakf and a Shia Board of Wakf, if Section 13(2) was attracted. It was found by the High Court that Section 13(2) contemplated that if 15 per cent of the Wakfs were Shia Wakfs or the income from such Wakfs is in the excess of 15 per cent of the total income, the law mandates that there must be separate Wakfs for the Sunnis and Shias respectively. The High Court proceeded to find that Section 13 contemplates that the Board is a body corporate and has perpetual succession. It was found further that the Act does not contemplate a Board being formed under Section 13(1) and thereafter, a survey report being received and on the strength of the contents of the survey report with reference to the criteria in Section 13(2), the Board which is originally put in place under Section 13(1) being extinguished and creation of two separate Boards for the Sunnis and the Shias as contemplated therein.

15. The Court found that the contention of the report being placed by the State apparently under Section 5 of the Act, viz., the requirement therein that the Government on receipt of the report of the Surveyor must forward the report to the Board and therefore, the Board must be in place and that the survey need not precede the incorporation of the Board was misplaced.

16. On the second aspect, the High Court posed the question as to the legality of the constitution of the Board. Section 14 provides for the constitution of the Board. The High Court drew support from the fact that, as on the date, it apparently considered the matter that there were only two members and the law contemplated that there must be a minimum of seven members in the Board and here is what the High Court held:

> "It is thus clear that presently there are only two Members of the Board. This position was not disputed before us. Perusal of Section 14 makes it clear that a wakf Board having only two members cannot be said to be properly constituted and· therefore, we have to hold that the constitution of Wakf Board of Maharashtra is not in accordance with law."

17. Moving on, the High Court dealt with the complaint of the writ petitioners regarding the publication of the list itself on 13.11.2003. The High Court largely drew on the report of the JPC itself.

18. Still later, the High Court found favour with the contention of the writ petitioners that here is a case where developments based on the filing of the writ petitions cannot be overlooked. The development consisted of the constitution of the Bifurcation Committee which had the blessings of the Government itself, and which Committee held meetings in which the Charity Commissioner of the Wakf Board also participated and certain public trusts were identified as public Trusts and others as Wakfs.

After finding that the survey conducted by the Survey Commissioner was flawed, the High Court accepted the request of the writ petitioners that since on 20.10.2020 resurvey was also ordered by the Government when the resurvey is conducted, the writ petitioners may be afforded an opportunity to place before the Survey Commissioner the report of the Committee under which the writ petitioners apparently were identified as being actually public trusts.

19. Thereafter, the High Court, we may notice, in the context of the impact of the 1950 Act proceeded to make the following observations:

> THE APPEALS

20. The appellants before us are the Board, State of Maharashtra and two others.

21. We heard Shri K. K. Venugopal, learned senior counsel appearing on behalf of the Board along with Mr. Javed Shaikh, Mr. Sudhanshu S. Choudhari, Ms. Suhasini Sen, Mr. Mahesh P. Shinde, Ms. Rucha A. Pande, Mr. Veeraragavan M. and Mr. Kamran Shaikh, learned counsel. We have also heard

Mr.Gopal Sankaranarayanan, learned senior counsel who also appeared for the Board.

We have heard Shri Rahul Chitnis learned counsel appearing on behalf of the State.

Last, but not the least, we heard Shri Harish Salve, learned senior counsel appeared on behalf of the respondents-writ petitioners in C.A. No. 7830 of 2022 (@ SLP (C) No. 1132 of 2017) along with Mr. S.Mahesh Sahasranaman, Dr. Abhishek Manu Singhvi, learned senior counsel who appeared in C.A. Nos. 7812-7814 of 2022 (@ SLP (C) Nos. 31288-31290 of 2011) along with Mr. Murtaza Kachwalla, Mr. Moinuddin Algaus Shaikh and Ms. Ekta Bhasin, learned counsel. We also heard Mr. Y. H. Muchhala, learned senior counsel along with Mr. Sagheer Khan and Mr. G. D. Shaikh, Mr. Seshadri Nadu, learned senior counsel, along with Mr. S. Mahesh Sahasranaman, also made his submissions.

We have further heard Shri Vinay Navare, learned senior counsel and we have also heard Shri Anil Anturkar, learned senior counsel.

22. Shri K.K.Venugopal, learned senior counsel for the Board would impugn the judgment on various grounds. He would challenge the finding regarding the alleged illegality in the incorporation of the Board as unsustainable. There is no duty cast under Section 13(2) of the Act to have separate Boards if the percentage of Shia Wakfs are found to exceed the percentage mentioned in the said section (15 per cent) he contended. He would further contend that a survey need not precede the incorporation.

23. Learned senior counsel also did contend that, in fact, when the Wakf Act 1954 was enacted having regard to Article 254 of the Constitution, even treating the 1950 Act as a law which embraced a Wakf as a public trust and provided for its regulation, the Wakf Act 1954 being a self-contained Code even if it was not made applicable to the State of Bombay, in view of the judgment of this Court in State of Kerala & Ors. v. Mar Appraem Kuri Co. Ltd. & Another,1 the mere making of the law by Parliament attracted the doctrine of repugnancy. Therefore, since the Scheme of the Wakf Act, 1954 is completely irreconcilable with the provisions of 1950 Act, it did not even survive the passing of the Wakf Act, 1954.

24. He would also after taking us through the factual developments which we have adverted to already, contend that the Board was indeed validly constituted and the survey was conducted as per law. The Survey Commissioner was appointed in 1997. It took the surveyor nearly five years to submit his report. He would, in particular, point out that even the JPC report which is the sole premise for finding the list flawed by the High Court, has observed that questionnaires were dispatched. This meant that all parties were put on notice. It is not as if the writ petitioners were put to prejudice. They had the right to approach the properly constituted alternate (2012) 7 SCC 106 forum viz., the Tribunal under Section 6 of the Act. No ground whatsoever existed to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution. The question as to whether an institution is a Wakf or a public trust as the writ petitioners claim is to be dealt with by the duly constituted Tribunal only.

25. He would submit that as far as the corrigendum which was issued on 05.05.2005 cutting down the width of the number of the Wakfs which was included in the original list dated 13.11.2003 is concerned, it was wrongly done. This fact was realised and the mistake came to be rectified as we have noticed in the narration of facts.

26. He would further contend that what JPC complained about was under-inclusion of the Wakfs. In other words, the JPC found that there were complaints about the large number of Wakfs which were left out in the List of 13.11.2003. This did not detract from the validity or the correctness of the List dated 13.11.2003. As regards Wakfs included therein, it is contended, therefore, there arose no occasion for the High Court to set aside the List dated 13.11.2003. As regards the other findings and directions which were given by the High Court, the learned senior counsel would contend that they are wholly untenable and cannot be sustained.

27. With regard to the effect of Section 112 of the Act, Mr. K.K. Venugopal, learned senior counsel, would submit that Section 112 clearly brings about a repeal of the law in relation to Wakfs in the 1950 Act.

28. Shri Gopal Sankaranarayanan, learned senior counsel, adopted the submissions made by the learned senior counsel Shri K. K. Venugopal. He would supplement, in particular, in his attack against the finding that the Wakf was not properly incorporated on the following grounds.

He would submit that a perusal of the Act would reveal that the Act has a definite scheme. It includes a provision for registration of the Wakfs. The immediate need for creation of the Wakf Board which cannot await the result of the survey commissioner is impressed upon us. The Act contemplates a duty with every Wakf whether created before or after the Act to register themselves with the Wakf Board.

29. Section 32 contemplates various powers and functions to be discharged by the Board. The Board's sanction is required under Section 51 even for leasing the property. Therefore, there cannot be a hiatus from the date of the commencement of the Act and creation of the Wakf Board, as it will defeat the sublime object of the Act. He has also argued that Section 103 and 106 would constitute a sufficient answer to the findings of the High Court that the Act does not contemplate the creation of second Wakf Board after the creation of the first composite Board. He would also point out that the report under the Survey under Section 4 of the Act is purely preliminary. It does not affect any legal rights. The right of the Wakf which is included in the List published under Section 5(2) of the Act cannot be preponed to the time when the Survey Commissioner submits its report under Section 4(3) of the Act to the Government. The right which the person aggrieved (as it stands amended in place of the 'person interested in the Wakf') has is that the aggrieved person can approach the Tribunal under Section 6.

30. Therefore, no prejudice as such was caused to the writ petitioners that would have justified their knocking at the doors of the High Court under the extraordinary jurisdiction under Article 226 of the Constitution.

31. He would also submit that there has been a different regime created from the previous one which fell for consideration before this Court in the case reported in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another2. He would canvas for the position that having regard to the effect of the amendment brought about to the word 'beneficiary' in section 3(a) of the Wakf Act 1954 and its continuance in the present Avtar in Section 3(a) again of the Act, the fundamental premise on which the decision of this Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra) was rendered has been taken away.

32. In other words, according to him, in view of the fact that though prior to the amendment in 1964, the word beneficiary was defined in such a manner that a Muslim who purported to create a Wakf, the benefit of which was available to all without reference to religion was AIR 1963 SC 985 tabooed, after the amendment, a Wakf which has for its object any public utility which is sanctioned by Muslim law would pass muster as a valid Wakf. This has brought about a complete change in the concept of Wakf and what is more important, its repercussions are pronounced with regard to the controversy at hand. In other words, he would submit that the very case of the writ petitioners/ respondents has been that since their institutions are public religious or charitable trusts and therefore, they were registered under the 1950 Act and they cannot be treated as Wakfs. Since, the very basis for the difference between the Wakf and a Trust as was perceived, by the Court in the said judgment having being deciphered with the pre-amendment definition of the word beneficiary has been removed, there cannot be any difficulty in the law getting at Wakfs, in substance and bringing them under the firm control of the Act. He relies on case law which we shall refer to at the appropriate stage.

33. Mr. Javed Sheikh, learned counsel for the Board supplemented Shri K. K. Venugopal and Mr. Gopal Sankarnarayanan, learned senior counsel, and would support them in their attempts at overturning the impugned judgment.

34. Shri Rahul Chitnis, learned counsel for the State who appears in certain special leave petitions would also attack the findings of the High Court on analogous grounds and he adopts the argument addressed by the learned senior counsel. He would submit that after the filing of the special leave petitions in this Court which took place in the year 2011, the Government has ordered a second survey on 07.12.2016. He would point out that the order dated 20.10.2010 has been revoked.

35. Shri Anil Anturkar, learned senior counsel, appears in SLP (C)No. 3136 of 2016.

He would contend that though this Court has pronounced about the ambit of Section 4 of the Wakf Act, 1954, in the decision reported in Board of Muslim Wakfs, Rajasthan v. Radha Kishan and Others3 as far as the present Act is concerned, he would submit that the complaint about natural justice being violated may be farfetched and may not be sustainable. He emphasised the impact of Section 43 of the Act which provides for deemed registration of 3 (1979) 2 SCC 468 Wakfs. He drew our attention to judgment of this Court reported in Madanuri Sri Rama Chandra Murthy v. Syed Jalal4.

36. He would, in fact, go to the extent of contending that natural justice if it is to be observed to the extent canvassed, may render it impermissible to obtain any fruitful results. He would further contend that Wakfs would have been registered as deemed Wakfs under Section 28 of the 1950 Act, being Wakfs prior to the 1950 Act. In that case, there can be no complaint at all as they would qualify as Wakfs even under the Act. This is for the reason once a wakf, always a Wakf.

37. He would also point out that Wakfs, which are registered under any law, are under Section 43 of the Act to be deemed registered under the Act. Even they cannot have any complaint. He drew our attention also to the judgment of this Court in Ramjas Foundation and Another v. Union of India and Others5 (paragraph 31) to contend that it is not the law that the Wakfs can be created only by Muslims and non-muslim can also create a 4 (2017) 13 SCC 174 (2010) 14 SCC 38 Wakf. The only limitation is that it must be permitted by law or countenanced by the law applicable the person who is a non-muslim to create such Wakf. He further contends, however, that there is a distinction between Public Trust and Wakf and the charity commissioner was not justified in making over all the Muslim trusts and what is more, it was clearly impermissible for the Wakf Board to act on the same and include them as Wakfs under the Act.

38. Dr. A. M. Singhvi, learned senior counsel, would stoutly contest the case of the appellants by pointing out that the appellant's case is in the teeth of an unbroken line of decisions of this Court bringing out the clear-cut distinction between a public Trust and a Wakf. He would submit that his client Sir Adamji Peerbhoy Santorium was created under a scheme settled by order dated 16.06.1931 passed by the High Court of Bombay and which was registered under the 1950 Act. The respondents were trustees of the aforesaid Public trust created by Muslims and they were not Wakfs. He would submit that a Muslim would perhaps naturally lean in favour of creating a Wakf. This does not preclude him or prevent him from creating a public charitable Trust. Also, the confusion, according to him, was generated on account of Category B registered public Trusts which are nothing but Public Trusts registered by Muslims being converted enmasse into Wakfs under the Act. This is entirely unjustified. Every Wakf is a trust but every Public Trust is not a Wakf. He would submit that a Wakf is perpetual and irrevocable whereas the Trust need not be perpetual and may be revoked under certain conditions. Wakf property is inalienable. In the case of a trust, alienation of the Trust property is not tabooed. The founder of a trust may himself be a beneficiary, whereas the founder of a Wakf cannot reserve any benefit for himself. The powers of a Mutawalli (manager of the Wakf property) are very limited as compared to the powers of a Trustee. He heavily drew upon the judgment of this Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra) which has been followed in Mohd. Khasim v. Mohd. Dastagir and Others6. This is besides drawing support from the judgment of the Madras High Court reported in The Kassimiah Charities Rajagiri v. The (2006) 13 SCC 497 Madras State Wakf Board,7. He would support the judgment of the High Court and point out that the survey report did not have a separate list of Shia Wakfs in 21 districts out of 34 districts over which survey was conducted.

39. Several Muslims Trusts governed by common law were also erroneously included in the survey report as Wakfs. The survey report failed to indicate the gross income in respect of 15436 Wakf out of 19987 Wakfs under survey.

40. The High Court was entirely justified in its reasoning particularly as it involves even the report of the JPC. It is also contended that the Board was not properly constituted having regard to the requirements of distinct categories from which the members must be drawn from for the valid composition of the Board. The survey report, he insists is a sine qua non and must be a prelude to the valid incorporation of the Board which discharges solemn functions which includes the power of superintendence under Section 32, power of registration under Section 36, maintenance of register under Section 37 and power of the Board under Section 40 to decide the 1963 SCC Online Mad 132 matters mentioned therein. He raised a serious challenge to the composition of the Board and complains that it was illegal.

41. The list notified on 13.11.2003 was afflicted with various discrepancies which are highlighted. He further dwells upon the developments following the Government's decision to constitute Bifurcation Committee. After taking us through the report, meetings, resolutions, corrigendum and notifications, it was contended that after the list of 13.11.2003, modified list was issued on 05.05.2005 which is completely based upon the resolution dated 09.03.2005 which in turn has its premise in the meeting which took place on 11.08.2004. All of it together, he would submit, unerringly points out to the understanding of the Government itself and what is more, the Board also that the survey was highly flawed. Public Trusts per se which are clearly different from Wakfs were made over by charity commissioner again on a misapprehension of the legal position and came to be assimilated by the State and the Board. This mistake was discerned and amends made. He would therefore, submit that on no ground can this Court particularly having regard to the long passage of time, tinker with the exclusion of Public Trusts from the original list dated 13.11.2003. He would submit that this is a matter of moment as the respondents- Public Charitable Trusts have been carrying out charitable work for several years and recognized as such. Any attempt at upsetting the view, would in fact, result in grave injustice. He urged us to draw support from the interim order passed by this Court as well. According to him, in the interim order which is reported in Maharashtra State Board of Wakfs v. Yusuf Bhai Chawala and Others (2012) 6 SCC 328, this Court has clearly appreciated the difference between a Public Trust and a Wakf and proceeded to provide only for protection for Wakfs per se as distinct from Public trusts and this distinction noticed in the interim order which is based in turn on the judgment of this Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another8 is commended for our acceptance.

42. Dr. Singhvi, learned senior counsel, also submitted that Section 13(2) incorporates a core democratic value and having regard to the distinction between the Sunnnis AIR 1963 SC 985 and Shias, a need to have separate Boards cannot but be emphasised.

43. Shri Harish Salve, learned senior counsel appears in SLP (C)Nos. 31288-90 of 2011 and SLP (C)No. 1132 of 2017. He would submit that the Muslim law recognises the concept of the English Trust. What is more, it also recognises the distinction between such a Trust and a Wakf. A Trust is known in Muslim legal terminology as amana and it is not treated as a Wakf. The Muslim Personal Law (Sharia) Application Act 1937 in section 2 refers to both Trusts and Wakfs separately. The definition in section 2(r) of the Wakf Act, 1995, only explains the words Wakf and defines it but this does not mean that every trust is to be transformed into a Wakf. A Wakf must fulfil certain legal attributes. It cannot encompass all Trusts created by a Muslim. The 1950 Act is a secular law and

there is no known principle that would compel a person to follow a customary law and deprive him of his rights under the secular law to create charity. The Constitution preserves customary rights but did not take away the benefits available to members of any community or faith under the secular law. He draws upon the judgment of this Court in Mohd. Khasim v. Mohd. Dastagir and Others (supra) relied on by the Dr.Abhishek Manu Singhvi, learned senior counsel, as well. This is besides, of course, drawing our attention to the judgment of this Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra).

44. He would point out that the Mutawalli has no ownership right or say in Wakf property. He is not in that respect a Trustee. In this regard, he draws support from Tyabji on Muslim law. A Mutawalli is not entitled to deal with, that is dispose of or transfer off property, property of a Wakf being inalienable. This is recognised under Section 51 of the Act by the Amending Act 27 of 2013. A Wakf has three distinct features, viz., it is perpetual, inalienable and irrevocable. In the case of a Trust, property is transferable by the Trustee. He drew our attention to the provisions of section 43 of the Act and he contends that it only provides that it shall not be necessary for the Wakf which is already registered under any earlier law to register under the Act again. It does not mean that what was a Muslim Public Trust before the Act would become a Wakf.

45. Mr. Harish Salve, submits that Trusts created by Muslims would continue to be administered by the Charity Commissioner, though after the Act was enacted, the Muslim Wakfs may stand transferred to be administered under the Act. He would support the various findings given by the High Court. He would also submit that this is a case where the respondents have been roped in as Wakfs without any basis and only on the premise of their being registered as Muslim Public Trusts under the 1950 Act which is impermissible.

46. Shri Y. H. Muchhala learned senior counsel, however, would essentially echo the same complaints about the contentions of the appellants. He would submit that section 97 of the Act clothes the Government with the power to issue directions which are binding on the Board. This submission is made in the context of the constitution of the Bifurcation Committee. He would, therefore, contend that the Bifurcation Committee which was constituted by the Government itself realising its follies has made amends for its errors and the Wakf Board which has participated in proceedings of the Committee must be treated as acting under the directions of the Government issued under Section 97 of the Act. The Board had no choice in law and the present appeals must be treated as premised on an infraction of the directions under Section 97 of the Act which is impermissible. He would also submit that the history of the institutions would show that they were all public Trusts per se and completely distinguishable in law from Wakfs. It is glossing over this fundamental distinction that the survey was carried out the, lists were published and illegalities sought to be perpetuated. The High Court has set right the illegalities for which its power is unquestionable under Constitutional provisions. The mere fact that there is an alternate forum provided by the Act again in no manner impinged on the power of the High Court under Article 226 of the Constitution. He would also submit that it would be wholly unfair and unjust for the appellants to persuade this Court to retrace its steps at any rate from the list dated 05.05.2005. He would harp upon the fact that though power may be available under Section 40 of the Act, it is noteworthy that the section lay unutilised for a long period of time. Authorities have proceeded on

the basis that the judgment of the High Court has reached justice to the parties and this Court may not interfere in the matter at any rate. He also has an alternate request that should this Court be persuaded to interfere in any manner, the rights of his parties may be protected with reference to the powers available to this Court under Article 142 of the Constitution.

47. Mr. Y. H. Muchhala, learned senior counsel, submits that the Survey Commissioner acted illegally. The notification of the Board was illegal and lists dated 13.11.2003 and dated 30.12.2004 are not to be followed being illegal. Charity is permissible and possible for a Muslim without the creation of a Wakf. His case is in sync with the reasoning of the High Court that there would be a repeal of the 1950 Act only upon the creation of a valid machinery to work the Act viz., there is a valid incorporation of the Board and its proper constitution.

48. He would submit that there must be a proper finding about the institution being a Wakf, even at the hands of the surveyor. That duty has been breached. In the facts of the case, he would support the judgment of the High Court as being unexceptional. The Board was not functional, as on the date of the Notification dated 13.11.2003, the Board consisted of only Government nominees. The requirement that elected members must exceed nominated members stood observed only in its breach. Even today, there is no valid and effective machinery under the Act which has been created by the Government. The Government has been appointing members without following the mandate of the law. The Act does not aim at codifying of the Muslim personnel law relating to Wakf at all. The Act merely provides for the creation of an administration or the machinery for proper administration of Wakfs. He highlights the salient features which distinguish a Wakf from a Trust and he would contend that no merit exists in the appeals.

49. Shri Naidu, learned senior counsel, appearing for one of the respondents would also support the contentions and essentially adopts the contentions of the respondents and he would trace the history of the institution of Wakf and he would also contend that doing of charity is emphasized by the prophet and a public trust can also be set up without it being cataloged as a Wakf.

50. Shri Vinary Navare, learned senior counsel would submit that the writ petitioners in his case were worshippers who approached the High Court. When queried whether they were Sunni or Shia, he fairly points out that the writ petitioners were Sunnis by faith. Upon being further queried how the Sunni worshippers can have a grievance over public Trusts which are essentially created by Shias, and when the entire grievance in the case and the argument was essentially founded on the injury caused to the Shia Wakfs, he would submit that the interest of the parties even as beneficiaries needs to be protected.

51. Shri Vinay Navare would submit also that his line of argument is slightly different. He would submit that even assuming that there is no need to constitute separate boards for Sunnis and Shias, there is a statutory duty that the Government must perform at the time when it takes a decision to incorporate a Board to find out about the number of Sunni and Shia Wakfs. In this regard, he draws upon Section 14(6) of the Act and he would contend that thereunder, the members belonging to the Sunni and Shia sects are to be determined with reference to their numbers and value. Therefore, there must be some material if not the data revealed in the survey to give effect to the legislative

intent contained in Section 14(6). He was at pains to take us through three affidavits to point out that there was admittedly no material to justify the Government to arrive at a conclusion that there is no need for a separate Shia Board to deal with the Wakfs of the Shias.

52. In reply, Shri Gopal Sankarnarayanan, learned senior counsel, would, in particular, point out that this is a case where during the survey under Section 4, affected persons were served with a questionnaire and in this regard, he relies upon the very basis of the High Court which is the report of the JPC.

53. In other words, the JPC refers to the fact that questionnaires were dispatched. Therefore, he poses the question as to how would there be infraction of principles of natural justice occasioned.

54. He would further emphasise that Section 4 only provides for a preliminary survey and no rights are created or affected. He would further point out that section 93 of the Wakf Act proscribes the making of a compromise in any suit or other proceeding by the Board. He would point out that there have been cases where illegal compromise has happened. This line of argument is taken in the context of his attack against the constitution of the Bifurcation Committee and its subsequent proceedings. In other words, he rubbishes the attempt on the part of the respondents to draw support from the abridging of the List dated 13.11.2003 and 30.12.2004 by the making of the truncated List dated 05.05.2005.

55. Shri Gopal Sankaranarayan, learned counsel would emphasise that after the amendment to the word “beneficiary”, the world has changed for Wakfs and trusts. He would contend that for a valid Wakf to come into existence, it is not the law that there must be dedication to the Almighty as such. The requirements of a Wakf would be sufficiently satisfied without any such firm dedication to the Almighty as such. What is required is the only employment of the property satisfying the different criteria which obviously means property is actually used in perpetuity without there being any scope for revoking it, and further the property is inalienable subject to the law.

56. Before we deal with the various contentions, it is for us to have brief overview of the legislation affecting the institution of ‘wakf’ in the country. Wakf is an institution which is close to the heart of the Muslim community. There are various versions about its origin. Suffice it is to notice one such. In his work, Mahommedan Law by Syed Ameer Ali (4th Edition) at page 192, it is stated:

> “Omar had acquired a piece of land in (the canton of) Khaibar, and proceeded to the prophet and sought his counsel, to make the most pious use of it, (whereupon) the prophet declared, ‘tie up the property (asl or corpus) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God.’”

57. We may notice certain further statements contained in the book “Mahommedan Law” by Syed Ameer Ali, at page 192:

> "A Waqf is thus interwoven with the entire religious life and social economy of the Mussulmans. "Trusts" in the Mussalman system may, for the sake of convenience be divided under three heads, that is, public, quasi- public and private. This will probably indicate the division adopted by the Arabian jurists, who group wakfs or trusts under the following three heads, viz: - (a) Trusts in favour of the affluent and indigent alike (b) Trusts in favour of the affluent and then for the indigent (c) Trusts in favour of the indigent alone. Trust for public works of utility which are dedicated to the public at large though classed under the first head, have a distinctive name. They are called wakfs for Masalih-ul-aamma and differ in one feature from other Wakfs."

58. The wakif must be free. He must be an adult and sane. The property must be certain. The declaration need not be in a particular form. The dedication must however exist. The dedication must not be transient but it must be permanent. The dedication must be for purposes which are regarded as pious, charitable or religious as per Muslim Law.

59. A Wakf-alal-aulad is also a Wakf. In fact, we find the following statement in the work of Syed Ameer Ali (supra) at pages 213, 214 and 215:

> "The word sadakah occurs so frequently in works dealing with Mahommedan Law, and has such an important bearing on the constitution of a wakf that an exact apprehension of its meaning is necessary to a property understanding of the rules relating to dedications in the Islamic system.
>
> Richardson in his dictionary translates it as meaning an "alms-gift" and also as "property dedicated to pious uses." Hamilton, the translator of the Persian version of the Hedayah, evidently thought that the word meant 'alms', to the poor; and this error has influenced all subsequent conceptions.
>
> As a matter of fact, the word sadakah has a much larger meaning in the Mussulman system. It means, property speaking, a pious act:- "a smile in a neighbour's face is sadakah; to help the weary is sadakah." Probably, the only expression by which it can be construed is the word charity in its broadest sense.
>
> In the Mussulman Law, however, it means an offering or gift made with the object of obtaining the approval of the Almighty, or a reward in the next world..." Xxx xxx xxx "the Prophet of God has declared that a pious offering to one's family to provide against their getting into want is more pious than giving alms to beggars." "Said, the Prophet of god, when a Moslem bestows on his family and kindred, with the object of earning the approval of the Almighty, it is sadakah, although he has not given to the poor but to his family and children" "The most excellent of sadakah is that which a man bestows upon his family." "The greatest sadakah in point of rewards is that which you give to your family." "To give money to free a slave, to give alms to the poor, to give to your children and kindred, are all sadakah."

60. The moment dedication is made, the wakif is believed to earn his reward. We may in this context notice the following statement from the work of Syed Ameer Ali at page 211:

> "It must be remembered also that a wakf is not a gratuitous transfer of property. It is a transfer to the legal ownership of the Almighty for substantial consideration, viz., His reward, which is obtained the moment the wakf is created. As will be seen afterwards, a wakf takes effect like the emancipation of a slave. There is no power of revocation nor can there be any reserve; and neither the wakif nor any person deriving title from him can say afterwards that he had no intention to make a binding and irrevocable wakf." A case of Wakf—alal-aulad however reached the Privy Council in Abul Fata Mahomed v. Russomoy9. The Privy Council took the view that it could not be treated as a legitimate wakf if the property was to be enjoyed by the descendants without end and the dedication to charity was illusory or small. This led to considerable resentment among the Muslims. The Mussalman Wakf Validating Act, 1913 came to be passed. This legitimised the institution of Wakf-alal-
>
> aulad. Another Act came to be passed in the year 1930 which gave it retrospective effect. In the meantime, the (1894) 22 Cal. 619 : 22 I.A.. 76 Mussalman Wakf Act, 1923 came to be passed. The said Act came to be applied in the Bombay Presidency by the Mussalman Wakf (Bombay Amendment)Act, 1935 (XVIII of 1935). There were certain variations in the 1935 Act in the State of Bombay. The Act was again amended in 1945.

61. Bombay, it must be noticed was initially a Presidency being under the direct governance of the British Crown since the year 1859. In the year 1937, after the passing of the Government of India Act, 1935, the Bombay Presidency became a province in British India. With the advent of Independence and under the Constitution, Bombay became a Part A State. With the passing of the State Reorganisation Act, 1956, Bombay along with certain other parts which included the Marathwada region came to be constituted as the State of Maharashtra in the year 1960. This reference is being made to notice the circumstances in the year 1950, when the Bombay Public Trust Act, 1950 came to be passed. It was applicable to the then State of Bombay which incidentally also consisted of parts of which formed the present State of Gujarat. In fact, it included even the territory which is today Sindh. While Marathwada region was not a part of Bombay State, Marathwada consisting essentially of six districts which were part of the Aurangabad Revenue Division, Marathwada was governed by the Wakf Act, 1954 which we must notice is an 'improvement' over the Mussalman Wakf Act, 1923. Under the Wakf Act of 1923, the wakfs were not controlled by Wakf Boards as such. The wakfs had to file returns to the courts. It is interesting to note however that in the Wakf Act 1923 as applicable in the State of Bombay, the law provided for a publication of list of wakfs. However, when 1950 Act came to be enacted in Bombay State and since the Wakf Act, 1954 was not applicable to the State, the Bombay Public Trust Act, 1950 governed the wakfs which were treated as public trusts. The Bombay Public Trust Act provided for the following definition of the word "Public Trust" under Section 2(13). It reads as under:

> 2(13) "Public trust" means an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a wakf, [a dharmada] or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860 (XXI of 1860);

62. Section 2 (19) interestingly provides for the definition of the word 'wakf'. This is so that wakf as defined in the definition of public trust is properly appreciated. 'Wakf' under Section 2 (19) of the 1950 Act provided for a wakf which was defined as the permanent dedication by a person professing Islam for the purpose recognised by Muslim Law as pious, religious or charitable and it includes a wakf by user and grants including Mashrut- ul-khidmat for any purpose recognised by Muslim law as pious, religious or charitable. The wakf-alal-aulad to the extent to which property is dedicated for any purpose so recognised was also a wakf which would qualify as a public trust. However, it did not include a wakf so described under section 3 of the Mussulman Wakf Validating Act 1913 under which any benefit is for the time being claimable for himself by wakif or for any member of the family or descendant. It is relevant and apposite to unravel the true purport of this definition. We would understand that what is covered as a public trust under the Bombay Public Trust Act is only a Muslim Public Trust. In this regard we would advert to the following declaration of the law contained in the judgment of this Court in AIR 1981 SC 798 at 799. "6....Similarly, even the Mahomedan law recognises the existence of a private trust which is also of a charitable nature and which is generally called waqf-allal-aulad, where the ultimate benefit is reserved to God but the property vests in the beneficiaries and the income from the property is used for the maintenance and support of the family of the founder and his descendants. In case the family becomes extinct then the waqf becomes a public waqf, the property vesting in God. A public waqf under the Mahomedan law is called waqf-fi-sabi-lil-lah."

63. We may notice also that the definition of wakf in the Bombay Public Trust Act does not appear to refer to a wakf as one embracing a public utility as the subject matter of a wakf. However, charitable purpose has however been defined in Section 9 of the 1950 Act. Therein, advancement of any other object of public utility is included. It reads as follows:

> "9. Charitable Purposes. - For the purposes of this Act, a charitable purpose includes-
>
> (1) relief of poverty or distress, (2) education, (3) medical relief and (4) the advancement of any other object of general public utility, but does not include a purpose which relates-
>
> (a) exclusively to sports, or
>
> (b) exclusively to religious teaching or worship."

64. Section 28, being relevant, it is noticed. Section 28 reads as under:

> "28. Public trust previously registered under enactments specified in schedule. — (1) All public trusts registered under the provisions of any of the enactments specified in Schedule-A and Schedule-AA shall be deemed to have been registered under this Act from the date on which this Act may be applied to them.

The Deputy or Assistant Charity Commissioner of the region or sub-region within the limits of which a public trust had been registered under any of the said enactments shall issue notice to the trustee of such trust for the purpose of recording entries relating to such trust in the register kept under section 17 and shall after hearing the trustee and making such inquiry as may be prescribed record findings with the reason therefore. Such findings shall be in accordance with the entries in the registers already made under the said enactments subject to such changes as may be necessary or expedient.

(2) Any person aggrieved by way of the findings recorded under sub-section (1) may appeal to the Charity Commissioner.

(3) The provisions of this Chapter shall, so far as may be, apply to the making of entries in the register kept under section 17 and the entries so made shall be final and conclusive."

65. The next relevant provision to notice is Section 36. It reads as under:

> "36. [(1) [Notwithstanding anything contained in the instrument of trust]. -
>
> (a) no sale, mortgage, exchange or gift of any immoveable property, and
>
> (b) no lease for a period exceeding ten years in case of agricultural land or for a period exceeding three years in the case of non-

agricultural land or a building, belonging to public trust, shall be valid without the previous sanction of the Charity Commissioner. (2) The decision of the Charity Commissioner under sub-section (1) shall be communicated to the trustees and shall be published in such manner as may be prescribed.

(3) Any person aggrieved by such decision may appeal to the Gujarat Revenue Tribunal within thirty days from the date of its publication. (4) Such decision shall, subject to the provisions of sub-section (3) be final."

66. What is relevant from Section 36 is that in the case of a public trust which includes a wakf under the Bombay Public Trust Act, the property of the wakf can be sold, the only requirement thereunder being the previous sanction of Charity Commissioner. We may at this juncture observe that it does not harmonise with one of the indispensable requirements of a wakf under the Act that the property of the wakf cannot be alienated. Section 37 deals with the power of inspection and supervision.

67. Section 38 deals with explanation being given by the trustees to the Charity Commissioner. Section 41A to 41E deals with various additional powers which have been conferred which include

the power of suspension, remission, dismissal of the trustees by the Charity Commissioner. Section 79 must be noticed in full. It reads as under:

"79. Decision of property as public trust property: (1) Any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act. (2) The decision of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal, as the case may be, shall, unless set aside by the decision of the Court on application or of the High Court in appeal be final and conclusive."

68. Section 85 provides for repeal. It reads as follows:

> "85. Repeals:-
>
> (1) The Religious Endowments Act, 1862, is hereby repealed.
>
> (2) On the date of the application of the provisions of this Act to any public trust or class of trusts under sub-section (4) of section 1 hereinafter in this section referred to an the said date the provisions of the Act specified in Schedule A which apply to such trust or class of trusts shall cease to apply to such trust or class of trusts.
>
> (3) Save as otherwise provided in this section such repeal or cessation shall not in any way affect –
>
> (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the said date.
>
> (b) any legal proceedings or remedy in respect of such right, title, interest, obligation or liability, or
>
> (c) anything duly done or suffered before the said date.
>
> (4) Notwithstanding anything contained in sub-section (3) all proceedings pending before any authority under the Mussalman Wakf Act, 1923 as amended by the Mussalman Wakf Bombay Amendment Act, 1935, the Bombay Public Trusts Registration Act, 1935, or the Parsi Public Trusts Registration Act, 1936, immediately before the said date shall be transferred to the Charity Commissioner and any such proceedings shall be continued and disposed of by the Charity Commissioner or the Deputy or Assistant Charity Commissioner as the Charity Commissioner may direct. In disposing of such proceedings the Charity Commissioner, the Deputy Charity Commissioner or the Assistant Charity Commissioner, as the case may be, shall have and exercise the same powers which were vested in and exercised by the Court under the Mussalman Wakf Act, 1923 as amended by the Mussalman Wakf (Bombay Amendment) Act, 1935, and by the Registrars under the Bombay Public Trusts

> Registration Act, 1935, and the Parsi Public Trusts Registration Act, 1936, and shall pass such orders as may be just or proper.
>
> (5) All records maintained by the authority or Court under any of the Acts referred to in sub-section (4) shall be transferred to the Charity Commissioner or to the Deputy or Assistant Charity Commissioner as the Charity Commissioner may direct."

69. Section 86 provides for further repeals and savings. Section 85 refers to schedule A. We may notice that the Mussalman Wakf Act of 1923 is one of the laws which is referred to in the said Schedule.

70. Section 87 declares that the Act will not apply to the Marathwada region. This is for the reason that it came under the ambit of the Wakf Act, 1954.

71. As we have noticed, the Wakf Act 1954 was perceived as an evolution of the earlier Act. It was specifically intended to introduce uniformity in matters relating to wakfs all over the country. But the fact remains that in view of the conditional legislation contained as it did in Section 1 of the Act, providing for power in applying the Act to different states on different dates and the power to apply itself being with the Government, the Act was not made applicable to the territory which was comprised in the erstwhile state of Bombay. The definition of 'Wakf' in the 1954 Act must be noticed. It reads as follows:

> "Wakf" means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-- (i) a wakf by user; 1[(ii) grants (including mashrut-ul-khidmat) for any purpose recognised by the Muslim law as pious, religious or charitable; and] (iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable; and "wakif" means any person making such dedication;"

72. Section 3(a) defined the word 'beneficiary'. It reads as follows:

> "3(a) "beneficiary" means a person or object for whose benefit a wakf is created and includes religious, pious and charitable objects and any other objects of public utility sanctioned by the Muslim law;"

73. In fact, there was an amendment brought out in 1964. The words "established for the benefit of Muslim community" was substituted with the words "sanctioned by the Muslim Law". In the notes on clauses in Bill No.32 of 1964 which culminated in the Amending Act 34 of 1964, we notice:

> "Clause 2- the definition of 'beneficiary' in Section 3(a) of the Act involves a deviation from the real concept of beneficiary under the Muslim Law which makes no distinction between Muslims and Non-Muslims in the matter of beneficiaries or disbursement of charity. It is to that extent inconsistent with the definition of 'wakf'

> contained in the Act. Sub-clause (i) seeks to amend the definition of 'beneficiary' to remove this inconsistency."

74. Section 4 provided for survey by the Survey Commissioner of the wakf 'property' as pointed by Shri Gopal Sankaranarayan. We need not refer to the said provision for the reason that the pari materia provision of Section 4 is replicated as the same Section in the Act. The Act contained provisions for power for control of the Board, registration of Wakfs and superintendence by the 'civil court'. It provided in Section 6 that on the publication of the list of wakf properties, any 'person interested in the wakf' could seek relief from the Court which was contemplated in Section 6 of the Act. The Act was amended on three occasions. There were complaints about the results which the Act of 1954 was able to produce. This finally paved the way for the passing of the Act with which we are concerned. It is passed in the year 1995. It came into force on 1.1.1996. This time around the State of Bombay which since 1960 had become the present State of Maharashtra which included the 'Marathwada region' also came under the regime of the Act.

75. Section 2 of the Act reads as follows:

> "2. Application of the Act. —Save as otherwise expressly provided under this Act, this Act shall apply to all auqaf whether created before or after the commencement of this Act:
>
> Provided that nothing in this Act shall apply to Durgah Khawaja Saheb, Ajmer to which the Durgah Khawaja Saheb Act, 1955 (36 of 1955) applies." (Emphasis supplied)

76. It is at once to be noticed that the Act shall apply to wakfs which were created 'before the Act' was passed and it is also to apply to wakfs which were brought into existence after the Act.

77. Section 3(a) in the Act which defines the word 'beneficiary' continues with the same definition as was present in the Wakf Act 1954 after its amendment in the year 1964. We will comment on its significance at the appropriate stage in the judgment. Section 3 (c) defines the word 'Board' as follows:

> "3(c) "Board" means a Board of Wakfs established under 4*[subsection (1), or as the case may be, under sub- section (1A) of section
>
> 9." Next, we would notice the definition of the word 'wakf' in Section 3 (r) before its amendment by Act 27 of 2013.

It read as under:

> "3(r). "Wakf" means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable and includes –

(i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) "grants", including mashrut – ul-

khidmat for any purpose recognised by the Muslim Law as pious, religious or charitable; and

(iii) A wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim Law as pious, religious or charitable, and "wakif" means any person making such dedication;"

78. It must also be noticed at this juncture that with effect from the date of the Act 27 of 2013 it has been substituted and as it stands today. Section 3(r) reads as follows:

"3(r) "waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes—

(i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;

(iii) "grants", including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law, and "waqif" means any person making such dedication;"

79. Section 4 of Wakf Act, 1995, which is at the centre stage of controversy must be adverted to:

"4. Preliminary survey of auqaf.— (1) The State Government may, by notification in the Official Gazette, appoint for the State a Survey Commissioner of Auqaf and as many Additional or Assistant Survey Commissioners of Auqaf as may be necessary for the purpose of making a survey of 3 auqaf in the State.

1A) Every State Government shall maintain a list of auqaf referred to in sub-section (1) and the survey of auqaf shall be completed within a period of one year from the date of commencement of the Wakf (Amendment) Act, 2013 (27 of 2013), in case such survey was not done before the commencement of the Wakf (Amendment) Act,

2013:

Provided that where no Survey Commissioner of Waqf has been appointed, a Survey Commissioner for auqaf shall be appointed within three months from the date of such commencement.

(2) All Additional and Assistant Survey Commissioner of Auqaf shall perform their functions under this Act under the general supervision and control of the Survey Commissioner of Auqaf.

(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report, in respect of auqaf existing at the date of the commencement of this Act in the State or any part thereof, to the State Government containing the following particulars, namely: —

(a) the number of auqaf in the State showing the Shia auqaf and Sunni auqaf separately;

(b) the nature and objects of each waqf;

(c) the gross income of the property comprised in each waqf;

(d) the amount of land revenue, cesses, rates and taxes payable in respect of each waqf;

(e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each waqf; and

(f) such other particulars relating to each waqf as may be prescribed.

(4) The Survey Commissioner shall, while making any inquiry, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely: —

(a) summoning and examining any witness;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record from any court or office;

(d) issuing commissions for the examination of any witness or accounts;

(e) making any local inspection or local investigation;

(f) such other matters as may be

prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular waqf is a Shia waqf or Sunni waqf and there are clear indications in the deed of waqf as to its nature, the dispute shall be decided on the basis of such deed.

(6) The State Government may, by notification in the Official Gazette, direct the Survey Commissioner to make a second or subsequent survey of waqf properties in the State and the provisions of sub-sections (2), (3), (4) and (5) shall apply to such survey as they apply to a survey directed under sub- section (1):

Provided that no such second or subsequent survey shall be made until the expiry of a period of ten years from the date on which the report in relation to the immediately previous survey was submitted under sub-section (3):

Provided further that the waqf properties already notified shall not be reviewed again in subsequent survey except where the status of such property has been changed in accordance with the provisions of any law."

80. Section 5 is equally an integral part of the scheme. It reads as under:

"5. Publication of list of auqaf.— (1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and fordward it back to the Government within a period of six months for publication in the Official Gazette] a list of Sunni auqaf or Shia auqaf in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed.

(3) The revenue authorities shall—

(i) include the list of auqaf referred to in sub-section (2), while updating the land records; and

(ii) take into consideration the list of auqaf referred to in sub-section (2), while deciding mutation in the land records.

(4) The State Government shall maintain a record of the lists published under sub-section (2) from time to time."

81. Sections 6 and 7 reads as follows:

"6. Disputes regarding auqaf.— (1) If any question arises whether a particular property specified as waqf property in the list of auqaf is waqf property or not or whether a waqf specified in such list is a Shia waqf or Sunni waqf, the Board or the mutawalli of the waqf or 7 [any person aggrieved] may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final: Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of auqaf:

Provided further that no suit shall be instituted before the Tribunal in respect of such properties notified in a second or subsequent survey pursuant to the provisions contained in sub-section (6) of section 4.

(2) Notwithstanding anything contained in sub-

section (1), no proceeding under this Act in respect of any waqf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of auqaf shall, unless it is modified in pursuance of a decision of the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1)." "7. Power of Tribunal to determine disputes regarding auqaf.— (1) If, after the commencement of this Act, any question or dispute arises, whether a particular property specified as waqf property in a list of auqaf is waqf property or not, or whether a waqf specified in such list is a Shia waqf or a Sunni waqf, the Board or the mutawalli of the waqf, or any person aggrieved by the publication of the list of auqaf under section 5] therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that—

(a) in the case of the list of auqaf relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of auqaf; and

(b) in the case of the list of auqaf relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement: Provided further that where any such question has been

heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any 3 [waqf] shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under sub-

section (1).

(4) The list of auqaf and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject- matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6, before the commencement of the Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

(6) The Tribunal shall have the powers of assessment of damages by unauthorised occupation of waqf property and to penalise such unauthorised occupants for their illegal occupation of the waqf property and to recover the damages as arrears of land revenue through the Collector:

Provided that whosoever, being a public servant, fails in his lawful duty to prevent or remove an encroachment, shall on conviction be punishable with fine which may extend to fifteen thousand rupees for each such offence."

82. Section 8 provides that the Board has to bear the cost of the survey.

83. Section 9 contemplates establishment and constitution of Central Wakf Council. Section 9 (4) alone need detain us and it reads as follows:

"9. Establishment and constitution of Central Wakf Council.— (4) The State Government or, as the case may be, the Board, shall furnish information to the Council on the performance of Waqf Boards in the State, particularly on their financial performance, survey, maintenance of waqf deeds, revenue records, encroachment of waqf properties, annual reports and audit reports in the manner and time as may be specified by the Council and it may suo motu call for information on specific issues from the Board, if it is satisfied that there was prima facie evidence of irregularity or violation of the provisions of this Act and if the Council is satisfied

that such irregularity or violation of the Act is established, it may issue such directive, as considered appropriate, which shall be complied with by the concerned Board under intimation to the concerned State Government."

84. Next, we come to Chapter IV under which the first provision is Section 13. It reads as follows:

"13. Incorporation. — (1) With effect from such date as the State Government may, by notification the Official Gazette, appoint in this behalf, there shall be established a Board of Auqaf under such name as may be specified in the notification:

Provided that in case where a Board of Waqf has not been established, as required under this sub-section, a Board of Waqf shall, without prejudice to the provisions of this Act or any other law for the time being in force, be established within six months from the date of commencement of the Wakf (Amendment) Act, 2013 (27 of 2013).

(2) Notwithstanding anything contained in sub-

section (1), if the Shia auqaf in any State constitute in number more than fifteen per cent. of all the auqaf in the State or if the income of the properties of the Shia auqaf in the State constitutes more than fifteen per cent. of the total income of properties of all the auqaf in the State, the State Government may, by notification in the Official Gazette, establish a Board of Auqaf each for Sunni auqaf and for Shia auqaf under such names as may be specified in the notification.

(2A) Where a Board of Waqf is established under sub-section (2) of section 13, in the case of Shia waqf, the Members shall belong to the Shia Muslim and in the case of Sunni waqf, the Members shall belong to the Sunni Muslim. (3) The Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued."

85. We must indeed refer to Section 14 which deals with the composition of Board. It reads as under:

"14. Composition of Board. — (1) The Board for a State and the National Capital Territory of Delhi] shall consist of—

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected from each of the electoral colleges consisting of—

(i) Muslim Members of Parliament from the State or, as the case may be, the National Capital Territory of Delhi;

(ii) Muslim Members of the State

Legislature;

(iii) Muslim members of the Bar Council of the concerned State or Union territory:

Provided that in case there is no Muslim member of the Bar Council of a State or a Union territory, the State Government or the Union territory administration, as the case may be, may nominate any senior Muslim advocate from that State or the Union territory, and

(iv) mutawallis of the auqaf having an annual income of rupees one lakh and above.

Explanation I.—For the removal of doubts, it is hereby declared that the members from categories mentioned in sub-clauses (i) to

(iv), shall be elected from the electoral college constituted for each category. Explanation II.—For the removal of doubts it is hereby declared that in case a Muslim member ceases to be a Member of Parliament from the State or National Capital Territory of Delhi as referred to in sub- clause (i) of clause (b) or ceases to be a Member of the State Legislative Assembly as required under sub-clause (ii) of clause

(b), such member shall be deemed to have vacated the office of the member of the Board for the State or National Capital Territory of Delhi, as the case may be, from the date from which such member ceased to be a Member of Parliament from the State National Capital Territory of Delhi, or a Member of the State Legislative Assembly, as the case may be;

(c) one person from amongst Muslims, who has professional experience in town planning or business management, social work, finance or revenue, agriculture and development activities, to be nominated by the State Government;

(d) one person each from amongst Muslims, to be nominated by the State Government from recognised scholars in Shia and Sunni Islamic Theology;

(e) one person from amongst Muslims, to be nominated by the State Government from amongst the officers of the State Government not below the rank of Joint Secretary to the State Government;

(1A) No Minister of the Central Government or, as the case may be, a State Government, shall be elected or nominated as a member of the Board:

Provided that in case of a Union territory, the Board shall consist of not less than five and not more than seven members to be appointed by the Central Government from categories specified under sub-clauses (i) to (iv) of clause (b) or clauses (c) to (e) in sub-section (1):

Provided further that at least two Members appointed on the Board shall be women:

Provided also that in every case where the system of mutawalli exists, there shall be one mutawalli as the member of the Board.

(2) Election of the members specified in clause

(b) of sub-section (1) shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed:

Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be declared to have been elected on the Board:

Provided further that where there are no Muslim Members in any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-

section (1) the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied, for reasons to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to

(iii) of clause (b) of sub-section (1), the State Government may nominate such persons as the members of the Board as it deems fit.

(4) The number of elected members of the Board shall, at all times, be more than the nominated members of the Board except as provided under sub-section (3).

(5) Xxx xxx xxx (6) In determining the number of Shia members or Sunni members of the Board, the State Government shall have regard to the number and value of Shia auqaf and Sunni auqaf to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

(7) * * * * * (8) Whenever the Board is constituted or reconstituted, the members of the Board present at a meeting convened for the purpose shall elect one from amongst themselves as the Chairperson of the Board.

(9) The members of the Board shall be appointed by the State Government by notification in the Official Gazette."

86. Section 15 provides that the Members of Board shall hold office for a period 5 years, as it stood, and the words 'from the date of notification referred to in sub- Section (9) of Section 14" was inserted by Act 27 of 2013.

87. Section 16 enumerates various disqualifications to be members of the Board. Section 17 deals with the meetings of the Board. Section 19 provides for resignation of chairperson and Members. The Chairperson or a Member can be removed under Section 20. Section 22 is significant as will be revealed later on. It reads as follows:

> "22. Vacancies, etc., not to invalidate proceedings of the Board.— No act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its member or any defect in the constitution thereof."

88. Section 32 provides for powers and functions of the Board and we will dwell upon it when it becomes appropriate.

89. Section 36 falls under chapter V and deals with registration of wakfs. Section 39 (1) must be referred to as a prelude to the scope of Section 40, which latter provision is, pari materia with Section 27 of the Wakf Act, 1954. Section 39 inter alia reads as under:

> "39. Powers of Board in relation to auqaf which have ceased to exist. — (1) The Board shall, if it is satisfied that the objects or any part thereof, of a waqf have ceased to exist, whether such cesser took place before or after the commencement of this Act, cause an inquiry to be held by the Chief Executive Officer, in the prescribed manner, to ascertain the properties and funds pertaining to such waqf."

90. Section 40 reads as follows:

> "40. Decision if a property is wakf property. — (1) The Board may itself collect information regarding any property which it has reason to believe to be waqf property and if any question arises whether a particular property is waqf property or not or whether a waqf is a Sunni waqf or a Shia waqf, it may, after making such inquiry as it may deem fit, decide the question.
>
> (2) The decision of the Board on a question under sub-section (1) shall, unless revoked or modified by the Tribunal, be final.
>
> (3) Where the Board has any reason to believe that any property of any trust or society registered in pursuance of the Indian Trusts Act, 1882 (2 of 1882) or under the Societies Registration Act, 1860 (21 of 1860) or under any other Act, is waqf property, the Board may notwithstanding anything contained in such Act, hold an inquiry in regard to such property and if after such inquiry the Board is satisfied that such property is waqf property, call upon the trust or society, as the case may be, either to register such property under this Act as waqf property or show cause why

such property should not be so registered:

Provided that in all such cases, notice of the action proposed to be taken under this sub- section shall be given to the authority by whom the trust or society had been registered.

(4) The Board shall, after duly considering such cause as may be shown in pursuance of notice issued under sub-section (3), pass such orders as it may think fit and the order so made by the Board, shall be final, unless it is revoked or modified by a Tribunal."

91. Under Section 41, the Board may compel a Muttawalli to apply for registration of a wakf or to supply any information or may itself cause the wakf to be registered or may at any time amend the register of auqaf. Section 43 is also crucial for appreciating the controversy before us. Section 43 reads as under:

"43. Auqaf registered before the commencement of this Act deemed to be registered. — Notwithstanding anything contained in this Chapter, where any waqf has been registered before the commencement of this Act, under any law for the time being in force, it shall not be necessary to register the 1 [waqf] under the provisions of this Act and any such registration made before such commencement shall be deemed to be a registration made under this Act."

92. Section 51 deals with alienation of wakf property. It reads as under:

"51. Alienation of wakf property without sanction of Board to be void. — (1) Notwithstanding anything contained in the waqf deed, any lease of any immovable property which is waqf property, shall be void unless such lease is effected with the prior sanction of the Board: Provided that no mosque, dargah, khanqah, graveyard, or imambara shall be leased except any unused graveyards in the States of Punjab, Haryana and Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Wakf (Amendment) Act, 2013 (27 of 2013). (1A) Any sale, gift, exchange, mortgage or transfer of waqf property shall be void ab initio: Provided that in case the Board is satisfied that any waqf property may be developed for the purposes of the Act, it may, after recording reasons in writing, take up the development of such property through such agency and in such manner as the Board may determine and move a resolution containing recommendation of development of such waqf property, which shall be passed by a majority of two-thirds of the total membership of the Board: Provided further that nothing contained in this sub-

section shall affect any acquisition of waqf properties for a public purpose under the Land Acquisition Act, 1894 (1 of 1894) or any other law relating to acquisition of land if such acquisition is made in consultation with the Board:

Provided also that—

(a) the acquisition shall not be in contravention of the Places of Public Worship (Special Provisions) Act, 1991 (42 of 1991);

(b) the purpose for which the land is being acquired shall be undisputedly for a public purpose;

(c) no alternative land is available which shall be considered as more or less suitable for that purpose; and

(d) to safeguard adequately the interest and objective of the waqf, the compensation shall be at the prevailing market value or a suitable land with reasonable solatium in lieu of the acquired property."

93. Section 52 provides for power of recovery of wakf property transferred in contravention of Section 51.

94. Section 97 relied upon by Shri Y.H. Mucchawala, learned Senior Counsel, reads as follows:

"97. Directions by State Government. — Subject to any directions issued by the Central Government under section 96, the State Government may, from time to time, give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with such directions:

Provided that the State Government shall not issue any direction being contrary to any waqf deed or any usage; practice or custom of the waqf."

95. Section 102 deals with special provisions for reorganisation of certain Boards and Section 103 deals again with special provisions for establishment of Board for part of a State. Section 104 provides for donation made by a non-Muslim becoming part of the wakf. It reads as follows:

"104. Application of Act to properties given or donated by persons not professing Islam for support of certain waqf.— Notwithstanding anything contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a waqf being—

(a) a mosque, idgah, imambara, dargah, khangah or a maqbara;

(b) a Muslim graveyard;

(c) a choultry or a musafirkhana, then such property shall be deemed to be comprised in that waqf and be alt in the same manner as the waqf in which it is so comprised."

96. Section 104A inserted by Act 27 of 2013 prohibits sale, gift, exchange, mortgage or transfer of wakf property, movable or immovable to any other person. This is notwithstanding anything contained in the Act itself or any other law for the time being in force. Section 104B deals with restoration of wakf property in occupation of the Government to the wakf Board. Lastly, we may only notice Section 112 since it deals with repeal and savings. It reads as under:

> "112. Repeal and savings. — (1) The Wakf Act, 1954 (29 of 1954) and the Wakf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.
>
> (2) Notwithstanding such repeal, anything done or any action taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act. (3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act that corresponding law shall stand repealed: Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or action was taken."

97. Having set out the salient provisions of the Act, the time is ripe for us to consider the contentions of the parties. The first contention which has been raised relates to the very incorporation of the Board. The incorporation of the Board is an essential feature for the working of the Act. This is for the reason that the Board is the fulcrum around which the whole control and regulation of the Wakfs is to take place. We have noticed the terms of Section 13. The High Court has found that the notification incorporating the appellant Board was flawed. The reason which appealed to the High Court appears to be that it was not preceded by the survey contemplated under Section 4. To expatiate, it is the finding of the High Court that the Act contemplates the survey giving birth to data which is requisite and indispensable for the Government to legally determine the question inter alia as to whether there must be separate Sunni and Shia Boards. This is because Section 13 (2) provides that the Government 'may' have Sunni Board and Shia Board if the conditions mentioned therein are present. The problem posed is the impossibility of finding out the solution to this question in the absence of relevant data. The only relevant data, according to the High Court, is what is yielded in the Survey under Section 4.

98. We must first decide as to whether Section 13 (2) provides for an inflexible and unalterable duty with the Government to establish separate Sunni and Shia Boards if the number of Shia Wakfs is in excess of 15 per cent of all the wakfs. Still further, will the Government be duty bound to constitute separate Boards for the two sects if the income from the Shia wakfs exceeds 15 per cent of the total income of all the wakfs put together.

99. The use of the word 'may' is not to be brushed aside with contempt or without due reference to the knowledge that legislature has knowingly used it. But we do bear in mind that the word 'may' indeed be capable of bearing an imperative meaning. In this regard we may refer to the judgment in

Baker, Re [Baker, Re, Nichols v. Baker10:

> 'I think that great misconception is caused by saying that in some cases "may" means "must". It never can mean "must", so long as the English language retains its meaning; but it gives a power, and then it may be question in what cases, where a Judge has a power given by him by the word "may", it becomes his duty to exercise it.'

100. We may also refer to the following observations made in Julius v. Lord Bishop of Oxford11:

> 'The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power (1890) 44 Ch D 262 (CA) (1880) 5 AC 214 and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.'

101. Bearing in mind the tests which have been laid down, we must pose the question as to whether there is anything in the object or in the context that requires of us to not give 'may' its ordinary meaning which undoubtedly implies only a discretion. The search for the object in the context undoubtedly transports us to explore the difference between Sunnis and Shias.

102. The principle sect of Muslims in India are undoubtedly Sunnis. This is by way of population. The differences between Sunni and Shia have a historical background. Though it may be true that it may have originated on the basis of the 'infallibility' which is attributed to the twelvers or the 12 Imams who were found to be blessed with infallibility, over a period of time, there have been differences which have developed which go to certain aspects of the practices of the faith as well. Closer home, in the institution of Wakf itself, for instance, in the case of Muslims governed by the Hanafi School of Thought which it must be noticed is part of the Sunni faith, delivery of possession may not be an indispensable element for the creation of a valid wakf. In the case of a Shia Wakf, the position may not be the same. At the same time, we must not also lose sight of the fact that both Sunni and Shia profess Islam as their faith. As regards the core belief of the oneness of God or Almighty and Prophet Mohammad being the last Messenger and the other fundamental tenets of the faith, there is little difference between a Sunni and a Shia. The Shia themselves have three branches, namely, Twelvers, Ismailis and Zaidis. With this brief background of the differences between sects of Islam, namely, Sunni and Shia, we must carry our discussion forward. In this case, the legislature itself has taken notice of the existence of two different sects of Islam, in Section 13 (2). It has proceeded to provide for two separate Boards if a percentage of Wakfs of Shias as a ratio to the total number of wakfs exists. However, we are unable to perceive Section 13 (2) as creating an inviolable duty with the Government to create Boards upon the magical figure of 15% mentioned in Section 13(2) being breached. It may be that, in a given case, it may be 16%. In another case it may be 30% or 40%. A wide range of possibilities representing both ends of the spectrum and all that lies

in-between can be imagined. We are unable to perceive any reason at all to burden the Government with the obligation to provide for separate Boards with all the expenditure and other burdens that it entails, upon Shia Wakfs or their income either exceeding the percentage indicated in Section 13(2).

103. There are other reasons as well, why we should not give a word importing a discretion, the force of a mandatory duty. In Section 13(1), the lawgiver has used the word 'shall'. Not unnaturally, in its setting it bears a mandatory connotation. There must be a Board. When it comes to Section 13(2), the immediate neighbour, the choice of word 'may' cannot be ordinarily set at naught. Section 4 of the Act may now be considered. Section 4 deals with the power to order a survey. The survey is to be a survey in the State. The Surveyor is to submit a report. The report is to be submitted to the Government. The Government receives the report under Section 4(3). Section 4 (3) does not speak of any other duty on the part of the Government on receipt of the report except to forward it to the Wakf Board. This takes place under Section 5 of the Act. The question which naturally arises, if a survey is to precede, the incorporation of Board then how can the Board be consulted? How can the Board then publish it, if it is not in existence before the survey? The High Court has proceeded to deal with it by stating that upon receipt of the survey report, it is not necessary to immediately send it over to the Board. The learned counsel for the respondents would also emphasise before us that the view which would occasion a harmonious operation of all the provisions of the Act and fulfilling its object would be to adopt the following course. Upon receipt of the report by the Government under Section 4(3), the Government can constitute the Board under Section 13. When it does this, it does justice to not only the demand of Section 13(2), but also it would comply with the mandate of Section 14(6). The argument is indeed attractive. However, we have found that the foundation of the reasoning of the High Court appears to be that Section 13(2) provides for an inexorable duty to form two separate Boards upon the percentage mentioned in Section 13 (2) being exceeded. We have already found that we are unable to cull out any such mandatory duty to form two separate Boards. This overturns the fundamental basis on which the High court has proceeded. We may notice also in this regard that Section 13(2) of the Act inter alia reads as follows:

> "13(2) Notwithstanding anything contained in sub-section (1), if the Shia [auqaf] in any State constitute in number more than fifteen per cent. of all the [auqaf] in the State or if the income of the properties of the Shia [auqaf] in the State constitutes more than fifteen per cent. of the total income of properties of all the 1 [auqaf] in the State, the State Government may, by notification in the Official Gazette, establish a Board of [Auqaf] each for Sunni [auqaf] and for Shia [auqaf] under such names as may be specified in the notification"

104. Section 32(2)(e) reads as follows:

> "32(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be—
>
> (e) to direct—

(i) the utilisation of the surplus income of a wakf consistent with the objects of a wakf;

(ii) in what manner the income of a wakf, the objects of which are not evident from any written instrument, shall be utilized;

(iii) in any case where any object of wakf has ceased to exist or has become incapable of achievement, that so much of the income of the wakf as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar or to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim community: Provided that no direction shall be given under this clause without giving the parties affected an opportunity of being heard. Explanation—For the purposes of this clause, the powers of the Board shall be exercised—

(i) in the case of a Sunni wakf, by the Sunni members of the Board only; and

(ii) in the case of a Shia wakf, by the Shia members of the Board only: Provided that where having regard to the number of the Sunni or Shia members in the Board and other circumstances, it appears to the Board that the power should not be exercised by such members only, it may co-opt such other Muslims being Sunnis or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;" This again indicates that the legislature has put in place a definite scheme and contemplated co-opting temporary Members of the two sects, where it was felt necessary. Equally, noteworthy is the fact that Section 14(5) which was omitted only under Act 27 of 2013 and was therefore relevant at the time when the High Court passed the impugned judgment provided for the appointment of one Shia member in the case of the Composite Board. Under Section 14(6) is concerned, it may be true that at the time of constitution of the Board, the number of Wakfs and the 'value' of the Wakfs is to be considered. What Section 14 says is with regard to establishment of Boards, the Government shall have regard to the number and value of the Shia and Sunni Wakfs to be administered by the Board. We notice Gopal Sankaranarayanan's argument about the distinction between the word 'value' as used in Section 14(6) and 'income' employed in Section 13(2), as also Section 3(4).

105. From the inputs available from the Act, we would think that the said provision should not in our view compel us to form the view that a survey under Section 4 must in all the cases be done first, and thereafter alone the Board should be incorporated.

106. We cannot be unmindful of the fact that the existence of the Board is vital to achieve the objects of the Act. We have noticed that Section 32 contemplates various powers and functions with the Board. Section 36 gives a right or casts a duty as it were on Wakfs to get themselves registered with the Board. Section 40 provides for another important function of the Board. It must be in this regard not be ignored that there was severe criticism about the treatment that was being meted out

to the Wakfs. Mutawallis were principally at the receiving end of the criticism in the form of allegations of indiscriminate alienations and encroachment on wakf property being ignored.

107. In the same breath we are duty bound to express our concern and ventilate our pain at noticing that amendment took place in the year 2013 after a good 18 years of the passing of the 1995 Act under which it was provided that where Wakf Boards are not appointed, it had to be appointed within a period of one year from the coming into force of the Amending Act 27 of 2013. This no doubt alerts us to the fact that the Act did not provide for any time limit with the Government to incorporate the Board. To this extent we acknowledge that the Act did not expressly provide for a sense of compelled urgency with the Government in incorporating the Board. But that in our view cannot detract from the actual existence of such a need for incorporating the Board at the earliest. We are also not unmindful of the fact that the Survey Commissioner appointed in 1997 and was in the process of submitting the survey report [in fact nearly three weeks after the incorporation of the Board on 04.01.2002, the report is submitted on 31/01/2002]. But once we find that the scheme of the Act contemplates the lawful incorporation of the Board even without receipt of the Survey report, we cannot possibly uphold the view taken by the High Court that the incorporation of the Wakf Board on 04.01.2002 was illegal as there was no previous survey.

108. We may notice the role of the Board at the stage of section 5(2). The Board 'examines' the report which is sent by the Government. We may notice and find that there is no requirement in law contrary to the contentions raised by the writ petitioners that the report furnished by the survey commissioner to the Government under Section 4(3) must be published. However, the Wakf Board is duty bound to 'examine' the contents of the report sent to it and it can indeed make changes which may be necessary and once the Wakf Board resolves to bring out the list, the list is to be published. This is made subject to any modification which may be made by the Tribunal under Section 6 of the Act. This in our view is essential to understand the purport of Section 13(2) of the Act as well. That is to say that when the legislature has contemplated the creation of separate Wakf Boards for Sunnis and Shias on the basis of the number of Wakfs, Shia Wakfs being in excess of 15 per cent of the total number of wakfs or the income from Shia Wakfs being in excess of 15 per cent of the total income of the Wakfs, it is the list which has been considered and published by the Wakf Board under Section 5(2) which can be material. This reinforces us in our belief that it is not necessary that a survey must precede the incorporation of the Board. In fact, the Wakf Act, 1954, was in operation in many of the States. It is not difficult to imagine that surveys would have been conducted under the previous enactment. So, it is not as if there may be absence of any material in regard to matters contemplated under Section 13(2). Not that it should form the premise of our finding, but for reassurance, we also find in the facts of this case that the survey commissioner has reported that there were 20194 Wakfs in the State. The total number of Shia Wakfs were surveyed and found to be 203. This constitutes 1.005 per cent of the total number of Wakfs. This is a figure which does not even in any way approximate to the figure of 15 per cent contemplated in Section 13(2). Another plank of the reasoning of the High Court in interfering with the incorporation of the Board was that under the Act, the Board assumes a corporate form and it is imbued with perpetual succession. The High Court reasons that once a Board is created, there is no provision for putting an end to it and giving birth to a Sunni Board and a Shia Board. We may notice in this context that it is not difficult to imagine that in a given case a State may have a composite Board to begin with. A second or subsequent survey are

contemplated and permitted under Section 4(6). Take a situation where initially the number of Shia Wakfs or the income therefrom did not justify the creation of separate boards and there is a composite Board. Can it be the law that if a second or subsequent survey, which is permitted under the law, results in the percentage of Shia Wakfs or income therefrom demands consideration of the question as to whether there should be two separate boards, it is rendered impossible by perpetual succession and corporate form the composite Board assumed under the original incorporation? We are clearly of the view that the existence of the original Board constituted under Section 13(1) cannot stand in the way of the constitution of two separate boards. Therefore, we do not think that there can be any legal hurdle in the creation of two separate boards which may be necessitated on the basis of the decision taken by the Government in the matter.

109. The next question which we must consider relates to the constituent elements of a Wakf. From the definition which is available in the Act, the first indispensable requirement is that there must be dedication. Dedication must be by a person who is the owner of the property. Dedication must be permanent. Permanent means that it cannot be for a period of time; it must be perpetual. It must be irrevocable. While on irrevocability, we may only indicate that a Wakf can be created by a will also. But when a Wakf is created by a will it is open to the Wakif to revoke the will prior to his death. As to the effect of his death, the will, will bring into existence a Wakf but limited to 1/3 share unless the heirs otherwise agree. Save as aforesaid, a Wakf cannot be revoked. A Wakf, again meaning the property which is the subject matter of a Wakf cannot be alienated. This is subject to what we will state when we discuss the differences between a Wakf and a Trust. The object of the Wakf must be such that it is approved by the Muslim law. The object must be religious, pious or charitable and we hasten to again reiterate that it is not a concept of piety religiousness or the charitable nature in the eyes of the entire world but what is in consonance with Muslim law. There is no prescribed mode of dedication. A Wakf need not be in writing. As far as declaration is concerned, it can be inferred from conduct. A Wakf, as defined includes Wakf by user. This usually arises in public places like kabristan, Durgah, Takia. Takia means a resting place. It may not be any resting place but usually, it is associated with a graveyard.

It may be an Imambara. About Inambara we find the following discussion in Mulla Principles of Mahomedan Law (22nd Edition):

> “223. Imambara An imambara is an apartment in a private house or a building set apart like a private chapel for religious purposes. It is intended for the use of the owner and members of his family, though the public may be admitted with the permission of the owner. It may be the object of a valid waqf-178. Such a waqf is a private waqf and not a public waqf nor a trust for the purposes of s.92 of the Code of Civil Procedure, but it may be proved that a particular imambara is a public waqf.”

110. In such a case, that is Wakf by user, it would be a case of immemorial user. That is precisely the reason why the need to prove the dedication may be dispensed with, as the proof of it, may have been lost with the passage of time.

111. A Wakf can be created for attaining a public utility. The public utility must, however, be for an object sanctioned by Muslim law. Subject to said conditions, irrespective of whether the beneficiaries are Muslims or not, there could be a valid Wakf. This is the result of the amendment brought to Section 3(a) of the Wakf Act, 1954 by the Amendment Act of 1964 which we have already noticed. The very same definition of Section 3(a) after the amendment in 1964 has been replicated in the Act as well. However, this would not dispense with the indispensable requirements to create a Wakf.

They include the requirement of permanent dedication. Even in such Wakf, there must be a divesting of title of Wakf and vesting of title in the Almighty. Shri Gopal Sankarnarayanan, learned senior counsel, laid stress on this development viz., the amendment to the definition of the word 'beneficiary' in section 3(a) of Wakf Act, 1954 and on continuance of the same definition in the 1995 Act, to point out that this has the result in law of removing the very foundation of the judgment relied upon by the writ petitioners viz., the decision of this Court reported in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra). In other words, even in the case of a public charitable trust created by a Muslim, the intention of the Muslim being to provide for activities for the general welfare and which are, therefore, secular and it emphasises the creation of the institution for human beings irrespective of religion, then the difference between a public Trust and a Wakf would cease to exist.

112. The time therefore is ripe now to examine the judgment of this Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra). In the said case, a Bench of five learned Judges had the following facts inter alia before them. Four appellants before the Court were trustees appointed by the Nizam of Hyderabad under a trust deed executed in 1954. They were initially confronted with proceedings under the Hyderabad Endowment Regulation 1348-F (1939). While litigation regarding the said provision was pending in this Court, developments took place in the form of proceedings to get them registered under the Wakf Act, 1954 by the Wakf Board. The contention raised by the appellants therein was, it was not a Wakf which the Court had before it but a Trust and what is more, a public charitable Trust. The Court made, we may notice, the following observations:

> "12. Similarly, the Muslim law relating to trusts differs fundamentally from the English law. According to Mr Ameer Ali, "the Mohammadan law owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' As a result of the creation of a wakf, the right of wakif is extinguished and the ownership is transferred to the Almighty. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. But in that capacity, he has no right in the property belonging to the wakf; the property is not vested in him and he is not a trustee in the legal sense". Therefore, there is no doubt that the wakf to which the Act applies is, in essential features, different from the trust as is known to English law."

113. Thereafter, the Court proceeded to analyse the Trust deed. The Court dwells on the effect of the trust deed in paragraph-16, 17 and 18:

> "16. It is also urged that the effect of clauses relating to the vesting of the property in the appellants as trustees should be judged in the light of the character of the property with which the document deals. The subject- matter of the trust is moveable property and unless the said property was assigned to the appellants, they would not have been able to deal with it, and that alone is the basis and the justification for the vesting provisions in the document. Therefore, too much importance should not be attached to the said provisions and it should not be held that since there is a vesting of legal title in the appellants, the transaction is a trust and not a wakf. The pervading idea of the document is the dedication of the property to purposes recognised by Muslim law as valid for a wakf and it is only as a means to give effect to that idea that the property has been vested in the appellants. That in brief, is the main argument in support of the plea that the trust is a wakf to which the provisions of the Act apply."
> "17. On the other hand, there are certain other broad features of the transaction which are wholly inconsistent with the notions of a wakf. The outstanding impression which the document creates is that the settlor wanted to create a trust for charitable purposes and objects in a secular and comprehensive sense, unfettered and unrestricted by the religious considerations which govern the creation of wakf. Even the clause on which Mr Pathak relies for the purpose of showing the intention to dedicate the property to Almighty makes it perfectly clear that amongst the objects for which the trust was created were included other charitable purposes without distinction of religion, caste or creed, and that obviously transgresses the limits prescribed by the requirements of a valid wakf. The same comprehensive character of the charitable purpose which the settlor has in mind is equally emphatically brought out by clause 3(c)(ii). Clause 3 provides that the Trustees shall hold and stand possessed of the Trust Fund upon the Trusts specified in sub-clauses
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> (a) to (c). Sub-clause (c)(ii) refers to the maintenance, upkeep and support of public religious institutions, and otherwise for the advancement of religion, particularly in the State of Hyderabad; and it adds that the benefit of the present clause shall not be restricted to any particular religion. A public charitable purpose which is not limited by considerations pertaining to one religion or another could not have been more eloquently expressed. The dominant intention of the settlor in creating the trust was to help public charity in the best sense of the words, "public charity" not confined to any caste, religion or creed; and it is in that sense that, the religious institutions which are within the purview of the trust are all religious institutions not confined to any particular religion. Then look at clause 3(c)(v). It provides that the trust property can be utilised for the advancement of any other object of general public utility, particularly in the State of Hyderabad. It is true that the settlor wanted the objects of general public utility in Hyderabad to be preferred and in that sense the document discloses a desire to prefer the objects of general public utility situated within the territorial limits of Hyderabad. But it is plain that it was farthest from the mind of the

> settlor to impose a limitation that the objects of general public utility should be confined to those recognised as such by Muslim law. It is thus clear that the outstanding feature of the trust disclosed by these provisions is plainly inconsistent with the concept of a wakf and that itself would rule out the view that the document creates a wakf and not a comprehensive public charitable trust." "18. It is true that a large number of provisions contained in the document are consistent with the view that the document creates a wakf as much as they are consistent with the view that it creates a public charitable trust as distinguished from wakf.

It is, however, patent that there are some clause which are inconsistent with the first view, whereas with the latter view all the clauses are consistent. In other words, if the construction for which the Board contends is accepted, some clauses would be defeated, whereas if the construction for which the respondents contend is upheld, all the clauses in the document become effective. In our opinion, it is an elementary rule of construction that if two constructions are reasonably possible, the one which gives effect to all the clauses of the document must be preferred to that which defeats some of the clauses. It is not in dispute that if the document is held to be a wakf, the directions in the document that charitable purposes should be selected without distinction of religion, caste or creed, would obviously be defeated and that undoubtedly supports the conclusion that the document evidences a public charitable trust and not a wakf."

114. Finally, we must, however, not overlook what this Court found in the following paragraph:

> "20. It is in this context that the other provisions about vesting must be considered. The document calls the author of the trust as the "Settlor" and the appellants as the "Trustees "and that introduces the concept of the Trust as contemplated by English law. Clause 1 of the document specifically assigns and transfers unto the appellants all those shares and securities described in the Schedule which are the subject-matter of the trust. This clause, in terms, transfers the shares and securities to the Trustees and so, the legal title in respect of the subject-matter of the trust vests in the Trustees. The argument that the provision for vesting had to be made because the property in question is moveable property, does not carry conviction because the whole scheme of the document appears to be to vest the title in the trustees and gives them absolute discretion to use the said property and its income for any of the charitable purposes specified in the document. Thus, the vesting provision has not been adopted as a means to carry out the intention to dedicate the property to the Almighty but it constitutes the essential basis of the transaction and that is to transfer the legal title of the trust property to the trustees. In that sense, clause 14 which confers on the trustees absolute discretion to deal with the property in any manner they like, as well as clauses 18 and 24 which clothe them with authority to employ servants in their uncontrolled discretion and to appoint a Committee for management of the Trust, become more easily intelligible. In this connection, we may also notice the fact that the appointment of non-Muslims as trustees which is prohibited by the Act, is an indication that the Settlor did not regard the trust as falling within the said statutory prohibition; likewise, the scheme of management of

> the trust which the trustees are given liberty to adopt in administering the trust, is completely free from the regulations based on Muslim law which the relevant sections of the Act have prescribed. These several features of the trust support the conclusion that the trust is not a wakf and does not fall within the provisions of the Act. We have carefully considered all the relevant provisions of the document and we are satisfied that on a fair and reasonable construction, the document must be held to have created a trust for public charitable purposes, some of which are outside the limits of the wakf and so, the conclusion is inescapable that the trust created is not a wakf but a secular comprehensive public charitable trust. In that view of the matter, Section 3(1) of the Act cannot apply to the trust and its registration under Section 28 is invalid and inoperative."

115. Therefore, this was a case where there was a document which was styled as a trust deed. The trust purported to provide for relief to the poor particularly in the State of Hyderabad. It contemplated maintenance and support to religious institutions otherwise for advancement of religion particularly in the State of Hyderabad. Most importantly, it was made clear that towards the said intent that the benefit of the clause was not to be restricted to any particular religion. The other clauses also sought to provide relief on a secular basis. It was intended to cater to the inhabitants of Hyderabad in particular without any regard to religion. We are aware of the fact that at the time when the Court considered the case the prevailing definition of beneficiary was what was contained in Section 3(a) in its unamended form. In other words, what this Court considered was the definition of beneficiary in Section 3(a) which ended up with the injunction that the beneficiary must be a member of the Muslim community. It is after this judgment that in the year 1964 as we have noticed by the Amendment Act that the words established 'for the benefit of the Muslim community' were substituted with the words 'for purposes sanctioned by the Muslim law'.

116. This judgment has also been followed by this Court in the decision reported in Mohd. Khasim v. Mohd. Dastagir and Others (supra). Therein, this Court held:

> "31. The aforesaid directions run contrary to the concept of wakf and the more appropriate view appears to be that the executant intended to create a simple English trust. Although, in order to create a valid wakf it is not necessary to use the term "wakf" in the document in question, except for providing for the performance of certain religious ceremonies, pious and charitable duties, there is no mention that the dedicator had ever intended that the properties forming the subject-matter of the trust should constitute a wakf. The executant appears to have deliberately used the expression "trustee" and not "Mutwalli" which would have ended the controversy that has now arisen." "32. The law is quite clear that there is no bar to a Mohammedan creating a simple English trust. It is not always necessary that in order to make a settlement of his properties, a Mohammedan has always to create a wakf. In fact, the said view has been expressed in a Division Bench decision of the Madras High Court in Kassimiah Charities Rajagiri v. Secy., Madras State Wakf Board [AIR 1964 Mad 18] . In the said case, while confronted with a similar question, the Division Bench observed that a Muslim can endow properties to charities either by adopting his

> favourite mode of creating a wakf or by endowing property conforming to the law of trusts. The question whether a particular endowment amounts to a wakf under the Mohammedan law or to a trust as recognised by modern jurisprudence, will have to be decided primarily on a true construction of the document establishing the charity. However, it has also been stated in the said decision that vesting of a power of alienation by way of exchange or sale under the document creating wakf is not inconsistent with the document constituting a wakf under the Muslim law. A dedication to a wakf will not, therefore, cease to be such merely because a power is reserved in the Mutwalli to exchange the wakf lands with other lands or to sell them and purchase other lands so that the lands so taken in exchange or by purchase, might become the subject of the wakf."

117. In the later judgment, the Court has purported to place reliance on the judgment of the High Court of Madras reported in The Kassimiah Charities, Rajagiri represented by its hereditary trustee Sri. R.E.M.S. Abdul Hamid v. The Madras State Wakf Board, represented by its Secretary AIR 1964 Madras 18.

Therefore, it is true as contended by Dr.Singhvi, learned senior counsel, and also Shri Harish Salve, learned senior counsel that this Court has maintained a distinction between a public Trust and a Wakf. The view taken by this Court has been that while it is open to a Muslim to create a Wakf and ordinarily, there would be the prospect of a Reward for dedicating property by way of Wakf, it would be entirely left to a Muslim to take a decision as to whether he should adopt the device provided by an English Trust or make the familiar dedication by way of Wakf. It may be also true that there is merit in the contention of the writ petitioners, that Article 25 provides a choice as to the manner in which a person may exercise his rights viz., as to whether he should resort to creating a Wakf or a Trust.

118. What we are called upon to decide is whether this position of law has in any manner been altered by the amendment to Section 3(a) of the Act.

Here we may also refer to what is a public Trust and the conditions which have been projected in the submissions of Dr. Singhvi in particular qua a Wakf. The Indian Trusts Act, 1882 deals with private Trusts. Section 1 of the 1882 Act reads as follows:

> "1. Short title. —This Act may be called the Indian Trusts Act, 1882:
>
> Commencement. —and it shall come into force on the first day of March, 1882.
>
> Local extent. — It extends to the whole of India except the State of Jammu and Kashmir] and the Andaman and Nicobar Islands; but the Central Government may, from time to time, by notification in the Official Gazette, extend it to the, Andaman and Nicobar Islands or to any part thereof.

> Savings. —But nothing herein contained affects the rules of Muhammadan law as to waqf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second Chapter of this Act applies to trusts created before the said day."

119. It is, therefore, clear that nothing in the Trust Act would apply to the Wakf. Nor would the provisions of the Trust Act as such apply to public or private religious or charitable Trusts.

120. We may at this stage explore the law as it obtains in England in relation to public charities. The leading work on charities is Tudor on Charities (8th Edition). We deem it appropriate only to refer to certain aspects. The prevailing law as we understand in England is the Charities Act, 1993. We may refer to the connotation of the expression 'charity' and how it has been understood by the learned author at page 1:

> "For the purposes of the Charities Act 1993, "charity" means "any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities"; "institution" includes any trust or undertaking, and "charitable purposes" means "purposes which are exclusively charitable according to the law of England and Wales." The essential elements for charitable status have been discussed under the same heading at page 2:
>
> "Although there is no one definition of charity, it is generally accepted that before any institution can be accepted as charitable three conditions must be satisfied. First, the purposes of the institution must be within the spirit and intendment of the preamble to the Charitable Uses Act 1601. Secondly, the institution must exist for the benefit of the public and, thirdly, it must be exclusively charitable." It may be noticed that the development of law relating to charity is traced to the Charitable Uses Act 1601 which is called the Statute of Elizabeth I. Therein, as we have noticed the law, the preamble of the Act of 1601 assumes significance. We think it is appropriate to refer to the same mentioned at pages 2 and 3.
>
> "The jurisdiction of the Court of Chancery and of its successor, the High Court of Justice, in respect of charities and charitable trusts is a separate head of equity, and charity law is founded less upon statute than upon the principles evolved by those courts and embodied in case law. It has, however, long been the practice of the courts to look for guidance as to what purposes are charitable to the preamble to the Charitable Uses Act 1601 (commonly referred to as "the Statute of Elizabeth I"), which lists as charitable:
>
> "The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities;

> the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes." It is stated therein that a trust "called to be charitable must have objects which are exclusively charitable." It is stated, "In four cases, the existence of a non-
>
> charitable purpose will not be fatal to charitable status for the relevant body". We need not be detained by the four cases as such.

121. We may also notice the oft-quoted enunciation of the four heads by Lord Macnaghten in the case of Income Tax Special Purposes Commissioners v. Pemsel (1891) A.C. 531, 583. The four heads have been classified as follows:

> (1) The relief of poverty;
>
> (2) the advancement of education;
>
> (3) The advancement of religion;
>
> (4) Other purposes beneficial to the community not falling under any of the preceding heads.

122. We may also notice as regards the fourth head, the following discussion:

> "On the other hand, Lord Macnaghten said that trusts falling under the fourth head "are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly. ..."

123. As regards the requirement of perpetuity in regard to a charitable trust, since we found a contention raised in the submissions of Dr. Singhvi that a charitable trust need not be perpetual, we find the following discussion under the head Duration:

> "A Charitable trust may be made to endure for any period which the author of the trust may desire. It may therefore be created for the application of the income in perpetuity to the charitable purpose, or it may be so framed as to require the immediate distribution of the capital, or the exhaustion of capital and income, during a limited or indefinite period. This exception to the rule that a trust for the application of income for an indefinite period is void as tending to a perpetuity is well established. It is founded upon grounds of public policy, and is essential to the useful existence of charitable trusts.

> But to qualify for the benefit of the exemption from the rule against perpetuities, a trust must be charitable within the legal meaning of that word. Thus, a perpetual trust for the repair of a tomb, not forming part of the fabric of a church, or for any other object or any institution or society not of a charitable character, is void. Similarly, a gift in perpetuity of the income of a legacy, for the benefit of individuals answering a certain description, without any reference to age or poverty, is likewise void. There is no escape from the dilemma that a perpetual trust must be either charitable, or void as tending to a perpetuity.
>
> The rule against perpetual duration cannot be evaded by making a charity the trustee. Thus, a condition attached to a charitable gift, constituting a trust in favour of objects not charitable, as, for instance, that the donor's tomb should be repaired forever out of the trust funds, or that the charity should grant a lease to private individuals ninety-five years hence, or a lease for ever to the testator's relatives, is void."

124. In regard to powers and duties of Charity Trustees, it is stated as follows:

> "The powers and duties of charity trustees, as defined in section 97 of the Charities Act 1993 as those persons having the general control and management of the administration of a charity, are governed by the legal structure adopted by the charity, the terms of the individual governing instrument and the relevant statutory provisions. ..."

125. The concept of a public charity as understood in England is to be contrasted with the concept of a Trust in the background of a public religious trust as understood in India. We turn to oft-quoted decision of the Privy Council reported in Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar and others12:

> "It is also to be remembered that a "trust" in the sense in which the expression is used in English law, is unknown in the Hindu System, pure and simple (J. G. Ghose, "Hindu Law," p.
>
> 276). Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system; to brahmans, goswamis, sanyasis, etc. AIR 1922 Privy Council 123 When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a juristic entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of math were founded under spiritual

teachers of recognized sanctity.

These men had and have ample discretion in the application of the funds of the institution, but always subject to cetrain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration.

The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Mahommedan influence has been pre-dominant, such as Upper India and the Carnatic, the expression wakf is used to express dedication.

But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of Jewan Doss Sahu v. Shah Kubeeruddin20 that a dedication to pious or charitable purposes is meant, the right of the wakf is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the mutawalli, the governor, superintendent, or curator. In Jewan Doss Sahu's Case21 the Judicial Committee call him "procurator." That case related to a khankah, a Mahommedan institution analogous in many respects to a math where Hindu religious instruction is dispensed. The head of these khankhas, which exist in large numbers in India, is called a sajjadanishin. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary mutawalli. But neither the sajjadanishin nor the mutawalli has any right in the property belonging to the wakf; the property is not vested in him and he is not a "trustee" in the technical sense." "It was in view of this fundamental difference between the juridical conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Mahommedan systems that the Indian Legislature in enacting the Indian Trusts Act (II. Of 1882) deliberately exempted from its scope the rules of law applicable to wakf and Hindu religious endowments. Sect. 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down, "but nothing herein contained affects the rules of Mahommedan law as to wakf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments. . . . . " Sect. 3 of the Act gives a definition of the word "trust" in terms familiar to English lawyers. It says:"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of

another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust.'"

126. What is only to be noticed is that the concept of trust was not unknown to the Muslims. In fact, as we have noticed in the discussion from Syed Ameer Ali on Muslim law, Wakf is described as a Trust. Incidentally, however, this judgment led to the amendment of Section 10 of the Limitation Act, 1963. It is apposite that we notice the case and judgment which was rendered therein which is reported in Wali Mohammed (Dead) by LRs. v. Rahmat Bee (Smt.) and Others13.

The question which arose was whether the Mutawalli of a Wakf would be a trustee. This Court after noticing the judgment of the Privy Council in Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar and others (supra), has discussed the impact it had in the following paragraphs:

> "35. It will be seen that the main part of Section 10 states that no period of limitation applies for recovery of property from a trustee in whom the property is vested for a specific purpose, unless such a person is an assignee for valuable consideration. The Explanation further states that it shall be deemed that a person managing the property of a Hindu, Muslim or Buddhist religious or charitable endowment is to be deemed to be a trustee in whom such property has vested for a specific purpose. We shall explain these provisions in some detail.
>
> 36. In Vidya Varuthi Thirtha Swamigal v.

Baluswami Ayyar [AIR 1922 PC 123 : ILR 44 Mad 831] the Privy Council held that property comprised in a Hindu or Mohammedan religious or charitable endowment was not property vested in trust for a specific purpose within the meaning of the said words in the main section. The reason was that according to the customary law, where property was dedicated to a Hindu (1999) 3 SCC 145 idol or mutt or to a Mohammedan wakf, the property vested in the idol or the institution or God, as the case may be, directly and that the shebait, mahant, mutawalli or other person who was in charge of the institution was simply a manager on behalf of the institution. As Section 10 did not apply unless these persons were trustees this judgment made recovery of properties of the above trusts from donees, from these managers, rather difficult.

37. The legislature therefore intervened and amended Section 10 for the purpose of getting over the effect of the above judgment. The Statement of Objects and Reasons to the Bill of 1929 makes this clear. It says:

"The (Civil Justice) Committee's recommendation refers, it is understood, to the decisions of the Privy Council in Vidya Varuthi v. Baluswami [AIR 1922 PC 123 : ILR 44 Mad 831] and Abdur Rahim v. Narayan Das Aurora [(1922) 50 IA 84] which lay down that a dharmakarta, mahant or manager of

a Hindu religious property or the mutawalli or sajjadanashin in whom the management of Mohammedan religious endowment is vested, are not trustees within the meaning of the words as used in Section 10 of the Limitation Act, for the reason that the property does not vest in them. The result is that when a suit is brought against a person, not being an assignee for valuable consideration, endowments of this nature are not protected. The Committee's recommendation is that Section 10 of the Limitation Act should be amended so as to put Hindu and Mohammedan religious endowments on the same footing as other trust funds which definitely vest in a trustee."

127. Thus, the Mutawalli is treated as a trustee. But would the amendment made to Section 10 of the Limitation Act, 1963 make a Mutawalli a trustee generally?

Our answer is an emphatic 'No'. This is for the reason that the change in Section 10 of the Limitation Act was effected to overcome the judgment of the Privy Council, when it held that a Mutawalli would not be a trustee and when in view of the requirement in Section 10 that the suit must be one against a person in whom the property has become vested in trust for any specific purpose and as a Mutawalli would not be a trustee in law per se, the legislature brought in the explanation. But what is striking are two features. Firstly, the change is brought by way of an Explanation. More importantly, the explanation begins with words "For the purpose of this section' and proceeds to declare that "any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be properly vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof." Therefore, apart from it being an Explanation, it also on its very terms, limits the deeming fiction to the purpose sought to be attained in Section 10 of the Limitation Act.

128. Dr. Singhvi, learned Senior Counsel, would list four distinguishing features of a Trust in comparison with a Wakf:

> (i) A wakf is perpetual and irrevocable, whereas a trust need not be perpetual and may also be revoked under certain conditions.
>
> (ii) A wakf property is inalienable whereas a trust is free to alienate the trust property.
>
> (iii) The founder of a wakf cannot reserve any benefit for himself, but the founder of a public trust may himself by a beneficiary.
>
> (iv) The powers of a mutawalli (manager of the wakf property) are very limited as compared to the powers of a trustee.

He would contend that in the case of a Wakf, the dedication must be perpetual and irrevocable. We have already noticed that this proposition is only to be accepted and save as we have noticed in the case of a Wakf by a will which is revocable during the lifetime of the maker dedication is to have effect immediately and it is not transient. The reason is that the reward is believed to be given immediately as the dedication is made. No doubt, in the case of a will, during his lifetime it is open

to revoke it but otherwise a Wakf must indeed be perpetual and irrevocable. A trust need not be perpetual and can be revoked in certain conditions submits Dr. Singhvi. We have noticed the passage from Tudor on Charities which appears to suggest that the requirement of perpetuity in a Wakf may not attach itself invariably to a public charity or a public charitable trust.

It is a matter essentially to be decided on the terms of a document, if there is any.

129. Next, it is contended that in the case of a Wakf, property is inalienable whereas in the case of a Trust, a trustee is free to alienate the trust property. Though the Trust Act is not applicable in the case of a public, religious or charitable Trust, it would appear to be the law that the principles enshrined in the provisions can be drawn upon. Section 37 of the Indian Trusts Act, 1882, reads as follows:

> "37. Power to sell in lots, and either by public auction or private contract. —Where the trustee is empowered to sell any trust- property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs."

130. A perusal of Section 37 would reveal the following:

> The trustee governed by the Indian Trusts Act, 1882, may effect a sale. The condition, however, is that the power of sale must be conferred by the trust deed. It all, therefore, boils down to the question as to whether there is a power with the trustee under the document in question. However, it is significant to note that Dr. Singhvi may not be correct if the contention is that the trustee has an absolute right of sale. At least it is not so under the Bombay Public Trust Act 1950. Section 36 of the Bombay Public Trust Act declares that a sale by Trustee can be made only after 'previous' sanction is obtained from the Charity Commissioner. In the case of a Wakf, however, undoubtedly the principle is well entrenched and it is integral to the very concept of a Wakf, wherein, upon a dedication there is an implied transfer of the property to the Almighty, which would in law render any alienation impermissible. The property would remain inalienable. However, interestingly, we may notice the following discussion in Mulla Principles of Mahomedan law:
>
> "207. Power of mutawalli to sell or mortgage.
>
> A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange waqf property or any part thereof, unless he is expressly empowered by the deed of waqf to do so."

131. However, learned author has also noted the change that has been brought about in section 51 of the Act and thereafter states as follows:

> "A mutawalli of a waqf although not a trustee in the true sense of the term is still bound by the various obligations of a trustee. He like a trustee or a person standing in a fiduciary capacity, cannot advance his own interests or the interests of his close relations by virtue of the position held by him. The use of the funds of the waqf for acquisition of a property by a mutawalli in the name of his wife would amount to a breach of trust and the property so acquired would be treated as waqf property.
>
> A mutawalli is not allowed to sell, mortgage or lease the waqf property unless he obtains permission of court which has the general powers controlling the actions of mutawalli. Save and except as recognised by any custom, the law does not favour the right to act as mutawalli becoming heritable. When the mutawalli dies and the waqif is still alive, he possesses the right to appoint another and in his absence his curator and in the absence of both, the Court appoints the successor mutawalli. Mutawalli has no ownership rights or estate in the waqf property, he holds the property as a manager for fulfilling the purpose of waqf. Even a Sajjadanashin, who has larger interest in the usufruct has no right in the property endowed. These features distinguish a mutawalli from a shebait. The elements which render shebait-ship a property, are absent in mutawalli-ship and mutawalli- ship is an office."

132. Therefore, whatever may have been the position prior to 1995, under the Act, a sale is absolutely prohibited. We draw support from Section 104A of the Act which, inter alia, prohibits alienation.

133. It is contended by Dr. Singhvi that the founder of a Wakf cannot reserve any benefit for himself but the founder of a public trust may become a beneficiary. Herein again, we may notice the following discussion in Mulla on Principles of Mahomedan Law:

> "192. Reservation of life interest for benefit of waqif (dedicator) (1) Under the Hanifi law, the waqif (dedicator) may provide for his maintenance out of the income of the waqf property. He may, if he wishes, reserve even the whole income for himself for his life. On the amount of maintenance becoming not sufficient to make both ends meet, the amount of maintenance can be increased on a suit by a beneficiary against Mutawalli.
>
> (2) Payment of waqifs debts. -Under the Hanafi law, the waqif may provide for the payment of his debts out of the income of the waqf property.

This was well established before the Wakf Validating Act, 1913, and it is now reproduced in s.3, Cl.(b) of the Act.

134. Under the Mahommedan law, a Wakif may provide for his maintenance out of the income of the Wakf property. He may even reserve the whole income for himself or his life. A different strand of opinion has been expressed however as regards the Shia law.

We find the following discussion in Mulla on Principles of Mahomedan Law at page 228:

> According to the Hanafi law, the settlor may reserve the usufruct of the endowed property of himself for his life. According to the Shia law a waqf is not valid unless the settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the waqf is created. Hence a settlor cannot, according to the law, reserve for himself a life-interest in the income or any portion thereof: Baillie, II, 218-219. It has been held by the High Court of Allahabad that if the settlor reserves the whole income for himself, the waqf is wholly void; but if he reserves a portion f the income i.e., one-third, the waqf is void as to one- third only to the corpus, but valid as to the remaining two-thirds. But in Abadi Begum v. Kaniz Zainab (AIR 1927 PC 2), the Privy Council expressed the opinion that in such a case, the waqf would be entirely void. Their Lordships approved the four conditions governing the validity of a waqf under Shia lawas set out in Baillie's Digest, II, 218-219. These are: "(1) it must be perpetual; (2) absolute and unconditional; (3) possession must be given to the mowkoof (beneficiary) of the thing appropriated; and (4) it must be taken entirely out of the waqif or appropriator," The last condition has been expressed in direct and homely language by saying that the waqif must not eat out of the waqf. The case was one in which the settlor under the colour of fixing her salary as mutawalli really reserved for herself a portion of the income very much in excess of the salary fixed for future mutawallis. The case was not decided on this ground but the waqf was held to be invalid as the settlor had not parted with possession so as to comply with the third condition set out above.
>
> But though a Shia cannot provide for his own maintenance out of the waqf property he may provide for the maintenance of his family, children and dependants. This is recognised in s. (a) of the Wakf Act. But a Shia may provide for the expenses of Roza, Namaz, Haj, Ziarat, etc. to be performed after his death for his spiritual benefit. He may also reserve a life interest for a beneficiary in the usufruct of the property if the intention that the property should become waqf on the settlor's death is clear. If the settlor is the first mutawalli he may lawfully take the remuneration of the mutawalli. The High Court of Allahabad has held that a provision that the endowment shall not take effect till the death of the settlor's wife is valid, but this view of the law has been overruled by the Privy council in Mt. Ali Begum v. Badr-ul-Islam Ali Khan, in which it was held that a direction that certain property should become waqf after the death of a person surviving the testator was invalid.
>
> Again, according to the Shia law, a waqf is not valid, if it provides for the payment of personal debts of the settlor. But a provision for payment of debts charged on the estate is valid; in other words, a Shia may like a Sunni, make a valid waqf of property which is subject to a mortgage.
>
> In Syed Ali Zamin v. Syed Akbar Ali Khan (AIR 1937 PC 127), the Judicial Committee held that the settlor has divested himself of all interest in the property dedicated

> though he had appointed himself Mutawalli with uncontrolled powers of management. Whether he has so divested himself, is a question of construction of the waqfnama, and is not to be confounded with the question whether there has been a transfer of possession or change in the character of his own possession."

135. Finally, we may take up the last distinction which is highlighted by Dr. Singhvi that it relates to the powers of the Mutawalli being very limited as compared to the powers of a Trustee. It is true that Mutawalli is essentially a manager and administrator of the property which vests in Almighty. A Trustee, on the other hand, is the person in whom the property vests. In the case of a private Trust, no doubt, as in respect of public Trust, it consists of an obligation annexed to the ownership of property and arises from out of confidence reposed in a person or persons. They are the trustees. In the case of a private Trust, there must be a written document which must be registered in terms of Section 5 of the Act. In a public religious or public charitable Trust, there need not be any document as such to create a public charitable trust. The foundation, however, remains the confidence which is reposed in the Trustee/Trustees and the apparent ownership that he possesses by having legal ownership being vested in him/them. The most significant aspect, however, would be that in the case of a Mutawalli of a Wakf or Manager of a Wakf or other person in charge of a Wakf, he can only be the manager of the property. This distinction we must not overlook forms the subject matter of the discussion in paragraph 20 of the judgment of this Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra) which we have referred to. We have noticed that in the said case what was involved was a trust deed where property was vested with the trustee, no doubt, for the purposes mentioned therein. It is this which must indeed be the indispensable hallmark to distinguish a Trust from a Wakf. This distinction cannot be overlooked. A power of sale, being located appears incompatible with a Wakf but the same is not incongruous with a Trust.

136. It is true as contended by Mr. Gopal Sankarnarayanan, learned senior counsel, that with the amendment to Section 3(a) by giving a secular flavour to the definition of the word Beneficiary meaning thereby that the condition that the beneficiary must only belong to the Muslim community being removed, it has restored the law which it always was, viz., that in a case of a Wakf which was intended to achieve a public utility, the beneficiaries need not be confined to the members of the Muslim faith and it was indeed secular all throughout in its application which is the reason for the amendment brought about in 1964. Though the amendment was made in 1964, we would think that this was always the law. We see the following discussion in Syed Ameer Ali on Mohammedan Law at page 274:

> "Another point worthy of attention in the Mussulman Law is that every trust for whatever purpose created is really and in fact for the benefit of human beings. The religious and legal system of Islam is founded essentially on the service and well-being of humanity. A dedication may be made for a mosque, - but the mosque is intended for human beings to pray in; it may be for a school, intended for the instruction of students; for khankahs, where a particular class of people congregate for religious exercises, and so forth. Every object, therefore, is intended for the spiritual, religious, moral, or material good of human beings. This is the meaning of

> the terse and sententious rule pronounced by the Prophet "tie up the property and leave its usufruct free for mankind." A wakf once made for whatever object, has the effect of "detaining" the property in the custody of the Almighty, its produce along being applicable for the good of human beings. This is the meaning of the definition given by the law officers in the case of Mohammed Sadik v. Mohammed Ali and Others, that wakf implies "the relinquishment of the proprietary right in any article of property such as land, tenements, &c., and consecrating it in such manner to the service of God that it may be of benefit to men." This definition was not invented by them but borrowed form the law-books, and must be read with the explanations given in them. In the Islamic system there is no such ting as a dedication "solely to the worship of God." A dedication "solely to the worship of God" is an unmeaning phrase in Islam. The service of man and the good of humanity constitute pre-eminently the service and worship of God. Everything which is dedicated to God is in reality for the good of mankind; and everything which is dedicated for the good of human beings, individually or collectively, is for the service of God."

137. Shri Gopal Sankarnaryanan, learned Senior Counsel, did attempt to persuade us to hold that with the amendment carried out to Section 3(a) way back in 1964 to the word 'beneficiary', little remains to distinguish a public Trust from a Wakf. At first blush, the argument may sound attractive. The argument is that since there can be a Wakf and the object of the wakf can be attainment of public utility and if the beneficiaries of the trust can belong to any faith and only requirement is that the object must be one which is sanctioned by Muslim law, then every public charitable Trust would be capable of being categorized as a Wakf. In other words, the argument appears to be premised on eschewing of the exterior and exploration of the very fundamentals of the transaction. The use of the word Trust by itself, it may be true cannot be decisive of the issue. The absence of the word Wakf is equally not determinative. It is a matter which must be considered with reference to the document, if any, the conduct of the parties and all other relevant aspects.

138. In this regard, he sought to draw our attention to the judgment of the High Court of Madras reported in AIR 1973 Madras 191. It is true that in the said case, the Court has referred to the judgment in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra). It observes that this Court has proceeded with the matter at a time when Section 3(a) had not been amended. But we would think that even in the said case, the matter really turned on the facts before the Court. However, to do justice to Shri Gopal Sankaranarayanan, learned Senior Counsel, we may refer to the following paragraph wherein after referring to the aforesaid decision, the court held:

> "But the Wakf Act of 1954 has been amended by Act 34 of 1964 under which the definition of 'beneficiary' and 'wakf have been amended by including wakf sanctioned by the Muslim law as coming under the Wakf Act. In Syed Abdulla Sahib v. Madras State Wakf Board(3) Kailasam J. has held that the coming into force of Act 34 of 1964 amending the Wakf Act of 1954 will have to be taken into account and that the donation of an immoveable pro party even though by a person not professing Islam, would be a wakf, if the other conditions are fulfilled. Thus, the definitions as

> amended have retrospective effect and apply to the wakf in this case. In fact, the learned advocate for the appellant did not dispute the fact that if the charitable bequest created in this case is a wakf, it would come under the Wakf Act, though the beneficiaries of the wakf may include non- Muslims." What is, however, decisive would be that it was on facts found that the compromise decree therein did create a Wakf.

139. Learned counsel also sought to draw support from the judgment of the learned Single Judge of the Gujarat High Court in Kachchh Wakf Board & Anr. v. Kachchh Memon Jamat & Ors.14. Therein, the Court has, no doubt, inter alia, referred to as follows:

> "50. In view of my aforesaid conclusion the appeal must succeed. However, before parting with it, I may notice that learned Counsel for the respondent-plaintiff argued that both the courts below have come to concurrent finding that, property in question was being used for providing shelter or abode to any visitor without distinction of caste or creed and this finding alone is sufficient to negative the contention of respondents about existence of a Muslim Wakf and consequently entitling the plaintiffs to claim relief for declaring the publication of list dated 6-5-1965 to be illegal and void and that the property in question is not a Muslim Wakf. This is so according to learned Counsel because if beneficiary of an amenity includes anybody other than Muslim, it can be anything but a Muslim Wakf. It may be a public charity or a public trust, but beneficiary if includes non- Muslim it becomes of secular character which is not envisaged object of a Muslim Wakf. Reference was made to decision of Supreme Court in Nawab Zain Yar Jung v. Director of Endowments AIR 1953 SC 985 as well as Board of Muslim Wakf v. Radha Kishan(1979) 2 SCC 468 :
>
> AIR 1979 SC 289. This plea was raised apart from contending that respondents have failed to prove that property was dedicated by a Muslim and was so dedicated to almighty as to vest the same in Him. I am prima facie of the view that both the parties have laboured under common impression that if the Muslims are only users of property it be treated as a Muslim Wakf and in the process necessary material in this regard for deciding the issue about existence of Wakf, if so, its nature and 1997 SCC Online Guj 220 beneficiary who could claim right to its benefit had also not been brought on record.
>
> 62. The decisions in Nawab Zain Yar Jung (AIR 1963 SC 985) or other contemporary decisions containing observation that beneficiary must be a member of Muslim Community has to be read in the context of definition of beneficiary in Section 3(a) of the Act of 1954 as it stood.

Until it is amended by the Wakf, (Amendment) Act, 1964 w.e.f. 10-10-1964:

> It reads:

> "beneficiary means a person or object for whose benefit a Wakf is created and includes religious, pious and charitable object and any other object of public utility 'established for the benefit of Muslim Community'."
>
> 65. In this light a Musafirkhana, if its dedication is for a religious purpose like providing shelter to pilgrims or to those who are performing religious ceretniones sanctioned by Muslim Law, may perhaps can have its beneficiaries only members of Muslim community. But if on the other hand if a property is dedicated as an amenity of general public utility or for charitable purpose to utilize its income for charitable purposes sanctioned by Muslim Law, use of such amenity may not militate against its being a Muslim Wakf. In other words unless it is made clear with what object property is dedicated, it may not be possible to decide the exact nature of dedication, even if it be presumed in favour of the appellants that it was after grant of land was made to Kamruddin, he constructed the house and that house is being used as Musafirkhana or Sarai Dharmashala, a place of abode for wayfarers. Both parties, apparently having engrossed with user of property by Muslims only have not lead any evidence on this vital aspect about 'object of dedication of building' of the issue. In this connection, it may also be noticed that it is not a case of lost grant and user of property, since time immemorial but grant in specific manner has been the contention of both sides, and user from that period by general public or Muslims.

The pivot object with which dedication and use was being made is missing. In this connection, it is also significant to notice that according to Bhagwadgomandal word 'Dharmashala' and 'Musafirkhana' have been defined to mean one and same thing. Nothing therefore, may turn on the expression 'Dharmashala' in the letter of grant of land without something more. Nor actual user contrary to the object of actual dedication will affect the nature of grant, though in the absence of clear evidence about object, long user in one way or other may itself furnish some evidence of object."

140. Lastly, the judgment in Indian Institute of Islamic v. Delhi Wakf Board 2011 SCC OnLine Del 5567 of the High Court of Delhi speaking through Hon'ble Mr. Justice S. Ravindra Bhat, as His Lordship then was, is also placed before us. Therein, in fact, we may only notice after considering the case law on the point which included the decision of this Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra) and the changes brought about in the law, it was inter alia held as follows:

> "66. It is thus clear - from the above discussion, that for a dedication to be a wakf it is not necessary that the benefit should flow only to Muslims, or a specific section of the community; as long as the object of the dedication is the performance of a task, or function, which is considered to be charitable, under Muslim law, and the property, asset or thing is permanently dedicated. Here, it would be essential to go into what exactly is a "permanent dedication". The Privy Council, in one of its earlier decisions, i.e Jewen Doss Sahoo v. Shah Kubeer-ood-deen ((1840) 2 MIA

390) explained the significance of the word 'dedication' and observed thus:

> "According to the two disciples, wakf signifies the appropriation of a particular article in such a manner as subjects it to the rule of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo Yoosuf holds the appropriation to be absolute from the moment of its execution, whereas Mahomed holds it to be absolute only on the delivery of it to a mutawalli, (or procurator,) and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it ...'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'"

141. Drawing support from the judgment of this Court reported in Mohd. Khasim v. Mohd. Dastagir and Others (supra) it was found in fact that what was projected as a Wakf was not a Wakf even though, it might be a valid Trust.

Having noticed the facts of the judgment of the apex Court in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra) and as followed in Mohd. Khasim v. Mohd. Dastagir and Others (supra) and having borne in mind the change brought about in Section 3(a), we are of the clear view that the law which was declared in the decisions of this Court leaves it open to a Muslim to create a public Trust or a Wakf and it remains undisturbed.

142. As to whether an institution is a Wakf or a public Trust is a mixed question of fact and law. This means it becomes a duty of whosoever upon whom the duty falls, to ascertain whether it is either and to carefully attend to the terms of the document by which the Trust is evidenced if there is such a document and find the facts and thereafter the law must be applied. The paramount feature which perhaps would figure in this inquiry would be the properties being vested either by a Trust, in the case of a Trust, for a trustee to deal with the property as such. Whether there is no power of sale, or inalienability may be a factor which may tilt the matter in favour of the institution being a Wakf provided other features which are indispensable are also present. It is no doubt true that the Amending Act of 1964, amending the words 'Beneficiary' making clear what was always the correct principle of Muslim law that fruits of a Wakf is not to be cribbed cabined and confined to the Muslim community would in the context of the object being public utility, narrow down the distinction between a trust and a wakf.

In this regard, the aspect reflected in para 17 of the judgment of this court in AIR 1963 SC 985 would indicate that the court was bearing in mind the injunction in Section 3(a) defining beneficiary in the unamended form. It does indicate that on the criteria of the unamended provisions of Section 3(a), the court found it to be not a wakf. The nomenclature and the form of the document can be indicative but not decisive.

143. Having held that there is a distinction between a public charitable Trust and Wakf, we must now move on to consider a more vexed issue and the controversy is this. Whether the survey which

was conducted in the case under Section 4 was valid and whether the list which was published on 13.11.2003 should have been interfered with?

144. It is an admitted case that the Act came into force on 01.01.1996. A person was appointed to carry out the survey by proceedings dated 01.12.1997. The surveyor was tasked to carry out the survey and he gave a report to the Government under Section 4(3) on 31.01.2002. It is also not disputed in the meantime, on 04.01.2002, the Wakf Board was incorporated. As to how a survey should be conducted under Section 4 has been subject matter of the decision of this Court in Board of Muslim Wakfs, Rajasthan v. Radha Kishan and Others (supra). It may be apposite to refer to it for the reason that though the survey in question was conducted under section 4 of the Wakf Act 1954, the provisions of Section 4 in the present Act is essentially pari materia with Section 4 of the earlier Act. Therein, the first question which arose was whether the commissioner of Wakfs appointed under Section 4 had jurisdiction to enquire and find whether a certain property is Wakf property or not when such a dispute is raised by a stranger to the Wakf. We need not be detained by the other question as it relates to the effect of Section 6 on such a person. The Court went on to hold inter alia as follows:

> "22-A. It is needless to stress that the whole purpose of the survey of wakf by the Commissioner of Wakfs under sub-section (1) of Section 4 is to inform the Board of Wakfs, as to the existence of the existing wakfs in a State, in order that all such wakfs should be brought under the supervision and control of the Board of Wakfs.
>
> 23. While the High Court was, in our view, right in determining the scope of sub-section (1) of Section 6 of the Act, it was clearly in error in curtailing the ambit and scope of an enquiry by the Commissioner of Wakfs under sub-

section (3) of Section 4 and that by the Board of Wakfs under Section 27 of the Act.

25. The very heading of Chapter II and the caption to Section 4 no doubt suggest that the Commissioner makes only a preliminary survey regarding existing wakfs and the list of wakfs prepared by him is published by the Board and neither the Commissioner nor the Board is required to make any enquiry regarding the character of the property. That is to say, the making of survey is only an administrative act and not a quasi-judicial Act. But, on a closer examination, it is clear that while making a survey of the existing wakfs in a State under sub-section (1) of Section 4, the Commissioner is required by sub-section (3) to submit a report to the State Government in regard to the several matters referred to in clauses (a) to

(f) thereof. There may be a dispute as between the Board, the mutawalli or a person interested in the wakf, as regards (a) the existence of a wakf, i.e. whether a particular property is wakf property, (b) whether it is a Shia wakf or a Sunni wakf, (c) the extent of the property attached to the wakf, (d) the nature and object of the wakf, etc. While making such an enquiry, the Commissioner is invested by sub-section (4) with the powers vested in a civil court under the Code of Civil Procedure, 1908, in respect of the summoning and examining of any witness, requiring the discovery and production of any document, requisitioning any public record from any court or office, issuing commissions for

the examination of any witness or accounts, making any local inspection or local investigation, etc. In view of these comprehensive provisions, it is not disputed before us that the enquiry that the Commissioner makes for the purpose of submission of his report under sub-section (3), while making a survey of existing wakfs 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.

26. 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. If we may refer to sub-section (1) of Section 4, so far as material, it reads:

> "The State Government may, by notification in the Official Gazette, appoint for the State a Commissioner of Wakfs ... for the purpose of making a survey of wakf properties existing in the State at the date of the commencement of this Act." It will be clear that the words "for the purpose of making a survey of wakf properties" is a key to the construction of the section. The ordinary meaning of the word "survey", as given in the Random House Dictionary of English Language, is 'to take a general or comprehensive view of or appraise, a situation'. If the Commissioner of Wakfs has the power to make a survey, it is but implicit that in the exercise of such power he should enquire whether a wakf exists. The making of such an enquiry is a necessary concomitant of the power to survey. The High Court was clearly in error in observing:
>
> "Except sub-section (5) there is nothing in Section 4 or in the Rules made by the State to show that the Commissioner is empowered to adjudicate on a question, if one arises, whether a particular property is a wakf property or not."

27. We are of the opinion that the power of the Commissioner to survey wakf properties under sub-section (1) or to enquire and investigate into the several matters set out in clauses (a) to (f) of sub-section (3) cannot be curtailed by taking recourse to sub-section (5). The High Court was wholly wrong in understanding the true implication of sub- section (5) of Section 4. It only lays down that if, during any such enquiry, any dispute arises as to whether a particular wakf is a Shia wakf or a Sunni wakf, and there are clear indications in the deed of wakf as to its nature, the dispute shall be decided on the basis of such deed. It, therefore, makes the wakf deed conclusive as to the nature of the wakf i.e., whether it is a Shia or a Sunni wakf. In our view, sub-section (5) of Section 4 cannot be projected into sub-section (1) for determining the question whether a certain property is a wakf property or not. Nor does it enter into an enquiry as to several of the matters adverted into some of the clauses of sub-section (3).

145. Therefore, we must proceed on the basis that the making of survey is not a mere administrative act but it is to be informed by a quasi-judicial inquiry. It is also the law that the surveyor has the power to find whether a particular institution is a Wakf. The commissioner has also indeed to determine the aspects which have been mentioned in Section 4 specifically which we need not dilate upon.

146. We may at this juncture venture to notice the findings which have been rendered by the High Court.

"18. The next question to be considered is whether the list of wakfs prepared and published by the Wakf Board is valid or invalid. The list is prepared and published under sub-section 2 of Section 5 of the Act. It reads as under:

> (2) The Board shall examine the report forwarded to it under sub-section (1) and publish in the Official Gazette a list of Sunni Wakfs or Shia Wakfs in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed.

Thus, the list to be prepared by the Board is based on the report of the survey which is conducted under Section 4 of the Act. So far as the survey conducted under the Act is concerned, the Joint Parliamentary Committee found that the survey was not conducted properly. Following paragraphs 4.16, 4.17, 4.18 and 4.19 in the Ninth Report of the Joint Parliamentary Committee in our opinion are relevant. They read as under:

> 4.16 The earlier JPC on Wakf, in its Eighth Report presented on 29.07.2003 noted that the survey was almost completed, except in Bombay suburban District. However, it was alleged by the members of the public during the visit of the Committee that the survey work had not been properly carried out and a large number of Wakf properties had been left out. It was also informed that even those properties which physically existed and were Wakf by user, were not included in the survey on flimsy grounds.

It was revealed that in the revenue records, the Wakf properties were mentioned in the name of Mutawallis or in the name of lessees and were not shown as Wakf properties which made the sale of the properties easy. It was also informed that no physical survey was done and only proformas were sent to the Mutawallis for furnishing the details of the Wakf properties. The State Government had also admitted that there were errors in identifying the Wakf properties. Later on, the State Government informed that the survey in Bombay sub-urban areas had also been completed and they supplied a list of the Wakf properties surveyed to the then Committee. The lists so received prima facie showed the properties of Marathwada region; the Wakf properties in other regions were negligible which might not be true. Keeping the situation in view, the then Committee recommended that the provisions of the Wakf Act, 1995 should be followed scrupulously for the survey of Wakf properties and the procedure adopted be made transparent and open to the public, with a remedy to correct errors in the survey. The Survey Commissioner should undertake a physical survey of all the Wakf properties after giving wide publicity through the media. The Committee further recommended that after the survey was completed, the lists of Wakf properties should be published properly in the Official Gazette as required under the Act. The Committee further recommended that the entries of Wakfs should be properly made in the revenue records.

4.17 The Committee, now in view of the flaws in the survey undertaken earlier and the earlier Committee's recommendation to correct errors in the survey, sought to know the present status of survey during its visit undertaken in June, 2007. The Chief Executive Officer informed the Committee that the Government had initiated survey vide the Government Notification dated 01.12.1997 through the Settlement Commissioner. Despite complaints that the survey had not been done properly and also the last Joint Parliamentary Committee had asked the Government to undertake re-

survey, it was yet to be undertaken.

4.18 Further explaining the position, the State Wakf Board, in its note giving the latest position of the survey submitted to the Committee in July, 2008, as under:

> "The survey of Wakfs and its properties was taken up by the Government of Maharashtra vide Revenue and Forest Department Notification No. WKF-1097/L-3/CR95 dated 01.12.1997 and survey was completed and submitted to the Government. Thus, the survey was completed before receipt of proceedings of the Joint Parliamentary Committee's VII Ith Report, which had suggested the survey to be carried out again in a transparent way. It has yet not been initiated.
>
> . . . The decision to conduct fresh survey in a transparent manner lies with the State Government."

4.19 The Committee is surprised to see that it got the same reply even after one year. On being asked, the Principal Secretary, Minority Development, Government of Maharashtra, during her oral evidence tendered on 24.07.2008, assured the Committee that the Survey Commissioner would be appointed within a month to take up the survey work. (emphasis supplied)

19. Thus, the Joint Parliamentary Committee found the survey to be defective. The decision of the Joint Parliamentary Committee has been accepted by the State Government when it issued the Notification dated 20th October, 2010. The reason that has been given by the State Government for ordering resurvey in the Notification dated 20th October, 201O is " And whereas the Joint Parliamentary Committee received complaints that the survey was not conducted properly and therefore the Committee issued direction dated 20th October, 201O to the State Government to conduct the resurvey of the wakfs in the State ..... " .

20. Thus, even according to the State Government the Survey was defective as the lists of wakfs prepared under sub-section 2 of Section 5 were based on the survey report submitted on 31-1-2002 to the State Government, which the State Government itself found to be defective, the only conclusion possible is that the lists of wakfs are defective and therefore, in our opinion, it would be appropriate to set aside those lists, so that fresh lists can be prepared by the wakf Board on the basis of the report of resurvey which is ordered by Notification dated 20th October, 2010."

147. We may notice that this is a case where the writ petitions were filed in the High Court. In the findings rendered by the High Court, the High Court has not found that there has been a breach of the principles of natural justice. This is not made out to be a case where there is a total want of jurisdiction either. Having made these preliminary observations, we may proceed to consider some of the allegations which have been made in the writ petitions:

> "11. The Petitioners submit that it may be noticed that even a Wakf created as per the provisions of the Muslim Law as applicable to the wakf is also included within the definition of the public trust, as contained in Section 2(13) of the Bombay Public Trust Act, 1950. Therefore, there are many Muslim trusts created by the Muslim Settlers belonging to diverse schools of Muslim law under the common law and have appointed the trustees and got the trust property vested in them. But all these Muslim public charities/ endowments created as public trusts as per the provisions of common law are also registered in 'B' category with the Charity Commissioner. There are indeed many Wakfs created by the Muslim Wakifs as per the school of Muslim Personal Law applicable to them and they are also registered in 'B' category by the office of the Charity Commissioner. The petitioners say and submit that the above trusts are the Public Trusts as per the common law and not Wakfs as per the provisions of the Muslim Personal Law applicable to the Settlors of the above Trusts and are registered under "B" category by the office of the Charity Commissioner." "12. Upon the enforcement of the Wakf Act, 1995 it has become necessary for the Charity Commissioner's office to bifurcate such Muslim Wakfs from the Muslim trusts. Instead of undertaking such exercise the Charity Commissioner proceeded to treat all the endowments/ charities registered in "B" category as Muslim Wakfs and issued a circular dated 24th July, 2003, bearing No. 307 of 2003 whereby it directed its office not to exercise or deal with any of the Muslim Public Trusts. The said circular inter alia stated that according to Section 43 of the Wakf Act, 1995, Wakfs registered as the Public Trust should not be tried under the Bombay Public Trust Act, 1950 and that the further orders might be awaited. After issuance of this circular the office of the Charity Commissioner refu!led to entertain any application in respect of the Muslim Public Trusts, which are registered with it. Hereto annexed and marked as Exhibits 'G' & 'G-1' are the copies of the circular dated 24th July, 2003 bearing No. 307 of 2003 issued by the Charity Commissioner along with its English translation." "14. Before stating the grounds it is al.so necessary to point out that the respondent No.1 has appointed the Survey Commissioner as per the notification dated 1st December, 1997. The petitioners say that the purported survey has been carried out by the Survey Commissioner without giving any notice to the existing Muslim Trusts/ Wakfs. The petitioners have learnt that several Muslim Trusts/Wakfs have carried out correspondence with the Survey Commissioner putting on record , that the Survey Commissioner has not given any notice to the existing Muslim Trusts/ Wakfs about the purported survey and that the Survey Commissioner should follow the rules of natural justice in identifying the Muslim Trusts/ Wakfs. Hereto annexed and marked as Exhibit 'I' is the copy of the letter dated 14th August, 2003 written by one such trust viz. Anjuman-i-lslam. The petitioners state that the Survey Commissioner

> i.e. Respondent No.3 by his letter dated 22nd August, 2003 informed Anjuman-i-lslam that he has submitted his report to Respondent No.1 on or about 31st January, 2002 in two sets. Hereto annexed and marked as Exhibit 'J' and 'J-1' is a copy of the letter dated 22nd August 2003 along with its English translation, written by Respondent No.3 to Anjuman-i-lslam. The petitioners state that the Survey Commissioner's Report has not been made available to the public. The petitioners state that their Trusts have not received intimation of any kind from the Survey Commissioner about the purported survey and no opportunity has been given to the petitioner's trusts to put their say in the matter."

148. From the writ petition which we are treating as the lead case, our understanding of the complaint must be captured. The writ petitioners were very much aware that survey was ongoing. The notices were published in newspapers. Notices have been marked in the counter affidavit.

149. We find from the counter affidavit of respondent No. 4 in SLP (C)No. 31288 of 2011 that one of the petitioners wrote a letter to the Charity Commissioner, wherein, he spoke about the ongoing survey. There is also a reference to a letter written by the Commissioner appointed to carry out survey informing one of the writ petitioners that the surveyor has already given his report. It would therefore appear that, notices were published. Notices were made available for the perusal of this Court with copies given to the counsel for respondents. We have perused those notices. Those notices would appear to elicit response from institutions which were Wakfs. One way to look at the matter is with reference to the specific dispute in this case. When the writ petitioners were contending that they are not Wakfs but Public Trusts governed by the 1950 Act, they could say that they were not affected by the notices.

150. In fact, they would appear to have adopted that stand as they were in a manner of speaking aware of the exchanges between the Wakf Board and the Charity Commissioner. No doubt, they could strictly in law say that they have not been put on notice. They can indeed contend since Bombay was not under the purview of the erstwhile Wakf Act 1954, their institutions could not possibly have been under the glare of scrutiny under the said Act. Therefore, they are institutions which must be more specifically put on notice. All the more, when they have a claim that though they have been registered under the Public Trust Act, and they were not registered for the reason that they were Wakfs but they were registered because they were public Trusts and the distinction between the two is underlined.

151. We have already noticed that understandably the petitioners do hold out that there are Wakfs which have been registered as public Trusts. Their contention is that they were not among the Wakfs. The inquiry before the Survey Commissioner lasted for nearly five years. It is true that the Survey Commissioner who has apparently kept in mind the Wakf Act of 1954 which however, applied only to six districts comprised in the Aurangabad division and constituted in the Marathwada region and might have collected information from the Revenue Officers. This is significant because if the property is treated as Wakf by way of publication of a list under Section 5(2), the previous regime also contemplated the list forming the basis for making entries in the revenue records. Therefore, collecting the materials from the Revenue officers cannot be frowned

upon.

152. Now, we must, before we pronounce on the impact of the preliminary survey also deal with the aspect about list which has been brought out on 13.11.2003.

153. The list which is characterised as final list by the appellant Board has been published on 13.11.2003. It related to Bombay region and another. We would think that in keeping with the appellant's case that this was indeed final. This means that in keeping with the scheme of the Act, its correctness could be tested before the Tribunal under Section 6. The writ petitioners have chosen to approach the High Court with writ petitions. What happened thereafter cannot be overlooked. One writ petition led to the filing of a spate of writ petitions as we have noticed. What triggered the writ petitions, however, also needs to be noticed. The challenge was not laid as such to the list alone. The challenge was laid to the incorporation of the Board on 04.01.2002. Equally, the clarification issued by the Charity Commissioner whereby he sought to disown his functions in respect of public trusts because of the Act coming into force, was challenged. The constitution of the Wakf Board was also the subject matter of challenge.

154. After the filing of the writ petitions, on 11.08.2004 a meeting was held and we have already extracted the deliberations in paragraph 6 of this judgment.

155. Thereafter there is an exchange of communications dated 29.10.1994 and 16.02.2005. On 30.12.2004, another list of Wakfs was published.

The List dated 30.12.2004 was published in respect of areas other than Bombay and the other region which was the subject matter of list dated 13.11.2003.

156. We have already adverted to what happened on 09.03.2005 and 05.05.2005. We may recapitulate the substance of the matter. Complaints were raised against the lists which were published by the Survey Commissioner on 13.11.2003 and 30.12.2004. While the writ petitions regarding the same were pending, under the auspices of the Government, two ministers, Charity Commissioner, two members of the Wakf Board and others, certain arrangements came to be made. Since the chief complaint was with respect to the writ petitioners who took shelter on the score that they were Public Trusts registered under the 1950 Act and had contended that they were not Wakfs, it was decided that out of the earlier number of public trusts treated as Wakfs, Muslim public trusts which were registered under the Bombay Public Trust Act should be taken out of the category of Wakfs and they should continue to be treated as Public Trusts. However, it was made subject to availability of power under Section 40 of the Act. In other words, while the list was published under Section 5(2) of the Act on 13.11.2003 qua Bombay and another list was published on 30.12.2004 in respect of other regions it came to be interfered with and abridged by way of first corrigendum on 05.05.2005, acting upon the meetings which preceded it, of which noteworthy is the resolution dated 09.03.2005 by the Board. We would have thought the matter would end there. However, to make matters more convoluted, there were other developments and they are captured in subsequent proceedings which took place on 09.06.2006 and 31.07.2006 and finally, what the petitioners would claim to be an acceptance of their position by proceedings dated 19.05.2006 and what is more which

in turn was sought to be over-ridden by the notification which was issued on 25.04.2007. By the last-mentioned communication, the Board purported to restore the list dated 13.11.2003 still further by the 23.10.2008 notification the position obtaining as on 13.11.2003 and 30.12.2004 was sought to be restored.

157. Now the time is ripe for us to consider the matter with greater focus on the litigation and the impugned judgment. The High Court has purported to invoke its power under Article 226. The contention raised by the appellants is that under the Act there is a remedy provided namely, a right to a person aggrieved to approach the Tribunal. The Tribunal is well equipped to deal with vexed issues related to Wakf. It is a Tribunal specially constituted for the said purpose. No prejudice is caused by the mere publication of the list. Even dehors the publication of the list, the Wakfs are otherwise covered. As far as the interference under Article 226 is concerned, when a party has a remedy, in particular, we need to appropriately notice a very recent judgment of this Court reported in Radha Krishan Industries v. State of H.P.15.

Therein, this Court held inter alia as follows:

> "27. The principles of law which emerge are that:
>
> (2021) 6 SCC 771 27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where: (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be

interfered with."

158. We have noticed that it is not a case where the Court has found that there is a violation of the fundamental rights as such. In the matter of interfering with the survey, what essentially weighed with the Court is the report of the JPC. Apart from the same, we are not able to find anything else in the judgment as forming the basis for setting aside the list dated 13.11.2003. No doubt, the aspect relating to the constitution of the Board is another matter. It clearly is not a case where there is a complete absence of jurisdiction as it is not the case of the petitioners that the Survey Commissioner was not having authority to carry out the survey.

159. This is a case of some significance. Facts which have occurred subsequent to the issuance of the list on 13.11.2003 and 31.12.2004, take it out of the ordinary run of cases. We have noticed the fact for reasons which will remain a mystery to us, Government took it upon itself to convene meetings; a Committee was constituted described as a Bifurcation Committee. The Committee saw merit in the contention of the writ petitioners. The Charity Commissioner was roped in as a member. It is thereafter that strangely after the publication of the lists which are claimed to be final lists under Section 5(2) on 13.11.2003 and 30.12.2004 that the list dated 05.05.2005 is published and it is also described as another final list. All these lists have finally been sought to be extinguished by virtue of the notifications dated 25.04.2007 and 23.10.2008.

160. At this juncture, we must notice the following submissions which have been continually harped upon by the writ petitioners:

> "The Survey Commissioner submitted report to the Govt. to the Maharashtra and the Govt. forwarded the same to the Maharashtra State Board of Wakfs Aurangabad the Board in its meeting held on 27 September 2003 after deliberation resolved to publish list of Wakf under Section 5(2) of the Wakf Act 1995 and accordingly Govt. Gazette was published on 13 November 2003. Also Govt. of Maharashtra vide its letter no Wakf-10/2002/CR-1/L-3 dated 19 August 2003 forwarded a list of the Trust obtained from the Charity Commissioner Mumbai. These are also included as per Section 43 of the Wakf Act 1995 is published in the Govt. Gazette extra Ordinary in the State of Maharashtra."

161. This means that the writ petitioners' case is based on to a great extent the mechanical manner in which upon receipt of the list of public Trusts from the Charity Commissioner, the Wakf Board has notified them as Wakfs. Section 5(2) speaks about Wakf Board conducting an inquiry, or examining the manner. This certainly is not to be brushed aside as a matter of no moment. In fact, the whole idea of the Government placing the report before the Wakf Board as has been canvassed by the appellants themselves to contend that a Wakf Board is very much contemplated even prior to the Survey being held is that it must discharge its functions of examining the report under Section 5, before it is finally published.

162. It would appear to be a case where proceeding on the basis that all the Muslim public Trusts registered under the 1950 Act must be treated as Wakfs, the Wakf Board has proceeded to notify all

of them as Wakfs. It is this which formed the subject matter of deliberations which involved the Government, Wakf Board and Charity Commissioner. It is, accordingly, under the auspices of the Committee described as Bifurcation Committee that efforts were made to weed out those public Trusts which fell not within the four walls of a Wakf and considering them as secular trusts. To a great extent, their claims being genuine is borne out by a bare passing of Resolution on 09.03.2005. A fresh list was published on 05.05.2005.

163. Now, we may, before we finally pronounce, also notice the contention of the respondents-writ petitioners regarding the constitution of the Board. Section 14 provides for the constitution of the Board. We have already adverted to the provisions. It is not in dispute that when the Board was constituted on 04.01.2002, there were only four members. All the four members were nominated. Two out of the four members were apparently appointed in the category of Member of Parliament as, both belonged to the Rajya Sabha. No doubt, there is a case that out of them viz., Shabana Azmi, the theatre person also fitted the bill of a Shia member. We must not be oblivious to the fact that Section 14(5) contemplated (the provision stands deleted by Act 27 of 2013) that there must be one Shia member in a composite board. After 04.01.2002 and before 13.11.2002, there were in all seven members in the Board, including the four notified in first notification, as three more were appointed prior to 13.11.2003. One more person was appointed on 13.11.2003 which according to the respondents was an attempt at complying with Section 14(5) of the Act viz., for the first time, a Shia member made his appearance in the Board. This is an aspect which was canvassed as one of the grounds for not only challenging the constitution but to attack the publication of the list of 13.11.2003. The contention taken was and still persevered in before us is that the Board had decided to notify the list even prior to 13.11.2003 viz., on 27.09.2003. The Board itself therefore had become functus officio after 27.09.2003 as far as the list is concerned, prior to 13.11.2003 when the eighth member was appointed.

164. The Board must consist of a minimum of seven members. Section 14 contemplates a maximum of 13 members. Not only must the Board have seven members at the very minimum, they must be drawn from specific categories. Lastly, the complaint of the writ petitioners is that apart from their not being drawn from the categories which are specified, the constitution of the Board was in breach of the injunction, which has democratic underpinnings, viz., that the elected members under Section 14(1)(b) (i-iv) must exceed the nominated members. The exception to the same is located when power is exercised by the Board for reasons to be recorded in Section 14(3) of the Act.

165. The answer of the appellants apparently is that whatever may be the defect, they are protected by Section 22 of the Act whereunder, any vacancy or any defect in the appointment notwithstanding, the section proclaims that it will not lead to the invalidity of the acts of the Board.

166. We will still further proceed to deal with certain other aspects before we finally conclude. We must not omit to consider the impact of Section 40 of the Act. Section 40 corresponds to Section 27 of the Wakf Act 1954. Section 40(1) read with Section 40(2) provides for power with the Board to call for information and to find whether any Wakf property existed and whether it is a Sunni or a Shia Wakf. Section 40(2) provides that subject to the decision of the Tribunal to which the aggrieved party may resort to, the decision of the Board is final. Section 40(3) is even more relevant to the

dispute before this Court. No doubt, there must be an inquiry conducted under Section 40 as may be deemed fit by the Board, Section 40(3) must be carefully attended to for it gives very vast powers to the Board. It provides for power when the Board has 'reasons to believe'. The expression 'reasons to believe' has been the subject matter of a catena of decisions and it does not require reference to any authority to glean its connotation and we do not venture to do that.

167. We proceed therefore, to hold that when the Board has, in law, any reason therefore to believe that any property of any Trust registered under the Indian Trusts Act, 1882 or any society registered under the Societies Registration Act 1860 or the property of any Trust registered under any other law, is wakf property, the Board is given certain powers and responsibility. The Board is clothed with the power notwithstanding anything contained in any of those laws, to hold an inquiry in regard to the said property. The said property must be understood to be a property of any Trust which is registered in this case under the Bombay Public Trust Act because Bombay Pubic Trust Act would qualify as any other law. The holding of the inquiry is to be preceded by a notice of the proposed action to be given to the authority by whom the Trust or the Society has been registered. It is not to be confused with the Trust or the Trustees. It means that the Wakf Board must give notice of the proposed action to the Charity Commissioner as it is the authority under the 1950 Act, who registered or registers a public Trust under Section 18 of that Act.

168. Section 40 contemplates that the Board 'if it is satisfied' that the property is Wakf property, it is to call upon the Trust to either register 'such property' under the Act as Wakf property or to show cause, why such property should not be so registered. In the first limb of this clause, an impression may be gathered that the Trust or society can be straightway directed to register the property under the Act and there is no need to issue any notice to them. We would treat it as an omission of the statute which must be filled up by the justice of the common law viz., the principles of natural justice would indeed apply. This is besides issuing notice to the authority which has registered the trust. Section 40(3) contemplates that the decision of the Board shall be final subject to the decision to be rendered by the Tribunal. This section must be understood in the following context.

169. When parliament made the Act in 1995, it was aware that it would repeal the Wakf Act 1954. Section 40 of the Wakf Act is a provision which corresponds to Section 27 of the earlier Act. Parliament must be presumed to know the laws which are on the statute book. In fact, Parliament must be presumed to be aware of all necessary facts which would give life to a law and make it workable, fair and reasonable. Parliament must, therefore, be assumed to know that laws like the Bombay Public Trust Act were on the statute book. It must be aware that the definition of public Trust such as is contemplated under the Bombay Public Trust Act took within its sweep Wakfs. Section 28 of the Bombay Public Trust Act, in fact, comes to mind. Section 28 of the 1950 Act contemplated that institutions which were Wakfs before the enactment of the 1950 Act would be deemed to be public Trusts under Section 28 and would be treated as such under the said law. As far as other public Trusts which are registered under the 1950 Act, no doubt, in keeping with what we have already observed and bearing in mind the fact that there is a distinction between a Trust and a Wakf, it is a matter to be decided on the facts of each case as to whether what is ostensibly a Trust within the meaning of 1950 Act is in substance a Wakf.

170. We must clarify here that what Section 40(3), in fact, states is that if the Board has reason to believe that the property of any Trust is Wakf property, it can hold enquiry and find such property to be Wakf property.

171. In this regard, we may notice that Section 30 of the 1950 Act contemplates previous sanction for the sale of the property of the public Trust. We may record that we are a little baffled and mystified by this deeming provision. This we feel for the reason that in the case of a Wakf, property passes to the Almighty and to treat it as the property of the public Trust ill squares with the idea that the property also vests in the Almighty. But we need not explore that matter further as we are not called upon to do so. Suffice it to say that despite the fact that the 1950 Act has been enacted and Muslim pubic Trusts have been registered in what is described as Category B which is a category meant for Muslim Public Trusts, the property of the said Trust as is described in Section 40(3) can be found after due inquiry, to be the properties of a Wakf. We make this position clear.

172. As far as Section 43 is concerned, it mandates for deemed registration of Wakfs. Its meaning may be culled out. It mandates that notwithstanding anything contained in the chapter, where any wakf has been registered before the commencement of this Act, under any law for the time being in force, there is no need to register the same under the provisions of this Act. Such registration is to be deemed to have been made under the Act.

173. Therefore, Shri Anil Anturkar, learned counsel, did refer to the non-obstante clause in Section 43 being confined to the chapter in question viz., chapter V which provides for registration. In other words, it did not overflow its boundaries and impact the earlier provisions which were included in chapter II. The effect of Section 43 may be culled out as follows:

> 174. Since under Section 2 of the Act, the Act applies to every Wakf which is created, whether before or after the Act came into force, it means that whatever is Wakf as defined in the Act which is made at any point of time, be it before or after 01.01.1996 must be registered under the Act [See Section 36]. Registration is intended to bring Wakfs under the close scrutiny of the competent authority, be it the Board or the executive officers.

The whole history of the legislation of Wakfs reflects the perception of the legislature that property which is dedicated to the Almighty for charitable, religious and pious purposes should be protected. The protection must be extended against the Mutawallis and others who may deal with the property and thereby, completely destroy the very original purpose of the founder. What would be used for public welfare, be it even of sections of a community for certain cases, would all be covered thereunder as provided in the Act.

175. It is with this perception that we must view Section 43 and the High Court in the impugned judgment, also has referred to Section 43 in the course of the argument against the incorporation of the Board to hold that it merely provides for registration. We would think that the importance of it lies in the fact that the registration has an important role to play towards control and regulation of the Wakf by the competent bodies.

176. Section 79 of the 1950 Act provides as follows:

> "79. Decision of property as public trust property: (1) Any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by theDeputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act.(2) The decision of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal, as the case may be, shall, unless set aside by the decision of the Court on application or of the High Court in appeal be final and conclusive." It provides for power with the deputy or the assistant Charity Commissioner to decide upon the issue as to whether a Trust exists and whether such Trust is a public Trust or any particular property is a property of such trust. With the advent of the Wakf Act, 1995, the powers under Section 40 of the Act must be read as conferring authority with the Wakf Board which must certainly prevail in regard to the matters which are provided for therein.

177. This brings us to other aspect which has been canvassed before us. Section 112 of the Act provides for repeal. There is not much controversy before us that Section 112 by virtue of the repeal it provides for would effect a repeal of the provisions of the 1950 Act insofar as it relates to public Trusts which are Wakfs. The Charity Commissioner, in effect, when it issued clarification which was challenged before the High Court also initially only stated that according to Section 43 of the Act Wakfs which are registered as Public Trusts should not be tried under the 1950 Act. As far as this understanding of the Charity Commissioner goes subject to what we will presently indicate, we would take the view that there is a distinction between a Trust and a Wakf. We have already highlighted the differences. It is a matter to be tested on a conspectus of various features and after complying with the law as to whether what is registered as a public Trust is, in fact, a Wakf or not. No doubt, all public Trusts which have been registered by way of a deeming provision under Section 28 of the 1950 Act will necessarily have to be treated as Wakfs. This is on the principle that once a Wakf is created unless it be a case where the title is extinguished by way of exercise of power of eminent domain by the State, the title of the Almighty though by implication cannot cease. We can state the position otherwise to be that once a Wakf, always a Wakf.

178. We are not for a moment commenting on the aspect about acquisition of title by adverse possession. Nor are we going into the question which can be raised as a result of Section 107 of the Act by which Limitation Act has not been made applicable in respect of a suit for recovery of possession but otherwise, we must hold that sans such features, the Wakf would continue and it would remain perpetual, inalienable and irrevocable. Therefore, what was once a Wakf before the 1950 Act, if it is registered under the 1950 Act, with the commencement of the Act, such a public Trust would necessarily come under the ambit of the Wakf Act, 1995. It is pointed out by Shri Anil Anturkar, learned senior counsel, that such Wakfs would come within Section 43 and be deemed to be registered. We, however, make it clear that the passing of the Act will not affect the powers of the authorities in respect of public Trusts registered under it which are not Wakfs.

179. Now, we may resume our discussion of the facts in greater focus. We notice that the High Court has interfered under Article 226. In keeping with what is laid down in the judgment we have

referred to, perhaps it could be said that the High Court would have been better advised to relegate the parties to the Tribunal. There are however, certain aspects to it. Firstly, we may notice that this is not a case where the challenge was laid only to the lists or the survey. Rather we have noticed that the challenge was laid to the very incorporation of the Board and its constitution. A challenge was also laid to the proceedings of the Charity Commissioner. These decisions which were impugned could not have been adjudicated by the Tribunal under Section 6 of the Act. The second aspect which we cannot ignore is that as held by this Court, Article 226 confers a jurisdiction or a power on the High Courts. It is a power under the Constitution. While it may be true that a statute may provide for an alternate forum to which the High Court may relegate the party in an appropriate case, the existence of an alternate remedy by itself cannot exclude the jurisdiction of the High Court under the Constitution. No doubt, it has been a self-imposed restraint which is fairly faithfully adhered to by the High Courts and it is largely a matter of discretion. We find that there are dicta which has held that on the basis of an alternate remedy, a writ petition is not maintainable. We would understand that the position to be that a constitutional remedy cannot be barred or excluded as when the High Court exercises its power under Article 226, it cannot be a case of lack of inherent jurisdiction. No doubt, when High Courts stray outside the limits with reference to certain principles as have been laid down in the decision which we have referred to, it can be corrected. Another factor which is to be borne in mind is that in a case where the High Court has entertained a matter and the matter comes for hearing in this Court in the jurisdiction under Article 136, our woes are compounded by the long passage of time as is demonstrated by the facts of this case. The judgment of the High Court was rendered in the year 2011. This Court is hearing the matter after more than a decade. It is nearly two decades after the filing of the writ petitions that this Court is hearing the matter.

180. We cannot be totally oblivious to the ground realities and we must also state our opinion on the legal position.

We have understood the position to be that once a list is published with the blessings of the Board, having considered the report in the manner to be done by examining 'the report', interference with the same is only premised on a decision of the Tribunal in a properly constituted proceeding within the time as provided in Section 6. In this case if we are otherwise inclined to interfere with the judgment, this would mean that we would have to restore the lists dated 13.11.2003 and 30.12.2004. The position on the ground, however, has been already stated viz., the filing of the writ petitions, constitution of a Bifurcation Committee, various proceedings, the exclusion of several trusts which are described as public Trusts from the original lists and their restoration again. Yet another development which we cannot ignore is that the Government itself took it upon itself apparently on the basis of the report of the JPC to order resurvey on 20.10.2010. An interim order was passed by this Court in 2012.

181. However, Shri Rahul Chitnis, learned counsel for the State, would point out that the proceedings dated 20.10.2010 have been subsequently cancelled by notification dated 06.12.2016. By the latter proceedings, a survey within the meaning of section 4(6) is taking place.

182. On the one hand, we have noticed the case of the writ petitioners to be that they were not given notice. We have also noticed their case based on the illegality in the constitution of the Committee. Several defects were pointed out by the learned senior counsel as noted in the survey. They include Shia Wakf being treated as Sunni and Bohara trusts being treated as Sunni Wakf. It is complained that income of the properties has not been disclosed contrary to Section 4.

183. We articulate the choices which are available before us. It is the appellant's case that Wakf properties need to be rigorously and lawfully regulated. However, there are public Trusts registered under the 1950 Act which are in fact, Wakf which fall under Section 28 of the 1950 Act. They must undoubtedly come within the regime of the Central Act viz., the Wakf Act, 1995. The converse also must be stated and highlighted viz.; a Muslim Public Trust registered under the 1950 Act need not be a Wakf under the Act. It would be certainly contrary to the unbroken line of judgments of this Court which contemplate such a division between two categories to paint all Muslim public Trusts with the same brush and glean them as Wakfs. We have elucidated the position however with reference to the impact of the amendment to Section 3(a) of the Wakf Act, 1954.

184. At this juncture we must notice an interim order which has been passed by this Court reported in 2012 (6) SCC 328. Much reliance was sought by the learned senior counsel for the writ petition on the said order on the basis that it acknowledges the position of law flowing from the principle in Nawab Zain Yar Jung (Since Deceased) and Others v. Director of Endowments and Another (supra) and that it otherwise articulates the law correctly. On the other hand, the appellants would point out that it is only an interim order and cannot detain this Court in analyzing the issues.

185. On the one hand, the case of the appellants is that the respondents must be relegated to approach the Tribunal against their inclusion in the list by the proceedings dated 13.11.2003 or 30.12.2004 whereas the case of the respondents is that if this Court interferes, the Court may treat the proceedings dated 05.05.2005 as correct and not interfere otherwise with the judgment of the High Court.

186. Mr. Muchchwala, learned Senior Counsel, contended that the power under Section 97 is available to give binding directions to the Board even as far as proceedings under Section 40 are concerned. Section 97 contemplates power with the Government to issue directions to the Board in the matter of discharge of its functions. Section 32 deals with powers and functions of the Board. It may be true that when the Board discharges its functions under Section 32 it may fall under the shadow of section 97. The Board may be bound but as far as Section 40 is concerned, it is meant to be a quasi-judicial proceeding as it is meant to be a proceeding where an inquiry is to be conducted by the Board to find out whether the property of the Trust is to be treated as the property of the Wakfs. It contemplates issuance of notice, affording an opportunity of natural justice otherwise as indicated by us. To hold that the Board would be bound by any direction in either manner, either in favour of the property being treated as Wakf or the other way around or otherwise may not be a correct understanding of the true boundaries of Section

40.

187. After considering the facts as aforesaid, we would think that in the situation obtaining, particularly, after such a long passage of time, we cannot allow the impugned judgment of the High Court to be sustained as it is.

188. As far as the incorporation of the Board is concerned, we have found that it is not flawed.

Therefore, the judgment of the High Court to the extent that it sets aside the notification dated 04.01.2002, is found to be unsustainable.

The High Court has through the impugned judgments, set aside the lists dated 13.11.2003 and 30.12.2004.

189. We cannot totally be unmindful of the fact that there were seven members in the Board and also Section 22 appears to work as a shield against invalidation.

190. In view of the developments post the publication of the list dated 13.11.2003 and 30.12.2004 in the form of the formation of the Bifurcation Committee and various proceedings, we cannot accept the request of the respondents that the matter must again go back to the Survey Commissioner who must be asked to look into the proceedings of the Bifurcation Committee.

191. We must observe that the constitution of the Bifurcation Committee and various proceedings thereafter, would appear to be not proceedings which are strictly within the ambit of the Act as such. There cannot also be plea of estoppel or equity against Statute.

192. But, at the same time, it would appear that both the Charity Commissioner and the Wakf Board were indeed proceeding under the misapprehension as far as the true purport of a Muslim public Trust registered under the 1950 Act is concerned.

193. In such circumstances, we dispose of the appeals as follows:

> The appeals are partly allowed.
>
> The judgment of the High Court setting aside the notification dated 04.01.2002, is set aside.
>
> As far as lists dated 13.11.2003 and 30.12.2004 are concerned, we uphold the said lists subject to the following directions:
>
> As far as the writ petitioners in the High Court/respondents before us which have been registered as public Trusts under the 1950 Act and whose cases have been found favour with by the Bifurcation Committee, the lists dated 13.11.2003 and 30.12.2004 will stand set aside. However, we direct that in regard to them, Board will take up their cases as if the matter is being dealt with at the stage when it was given the report under Section 5(1) and examine their case after affording them an opportunity.

The Board will afford them an opportunity and take a decision and if they are found to be Wakfs, it will be open to the Board to cause a list of Wakfs published/ regard them also.

Still further, this is made conditional upon the respondents-writ petitioners as aforesaid approaching the Wakf Board within the period of eight weeks from today.

Such of those who do not approach within the period of eight weeks will forfeit their right and we make it clear that their inclusion in the list dated 13.11.2003 or 30.12.2004 shall stand restored and it will be treated as final.

Still further, we direct that in regard to such of those who approach the Board within the period as aforesaid, the Board will conclude the proceedings and take a decision expeditiously within a period of six months from the date on which they apply.

We further make it clear that this order will not enure to the benefit of such of those falling within the category against whom the Tribunal has already adjudicated and found them to be Wakfs. Needless to say such of those institutions will be free to work out their own remedies.

Interim order dated 11.05.2012 operating since last 10 years will operate till the time decision is taken by the Board.

We make it clear that the judgment will not in any manner dilute the power which is available to the Wakf Board under Section 40 or for that matter under any other provision of the Act.

Parties will bear their respective costs.

....., J.

[K.M. JOSEPH] ....., J.

[HRISHIKESH ROY] New Delhi;

October 20, 2022.