

## **Hammad Ahmed vs Abdul Majeed on 3 April, 2019**

**Equivalent citations: AIRONLINE 2019 SC 650, 2019 (14) SCC 1, 2019 (201) AIC (SOC) 26 (SC), (2019) 2 CURCC 124, (2019) 2 RECCIVR 723, (2019) 2 WLC(SC)CVL 1, (2019) 3 ALL WC 2425, (2019) 3 CAL HN 266, (2019) 3 CIVLJ 719, (2019) 4 MAD LJ 720, (2019) 5 SCALE 698**

**Author: Hemant Gupta**

**Bench: Hemant Gupta, Uday Umesh Lalit**

REPORTABLE

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.3382-3383 OF 2019  
(Arising out of S.L.P (C) Nos. 32285-32286 of 2018)

HAMMAD AHMED

.....APPELLANT

Versus

ABDUL MAJEED & ORS.

.....RESPONDENTS

JUDGMENT

Hemant Gupta, J.

Leave granted.

2. The challenge in the present appeals is to an order passed by the Division Bench of the High Court of Delhi on 27.11.2018 whereby an application filed by the Plaintiff under Order XXXIX Rules 1 and 2 of Code of Civil Procedure, 19081 was dismissed. The Division Bench has set aside an order passed by the learned Single Bench on 25.10.2017.

3. The dispute between the parties at this stage is as to who should discharge the duties of Chief Mutawalli of Hamdard Laboratories (India)<sup>2</sup> earlier known as Hamdard Dawakhana, after the 1

Code 2 Hamdard death of previous undisputed Chief Mutawalli - Abdul Mueed on 19.03.2015.

4. The Appellant filed Civil Suit No. 211 of 2017 on 08.05.2017, whereas Respondent No. 2 filed Civil Suit No. 162 of 2017 on 29.03.2017. The suit of the Appellant is for declaration, prohibitory injunction and for other reliefs. The Appellant asserted that after death of Abdul Mueed, Chief Mutawalli on 19.03.2015, the Appellant being living senior most male direct successor of Wakif Mutawalli took over the Office of Chief Mutawalli on 20.03.2015 when an office order was issued to this effect by him. The Respondent Nos. 1 and 2 are the defendants in the suit filed by the Appellant. Such Respondents are sons of former Chief Mutawalli late Shri Abdul Mueed, elder brother of the Appellant. The Respondent No. 1 – Abdul Majeed also issued an office order on 23.03.2015, appointing himself as Chief Mutawalli. The Respondent No. 1 issued letters on the basis of such declaration on 23.03.2015 to various authorities including Banks. It is in this background; the Appellant has sought declaration that the Respondent No. 1 is no longer Mutawalli under the Wakf Deed 3 dated 28.08.1948 as amended from time to time on account of breach of his obligations under the said Deed and to issue a decree in nature of permanent injunction restraining Respondent No.1 to continue as Mutawalli of Hamdard. The Appellant also claimed that all decisions, orders issued by Respondent Nos. 1 and 2 jointly or severally after 20.03.2015 are null and void and of no effect. 3 Deed

5. The Appellant filed an application under Order XXXIX Rules 1 and 2 read with Section 151 of the Code along with the suit claiming the following interim directions:

“a) To release the salaries and other dues of all the Mutawallis of HLI (including Defendant No. 4) from September, 2016 till date.

b) Direct all the banks as stated in para no. 2 of the application, to allow the plaintiff to operate accounts maintained by HLI as sole signatory in his capacity as Chief Mutawalli.

c) An order directing the defendants no. 1 and 2 to handover the password of the domain name [www.hamdard.com](http://www.hamdard.com), [www.hamdard.in](http://www.hamdard.in) and [www.hamdardindia.com](http://www.hamdardindia.com) and its e-mail server password to the plaintiff.

d) Direct defendants no. 1 and 2 to disclose and handover the ERP (Enterprise Resource Planning) Admin Control Password.

e) Pass any other or further relief(s) which this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.”

6. On the other hand, Asad Mueed son of the previous Chief Mutawalli Abdul Mueed, sought removal of Appellant- Hammad Ahmed and his son Hamed Ahmed from the position of Mutawallis of Hamdard in the suit (Civil Suit No.162/2017) filed by him. The Defendant No. 4 in the said suit is Abdul Majeed, respondent No.1 herein, the elder son of the last undisputed Chief Mutawalli Abdul Mueed who died on 19.03.2015. The removal of the Appellant and Respondent No. 3 was sought

inter alia on the ground of malfeasance and misfeasance of the affairs of Hamdard.

7. The learned Single Judge decided the Interlocutory Applications filed by the parties in their respective suits on 25.10.2017, whereby IA No. 4331 of 2017 filed by Respondent No. 2 in suit filed by him was dismissed, whereas, IA No. 5860 of 2017 filed by the Appellant was allowed inter-alia observing as under: -

“28. At the time of disposal of interim applications, only prima facie view of the matter is to be taken. On perusal of the various clauses of the Trust Deed, it can be inferred, at this stage, that the senior-most male descendant in the line of succession (of Wakif Mutawalli) is prima facie entitled to be appointed as Chief Mutawalli. It is not in dispute that presently the second defendant is the senior most male descendant in the line of succession of Wakif Mutawalli. It is fairly admitted by the defendants that the second defendant would remain Chief Mutawalli during his life time and after that, it can devolve upon the plaintiff in terms of the clauses of the Trust Deed. Clause 3 is very specific and categorical in this regard. It cannot be interpreted that the male descendant in the line of succession would be that of the Chief Mutawalli to be appointed as Chief Mutawalli. This interpretation will lead to the conclusion that the office of Chief Mutawalli would always remain in the family of the plaintiff to the exclusion of the second defendant and his family members for all the time to come.

29. I find no substance in the arguments that the succession to the office of Chief Mutawalli must devolve by the rule of lineal primogeniture....” xxx xxx xxx “47. In view of observations above, the defendants No. 1 & 2 are directed to hand over the password of the domain name www.hamdard.com, www.hamdard.in and www.hamdardindia.com and its e-mail server password to the plaintiff. They shall also disclose and handover the ERP (Enterprise Resource Planning) Admin Control Password.”

8. The learned Single Bench also did not find any merit in the argument that the Appellant has incurred disability on account of pending criminal cases against him in terms of Clause 6 of the 1973 Wakf Deed<sup>4</sup>, as amended on 26.6.1973. The learned Single Bench held that mere pendency of criminal proceedings cannot debar the Appellant to be appointed as Chief Mutawalli as the disqualification as per Clause 6 (2) of the Deed is conviction of an offence involving moral turpitude alone for disqualification. The relevant clause reads as under:-

“In spite of the fact that a person has a right to be appointed as a Mutawalli under Clause Four herein, the Majlis-e-Ayan shall have the authority by a Special Resolution, to refuse to appoint such person as a Mutawalli or in the event of such a person having already been appointed as a Mutawalli, to remove or suspend him from office, if:

1. He is a minor or insane or by reason of lack of education, experience or old age and weak health is unable satisfactorily to perform his duties as a Mutawalli;
2. He is dishonest, addicted to alcohol, gambling or has been convicted of some crime involving moral turpitude;....”

9. Two First Appeals were preferred by the present Respondent Nos. 1 and 2. The learned Division Bench set aside the order passed by the learned Single Judge prima-facie finding that though the rule of primogeniture is not applicable as a rule of succession amongst Muslims but that is not a ground to overrule its application if provided in the testamentary or other document. The Division Bench relied 4 1973 Deed upon para 3 of the 1973 Deed that after the death of First Chief Mutawalli, the senior most male descendant in his line is to be appointed as Chief Mutawalli. The Bench recorded the following findings: -

“28. This court is of opinion that Faqraddin (supra) is an authority that under Muslim personal law, lineal primogeniture does not apply. However, it nowhere states that lineal male primogeniture is prohibited-either in its application in a testamentary document, or in a trust. In fact in Faqraddin (supra), the spiritual nature of the office and the acceptance of the holder, by the congregation were proved; they were not in controversy. For these reasons, that primogeniture is not applicable as a rule of succession amongst Muslims, is not a ground to overrule its application if a given deed (testamentary or otherwise) so directs. Likewise, in Aruputham (supra), in fact the court upheld the applicability of the relatively simpler rule of succession through lineal male primogeniture, rather than through a more complicated generation by generation process of discerning who amongst a collegial body, was entitled to “ambulatory” lineal primogeniture succession.

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30. A complete reading of the provision (relating to succession) therefore, leads one to conclude that after the death of the first Chief Mutawalli, the senior most male in his line- and one who is also a Mutawalli, is entitled to succeed to the office. The last condition is important, because one might be the senior most male member; yet existing membership as a Mutawalli ensures that the wakf is spared the risk of experimentation and vagaries of administration by one alien to its governance. The last internal clue, which has assumed some importance in this case, is that during the tenure of a Chief Mutawalli (or any Chief Mutawalli) he is the President of the Majlis-e-Ayan “the descendant second in seniority to the Chief Mutawalli will be its Nazir/Secretary”.

This condition is to be read along with the other two preconditions, because it occurs as part of the principle governing succession. The designation of a Nazir or Secretary, has to be of the “descendant second in seniority to the Chief Mutawalli”. In other words, the successor to the office is also revealed during the lifetime of the holder, Chief Mutawalli, in the persona of the Nazir, who is

second in seniority to the Chief Mutawalli.”

10. Some facts leading to the present appeals are - Hakim Hafiz Abdul Majid started the business of Hamdard as a sole proprietor in the year 1906. He died on 22.06.1922 leaving behind his wife Mst. Rabea Begum and two sons, Haji Hakim Abdul Hamid and Hakim Mohd. Sayeed. These three executed a Deed on 28.08.1948 in order to manage the affairs of Hamdard. The Deed inter alia when translated in English recites as under:

“1. There shall be at least one or maximum two Trustees (Mutwalli) and if there is one Trustee then he will be given fees of Rs.1 anna from special profit and if there are two Trustees then both will get from the income Rs. 1.5 anna as commission and this right will be beside the share of the family income which according to the terms of the Trust Deed will be obtained by the Trustee or Trustees from his forefather, but till the time owner no. 1 and 2 will remain as the Trustee of the Trust they will not be given any right under this section.

2. Till the time we owners from this Trust, ownership No. 1 Haji Abdul Hameed and owner No. 2 Hakeem Hafiz Mohd. Sayeed is alive then we both will be Trustee of this Trust and all the rights regarding the management of the Trust will remain jointly and severally with both of us and this right will be received by both of us managers jointly.

That we can appoint someone else as Trustee during our life time or we can include any other person to share the benefit of the Trust with compensation or without compensation and for making arrangement after our death we can appoint any person as a Trustee against the terms of the Trust Deed and we both the Trustees will have rights during our life time jointly and in the case that only one Trustee is alive then he will have this right alone to decide regarding that the above mentioned condition and the arrangement or way of distribution of the income and right of inheritance in the above Trust Deed in proper manner or to increase or decrees it. The Trustee or Trustees we will appoint under this section for doing our work through written agreement, after us only that persons can be appointed as Trustee. Right to remove the trustee which will be nominated and appointed by us will be there to us jointly or separately.

3. In case of death of anyone of the Trustee then the deceased Trustee will be replaced by his eldest son and in case of death of the other trustee he will be replaced by his eldest son and if out of us the trustees anyone son is minor or he is not capable to fulfil the duties of the trustees then till that son becomes major and capable to fulfil the duties of trustees the sol trustee will manage all the works of the Trust alone. After we both trustees till the time whenever there will be two trustees of the trust, their right will be distributed by resolution by Majlis-e-Ayan, but the Majlis-e- Ayan will not have right to decide the rights or increase or decrease the right or to distribute rights of both the Trustees together or separately without any special reason or justification because of which both the trustees or anyone of them cannot perform his duties with full independence or properly.

4. After us, and after the trustee or trustees who will be appointed as Trustees, the trustee of this Trust will be appointed from our sons who will be the eldest in the age and after that from son of our sons the eldest son will be appointed as Trustee and in this manner the appointment of the trustee of the trust will continue from our sons generation by generation and if no son is there from our children who is capable of managing and taking care of this Trust then out of the sons of our daughter, one will be appointed as the Trustee, and if the sons of our daughter are not capable to manage Trust, then from our children any such lady will be appointed as Trustee who has capability of trustee. God forbids out of our children any male or female who is capable to be appointed as trustee is not there then the Majlis-e- Ayan will have a right through the resolution they can appoint any non-family person as trustee who is capable to manage and increase the trust.”

11. Mst. Rabea Begum died on 5.10.1948, whereas, the other Trustee Hakim Mohd. Sayeed migrated to Pakistan in the year 1948. His interest was declared evacuee property on 06.08.1948. Subsequently, his share was purchased by Hamdard for the purpose of Wakf Quami, that is for charity on 22.06.1950. Thus, Haji Hakim Abdul Hamid became the sole surviving Wakif Mutawalli in terms of the 1948 Deed.

12. The above said Wakif Mutawalli in the year 1964 appointed his two sons Abdul Mueed (born in the year 1935) and Hammad Ahmed (born in 1945) as Mutawallis. The Wakif Mutawalli has issued various declarations from time to time in respect of working of Hamdard. On the basis of all such declarations, a comprehensive declaration was issued on 02.07.1973 amending the 1948 Deed substantially. The amended Deed was countersigned by the Wakif Mutawalli on 26.6.1973. It may be stated herein that though the declaration and the countersignatures are of different dates but both documents are contemporaneous and almost containing similar recitals.

13. The Appellant relies upon the declarations in the nature of amendments in the 1948 Deed carried on 02.07.1973 as to who should manage the affairs of the Wakf after the Wakif Mutawalli. The relevant extracts from the declaration issued by the Wakif Mutawalli read as under:

“2. In exercise of the rights, powers and duties vested in me by the Wakf-Deed I had made some declarations for efficient and better management of the Wakf and for clarifications and interpretations and removal of doubts and difficulties and the said declarations have been enumerated as various appendices to the Wakf- Deed and now they stand merged and incorporated in the text of the relevant provisions and appropriate contexts for the sake of convenience. These declarations were made to meet the exigencies of time and situation and within the framework of the Wakf for the benefit of charity and advancement of charitable objects and compliance of the basic provisions of the Wakf.

3. In view of the vast expansion in the activities of the charity for which the Wakifs dedicated, complex problems of modern management and for more efficient administration, control and fulfilment of the object of charity and to meet the requirements of the changing tax and other laws it has become necessary to make a further declaration for clarification, explanation, elucidation, alteration, removal of

doubts and difficulties, if any, and for further exposition of the provisions and meeting the requirements of changing laws and safeguarding the objects of charity and the business of the Wakf which is for charity and for advancement of the charitable objects.

Accordingly, I, in my capacity as sole Wakif- Mutawalli, do hereby declare on solemn affirmation regarding matters referred to above, effective from 01.01.1973:” xxx xxx xxx “Clause No. 1: This clause is substituted by the following text;

“For the management of the Wakf there shall be at least one and at the most five Mutawallis including the Wakif-Mutawalli and the Chief Mutawalli.” “The senior most among the male descendants of the Wakif-Mutawalli who shall be holding an office of Mutawalli will be the Chief Mutawalli. After the Wakif-Mutawalli ceases to be Mutawalli, every Chief Mutawalli shall have the same rights and duties of administration of the Wakf and power of making regulations therefore as are provided in this Deed for the Wakif-Mutawalli and allocate rights and duties among other Mutawallis. With the exception of Wakif-Mutawalli, the remuneration of the Chief Mutawalli and Mutawallis for services rendered to the Wakf shall be such as may be decided upon by the Wakif-Mutawalli and after he ceases to be Mutawalli, by the Chief Mutawalli in case of Mutawallis, and the Majlis-e-Ayan in case of Chief Mutawallis. These remunerations will be decided upon after taking into account the nature of service rendered by each one of them and the extent of the activities of the Wakf.” “The above remuneration of a Mutawalli will be in addition to the share of Khandani Income which may be due to him under this Wakf-Deed, except in the case of Wakif-Mutawalli Hakim Abdul Hameed. During the life time of Wakif-Mutawalli Hakim Abdul Hameed there will be no Khandani Income. He will be paid for services rendered Rs. 72,000/- a year or 7/64 whichever is less.” xxx xxx xxx Clause 3: This clause is substituted by the following text:

“The First Chief Mutawalli will be appointed by Wakif-Mutawalli. And thereafter the senior most male descendant in line of succession (of Wakif- Mutawalli) and then holding an office of Mutawalli will be the Chief Mutawalli. After the Wakif-Mutawalli, the division of rights and duties among the Mutawallis shall be made by the Chief Mutawalli for efficient working of the Wakf and the Majlis-e-Ayan shall have no right to disturb this division or render it difficult for the Chief Mutawalli or any of the Mutawallis to perform his or their duties to manage the Wakf satisfactorily and with proper freedom of action.” “This Chief Mutawalli will be the Sadar (President) of the Majlis-e-Ayan and the descendant second in seniority to the Chief Mutawalli will be its Nazir (Secretary).” xxx xxx xxx Clause 42 : This Clause is substituted by the following text:

“42.: During the life time of Wakif Mutawallis there will be no Khandani Income. He will be paid for the services rendered Rs. 72,000/- a year or 7/64 of the net divisible profit whichever is less. The Khandani Income will arise and become payable only after the death of Wakif-Mutawalli as per Shariat law.” “42-A.: Mr. Abdul Mueed and Mr. Hammad Ahmad, sons of Wakif-Mutawalli Hakim Abdul Hameed, are nominated as his successors under the terms of this Deed. They are the two other

Mutawallis of this Wakf appointed by the Wakif-Mutawalli. They will act as Chief Mutawallis and Mutawallis respectively. They will be paid salaries for services rendered to the Wakf as fixed by the Wakif- Mutawalli. This shall be charged to the profit and loss account of the Wakf. The salaries of other Mutawallis will be fixed by Wakif-Mutawalli/Chief Mutawalli. The salary of subsequent Chief Mutawalli will be fixed by Majlish-e-Ayan.””

14. The 1948 Deed as countersigned on 26.06.1973 after incorporation of the amendments by Wakif Mutawalli has been appended as Annexure P.1. The relevant extracts from such amended document are as under:

“1. For the management of the Wakf there shall be at least one and at the most five Mutawallis including the Wakif Mutawalli and the Chief Mutawallis.

The senior most among the male descendants of the Wakif Mutawalli who shall be holding an office of the Mutawalli will be the Chief Mutawalli. After the Wakif Mutawalli ceases to be Mutawalli, every Chief Mutawalli shall have the same rights and duties of administration of the Wakf and power of making regulations therefor as are provided in this Deed for the Wakif Mutawalli and allocate rights and duties among other Mutawallis. With the exception of Wakif Mutawalli, the remuneration of the Chief Mutawalli and Mutawallis for services rendered to the Wakf shall be such as may be decided upon by the Wakif Mutawalli and after he ceases to be Mutawalli, by the Chief Mutawalli in case of Mutawallis, and by Majlis-e-Ayan in case of Chief Mutawalli. These remunerations will be decided upon after taking into account the nature of service rendered by each one of them and the extent of the activities of the Wakf.

The above remuneration of a Mutawalli will be in addition to the share of Khandani Income which may be due to him under this Wakf-Deed except in the case of Wakif Mutawalli Hakim Abdul Hameed. During the life time of Wakif Mutawalli Hakim Abdul Hameed there will be no Khandani Income. He will be paid for services rendered Rs. 72,000/- a year or 7/64 whichever is less.

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3. The First Chief Mutawalli will be appointed by Wakif Mutawalli thereafter the senior most male descendant in line of succession (of Wakif Mutawalli) and then holding an office of Mutawalli will be the Chief Mutawalli. After the Wakif-

Mutawalli, the division of rights and duties among with Mutawallis shall be made by the Chief Mutawalli for efficient working of the Wakf and the Majlis-e-Ayan shall have no right to disturb this division or render it difficult for the Chief Mutawalli or any of the Mutawallis to perform his or their duties to manage the Wakf satisfactorily and with proper freedom of action.



The Chief Mutwalli will be the Sadar (President) of the Majlis-e-Ayan and the descendant second in seniority to the Chief Mutawalli will be its Nazir (Secretary).

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6. In spite of the fact that a person has a right to be appointed as a Mutwalli under Clause Four herein, the Majlis-e-Ayan shall have the authority by a Special Resolution, to refuse to appoint such person as a Mutawalli or in the event of such a person having already been appointed as a Mutawalli, to remove or suspend him from office, if:

(1) He is a minor or insane or by reason of lack of education, experience or old age and weak health is unable satisfactorily to perform his duties as a Mutawalli;

(2) He is dishonest, addicted to alcohol, gambling or has been convicted of some crime involving moral turpitude;....

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8. In the event of Wakif Mutawalli ceasing to be the Mutawalli of this Wakf, the general superintendence of the Wakf shall vest, subject to the terms of this Deed, in a Majlis called Majlis-e-

Ayan. However, the Majlis-e-Ayan shall not interfere in the day to day administration of the Wakf. The rights and powers that have been reserved for exercise by the Majlis-e-Ayan shall be exercised by the said Majlis-e-Ayan only after the death of Wakif Mutawalli or when he ceases to be Mutawalli. This Majlis shall have a maximum of nine members nominated by Wakif Mutawalli including all the Mutawallis in office. The future vacancies will also be filled in by nomination by Wakif-Mutawalli in his life time and after his death by the members of the Majlis-e-Ayan from out of his heirs, legal representatives and all persons male or female who are entitled to a share in Khandani Income either in their own right or as rightful guardian of the minor beneficiaries. The Wakif Mutawalli after his ceasing to be Mutawalli and all the Mutwallis in office shall be ex-officio members of the Majlis-e-Ayan. They shall have all the rights and duties of the members of Majlis-e- Ayan including the right to vote.

9. An ordinary meeting of the Majlis-e-Ayan shall, subject to the rules and bye-laws framed by it, be held at least twice a year. (Whenever) Whatever resolutions are passed by a majority of votes of members present at such meetings, the same shall be called 'ORDINARY RESOLUTIONS'. The Chairman of the Meeting shall have the casting vote.

xxx xxx xxx 42-A. Mr. Abdul Mueed and Mr. Hammad Ahmed, sons of Wakif Mutawalli Hakim Abdul Hameed, are nominated as his successors under the terms of this Deed. They are the two other Mutawallis of this Wakf appointed by the Wakif Mutawalli. They will act as Chief Mutawalli and Mutawalli respectively. They will be paid salaries for services rendered to the Wakf as fixed by the Wakif Mutawalli. This shall be charged to the profit and loss account of the Wakf. The salaries of

other Mutawallis will be fixed by Wakif Mutawalli/Chief Mutawalli. The salary of subsequent Chief Mutawalli will be fixed by Majlis-e-Ayan.”

15. The Wakif Mutawalli appointed his grandsons Abdul Majeed (eldest son of Abdul Mueed born on 23.12.1969) and Hamed Ahmed (eldest son of Hammad Ahmed born on 25.3.1977) as Mutawallis on 30.05.1995 as fourth and fifth Mutawalli. Haji Hakim Abdul Hamid, the Wakif Mutawalli died on 22.07.1999 that is after the amendments in the deed of Wakf.

16. On 04.07.1995 the Wakif Mutawalli constituted Board of Mutawallis. Abdul Mueed was declared to be the Vice Chairman and his son Abdul Majeed as Secretary of the Board of Mutawallis. Such declaration reads as under:

“HAMDARD Dated 04/07/1995 CONSTITUTION OF THE BOARD OF MUTAWALLIS Presently, Wakif Mutawali, Chief Mutawali and Mutawali are consulting and discussing the affairs of the Hamdard Dawakhana (Wakf) both formerly and informally. Now two more Mutawallis, viz. Mr. Abdul Majeed & Mr. Hamid Ahmed eldest sons of Mr. Abdul Mueed and Mr. Hammad Ahmed respectively, are appointed as Mutawallis of the Wakf. They will be working from the day they assume their offices.

It is felt that the Board of Mutawallis should be constituted in the life of Wakif Mutawalli, which can be converted later into “Majlis-e-Ayan” after Wakif Mutawali ceases of hold his office.

As per clause 8 of the Wakf Deed of Hamdard Dawakhana, “Majlis-e-Ayan” will be constituted in the event of Wakif Mutawalli ceasing to be Mutawalli of Wakf for the general superintendence of the Wakf.

With this order, I hereby constitute the board of Mutawallis for the Hamdard Dawakhana (Wakf) as under:-

1. Hakeem Abdul Hameed (Wakif Mutawalli) : Chairman
2. Mr. Abdul Mueed : Vice Chairman
3. Mr. Hammad Ahmed : Senior Mutawalli
4. Mr. Abdul Majeed : Mutawalli
5. Mr. Hamid Ahmed- can attend the meetings as an observer till he assumes office of Mutawalli.

Mr. Abdul Majeed will be the Secretary of the Board of Mutawallis and he will issue the agenda and will record the minutes.

In the absence of Wakif Mutawalli, Vice Chairman will preside over the meetings.

The meeting will be held initially fortnightly i.e. for about a year and subsequently the frequency will be reviewed.

The Board of Mutawallis will supervise, monitor and review the functions of Hamdard Dawakhana (Wakf). The Board of Mutawallis will finalise and approve the budgets, working plans, projects and major policies which are not of routine in nature. The Board of Mutawallis will also review the reports, budgets and plans of the Aid Receiving Institutions from Hamdard Dawakhana(Wakf). This Board will start functioning from today.

Sd/-

(Hakeem Abdul Hameed) Wakif Mutawalli”

17. After the death of Wakif Mutawalli, Abdul Mueed as the Chief Mutawalli appointed Asad Mueed, his younger son born on 1.9.1973, as the fifth Mutawalli on 17.04.2000. It is said Asad Mueed, who is Plaintiff in Civil Suit No. 162 of 2017. Abdul Mueed died on 19.3.2015, leading to disputes between the parties.

18. Sajid Ahmed son of Hammad Ahmed (born on 5.6.1978) was appointed as fifth Mutawalli on 14.4.2015 by Hammad Ahmed claiming himself to be Chief Mutawalli after the death of Abdul Mueed, the first and last undisputed Chief Mutawalli.

19. In this background, the learned Senior Counsel for the Appellant argued that the rule of primogeniture is not contemplated by the Deed as amended in the year 1973 by the Wakif Mutawalli. Learned Senior Counsel for the Appellant refers to the various clauses of the 1948 Deed, which contemplate that the Wakif, his sons and grand- children would not get anything as income but could receive remuneration only for consideration of services rendered to the Wakf. The Wakif Mutawallis and their successors would have no right of ownership or power of disposition in the capital, the assets, the corpus and the properties of the Wakf or any appreciation in value thereof.

20. Earlier four suits including one by Hamdard bearing Suit No. 117 of 1972 were decided by the learned Single Bench of High Court of Delhi on 23.12.2011. The challenge in the suit was to a notification dated 12.12.1970 declaring Hamdard as Wakf under the Wakf Act, 1995. The said notification was alleged to be illegal and void. It was held therein that the Hamdard is not a Wakf within the meaning of the Wakf Act. The relevant extracts from the judgment of the learned Single Judge read as under:

“74. In view of the above discussion, it is held that the Dawakhana Wakf is not a Wakf within the meaning of the term, under the Wakf Act, despite the use of the term “wakf” (which appears to be misleading). It is settled law that nomenclature of a document or deed is not conclusive of what it seeks to achieve; the court has to consider all parts of it, and arrive at a finding in regard to its true effect....

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77. In this case, as held earlier, the Dawakhana Wakf is not a wakf, on an application of all the relevant tests. Therefore, the question of the Nursing Home, the Institute of History of Medicines and Medical Research, Hamdard National Foundation, Indian Institute of Islamic Studies being wakfs just because their properties were purchased out of the income of the Dawakhan Wakf, would not arise. Some of them, are in fact independent juristic entities, being societies, capable of, and in fact holding properties. In the case of registered societies, by virtue of Section 5 of the Societies Registration Act, 1860 the property, movable and immovable, belonging to it, if not vested in trustees, would be deemed to be vested in its governing body. This is completely contrary to a wakf, where the mutawalli is a mere manager; the property is perpetually and irrevocably dedicated to God Almighty.

Furthermore, each of the said bodies and entities is autonomous, and the Dawakhana Wakf is not the exclusive donor; it is one of the sources of grant. They can itself seek donations and grants from other institutions in furtherance of its objectives. Lastly, there is nothing in the deeds or instruments creating them, either in the Memorandum or Articles of Association, indicative of perpetual dedication, or its being in favour of the Lord Almighty, to obtain divine pleasure. In other words, the controlling instruments, or documents which have created these institutions, are singularly silent about the essential elements which signify a wakf. The court therefore, holds that the said institutions are not wakf, even though some of them are beneficiaries of the Dawakhana Wakf. The issues are answered against the Defendants, and in favour of the plaintiff.” Such judgment and decree was affirmed in the appeal.

21. The argument is that the entire reading of the Deed particularly Clauses 1, 3 and 42-A would show that the senior most surviving male successor is contemplated to be the Chief Mutawalli, whereas, the four other male successors/descendants are contemplated to be the Mutawallis. The Deed also contemplates that in the event, if there is no male descendant in the direct line of succession who is fit person to assume charge as a Mutawalli of the Wakf, then anyone from the male descendant of the female issue being rightful claimant to succession shall be appointed as Mutawalli. If there is no male descendant of the female issue, who is fit enough to become a Mutawalli then any female issue of descendants who shall be fit to become Mutawalli shall be so appointed. It is only in the event, when there is no male or female left from the male and female descendants, Majlis-e-Ayan shall have the right to appoint by an extra-ordinary resolution, someone from outside the family who has the ability to act as a Mutawalli and to administer the Wakf property.

22. In terms of Clause 1 of the 1973 Deed, there shall be minimum of one and maximum of five Mutawallis including the Wakif Mutawalli and the Chief Mutawalli. The senior most amongst the male descendants of the Wakif Mutawalli who shall hold the office of the Mutawalli, will be Chief Mutawalli. On the basis of such clause, it is argued that for a Chief Mutawalli, the condition is that the person should be Mutawalli and the senior most amongst the male descendants of the Wakif Mutawalli shall be the Chief Mutawalli. After the death of Wakif Mutawalli, the senior most male

descendant, Abdul Mueed came to discharge the duties of Chief Mutawalli. Therefore, after his death, the Appellant being senior most male descendant of the Wakif Mutawalli, is to act as Chief Mutawalli. Abdul Majeed, the elder son of First Chief Mutawalli cannot be the Chief Mutawalli as is made out from the nature of the bequest and the cumulative reading of the Wakf documents.

23. Learned Senior Counsel for the Appellant refers to Clause 3 of the Deed amended in the year 1973 to argue that the First Chief Mutawalli is to be appointed by Wakif Mutawalli. Thereafter, the senior most male descendant in line of succession and then holding an office of Mutawalli will be the Chief Mutawalli. It is further stated that the Chief Mutawalli would be called President of the Majlis-e-Ayan and the descendant, who is second in seniority to the Chief Mutawalli will be its Nazir (Secretary).

24. Referring to Clause 42-A of the 1973 Deed, it was pointed out that Abdul Mueed was appointed as Chief Mutawalli and the Appellant as Mutawalli by the Wakif Mutawalli. Therefore, a reading of the entire document would show that the object of the Deed is to appoint the senior most male descendant as the Chief Mutawalli. Since the Appellant is the senior most male descendant, he has rightly issued an order on 20.03.2015 to take over the responsibilities as a Chief Mutawalli.

25. Mr. Vasdev, learned Senior Counsel for the Appellant argued that Asad Mueed has not pleaded in the suit that Abdul Majeed is entitled to be Chief Mutawalli in view of rule of primogeniture or that Abdul Majeed is Chief Mutawalli, but it was only in replication the plea of applicability of rule of primogeniture was raised. It was submitted relying upon the judgment in Faqrudin v. Tajuddin<sup>5</sup> that rule of primogeniture has no application amongst Muslims.

26. The reliance is placed upon an earlier order passed by the Division Bench of the High Court of Delhi, in FAO(OS) 208/2017, directed against an order of the learned Single Bench of 26.5.2017, wherein learned counsel for the parties stated that issue relating to Chief Mutawalli is of considerable importance as it affects the 5 (2008) 8 SCC 12 functioning of the aforesaid institutions/organisations. The appeals were decided in view of the fact that the matter was listed before the learned Single Judge on 30.8.2017. The relevant extract from the said order reads as under:

“3. Learned counsel for the parties state that the issue relating to Chief Mutawalli is of considerable importance as it affects the functioning of the aforesaid institutions/organisations. Counsel for the parties state that they will make a request for early adjudication of the said issue. We hope and trust the matter would be decided expeditiously. We also record that the matter is already listed before the single Judge on 30th August, 2017.”

27. It was argued that there is no impediment or bar on the judgment of a Court to grant an injunction, even at the interim stage if there is illegality for the reason that the Appellant is the senior most male descendant in the line of Wakif Mutawalli, therefore, the Appellant is entitled to control of domain names as Chief Mutawalli.

Reliance has been placed upon the judgment reported as *Dorab Cawasji Warden v. Coomi Sorab Warden and Others*<sup>6</sup>. It was also argued that in an Appeal against an order of injunction, a Court of Appeal interferes not when the judgment under attack is not right, but only when it is shown to be wrong, placing reliance upon *Dollar Company, Madras v. Collector of Madras*<sup>7</sup>. The reliance is also placed upon a judgment reported as *Wander Ltd and Another v. 6 (1990) 2 SCC 117 7 (1975) 2 SCC 730 Antox India P. Ltd.*<sup>8</sup> that the Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below, if the one reached by the court below was reasonably possible on the material. The reliance was also placed upon the judgment reported in *Mohd. Mehtab Khan and Others v. Khushnuma Ibrahim Khan and Others*<sup>9</sup> that the Appellate Court should not have substituted its view on the matter merely on the ground that in its opinion the facts of the case call for a different conclusion.

28. Learned Senior Counsel for the Appellant argued that the judgment reported as *A. Aruputham v. A.V. Yagappa*<sup>10</sup> has been wrongly applied to hold that the principle of lineal primogeniture applies in the present case. The said judgment arises out of a case where the parties are governed by the Hindu Law of Succession wherein testator has specified that his estate to come to his son and sons by the rule of primogeniture. In the present case, in the case of Hanafi Muslims, the Deed governing the succession to manage the affairs of a Wakf specifies a line of succession as different and distinct from the said judgment. The succession to the office of Mutawalli is governed by the terms of Deed. Therefore, the question that who will succeed as a Chief Mutawalli is to be arrived at only from the entire reading of the Deed.

8 (1990) Suppl. SCC 727 9 (2013) 9 SCC 221 10 (1971) 3 SCC 808

29. It is also argued that on 28.04.2015, a resolution was passed by all the Mutawallis that the banking operations shall be carried out by Abdul Majeed and Hammad Ahmed. In pursuance of such resolution, more than Rs. 900 crores have been disbursed to various parties in the last 2 years. Since there is no rule of primogeniture and the Deed as amended in the year 1973 has not changed the basic concept of Wakf Management in the hands of two sons of Wakif Mutawalli and their successors with the condition that the senior most male descendant will be the Chief Mutawalli, therefore, Abdul Mueed, the senior most male descendant, after the death of Wakif Mutawalli was rightly designated as Chief Mutawalli and after his death, by virtue of the Deed, the Appellant has rightly declared himself to be the Chief Mutawalli.

30. Mr. Rohatgi, learned Senior Counsel for the Respondents argued that order of the Division Bench passed on 04.08.2007 relates to issues pertaining to Chief Mutawalli, the issue that is to be framed in a suit and not for the purpose of deciding an interim injunction application. Since the issues in the suit have not been framed, therefore, the question that who will be the Chief Mutawalli is not an issue to be decided at the time of consideration of application under Order XXXIX Rules 1 and 2 of the Code.

31. It is also argued that in an application under Order XXXIX Rules 1 and 2 of the Code, the Court will not grant interim mandatory relief resulting in creation of entirely new state of affairs which hitherto never existed. The reliance is placed upon *Samir Narain Bhojwani v. Arora Properties and*

Investments and Another<sup>11</sup>. It is contended that the declaration of the Appellant to be Chief Mutawalli, disputed immediately by Respondent No. 1, does not mean the existence of status at the time of filing of the suit which can be protected in an application under Order XXXIX Rules 1 and 2 of the Code. Since the Appellant has sought passwords of domain names, server and Enterprise Resources Planning System, it shows that the Appellant was not in control of the management of Hamdard, therefore, injunction to hand over of the passwords and thus management of Hamdard cannot be granted being an injunction in the mandatory form.

32. It is also argued that Respondent No. 1 being in actual control of Hamdard was not required to file a substantive suit for control of the Organisation as he was already in control of the Organisation and all Heads of the Departments of Hamdard report to him. He is the occupier of all factories and the holder of all licences allotted to Hamdard.

33. It is submitted that the language of the Deed as amended had to be different if the contention of the Appellant is to be accepted. Though 1948 Deed sets out the “line of succession” of the said Wakif Mutawalli but the amended deed does not contain any such or similar clause.

34. In pursuance of such Deed, Abdul Majeed was declared to be Nazir by the Wakif Mutawalli on 04.07.1995 during his life time. Such 11 2018 (10) Scale 33 declaration will negate the argument that the Appellant was not the second in the line of succession competent to be appointed as Nazir in terms of Clause 3 of 1973 Deed. The parties have understood that position since 1995 when Abdul Majeed was declared as Nazir. The Appellant has not disputed such arrangement for more than 20 years; therefore, the Appellant cannot assert himself to be the Chief Mutawalli. It is also argued that Abdul Majeed died on 19.03.2015 but the suit has been filed only on 16.05.2017, asserting himself to be Chief Mutawalli. Such assertion also suffers from delay and laches. It is argued that the words “in line of succession” would be rendered otiose and meaningless if the contentions raised by the Appellant is to be accepted.

35. Relying upon the judgment reported as *The Secretary of State for India in Council v. Syed Ahmad Badsha Sahib Bahadur*<sup>12</sup>, it is argued that in the case of single indivisible hereditary office, the succession should be governed by the principle of lineal primogeniture in the absence of clear evidence to the contrary.

36. Further, the Division Bench has remitted the matter back to the learned Single Bench to frame a neutral administrative oversee mechanism for the management of Hamdard to balance the interests of the parties. Therefore, the order passed by the Division Bench does not require any interference.

12 (1921) LW Mad.188 (DB)

37. We find that the order of Division Bench cannot be sustained. In an earlier suit, the challenge was to notification dated 12.12.1970 declaring Hamdard as Wakf under the Wakf Act, 1995. The Delhi High Court examined 1948 Deed and also the amendments made in the year 1973, to arrive at a finding in regard to true nature of Wakf. It was held as under:-

“74. In view of the above discussion, it is held that the Dawakhana Wakf is not a wakf within the meaning of the term, under the Wakf Act, despite the use of the term "wakf" (which appears to be misleading). It is settled law that nomenclature of a document or deed is not conclusive of what it seeks to achieve; the court has to consider all parts of it, and arrive at a finding in regard to its true effect.....

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77. In this case, as held earlier, the Dawakhana Wakf is not a wakf, on an application of all the relevant tests. Therefore, the question of the Nursing Home, the Institute of History of Medicines and Medical Research, Hamdard National Foundation, Indian Institute of Islamic Studies being wakfs just because their properties were purchased out of the income of the Dawakhana Wakf, would not arise. Some of them, are in fact independent juristic entities, being societies, capable of, and in fact holding properties. In the case of registered societies, by virtue of Section 5 of the Societies Registration Act, 1860 the property, movable and immovable, belonging to it, if not vested in trustees, would be deemed to be vested in its governing body. This is completely contrary to a wakf, where the mutuwalli is a mere manager; the property is perpetually and irrevocably dedicated to God Almighty.

Furthermore, each of the said bodies and entities is autonomous, and the Dawakhana Wakf is not the exclusive donor; it is one of the sources of grant. They can itself seek donations and grants from other institutions in furtherance of its objectives. Lastly, there is nothing in the deeds or instruments creating them, either in the Memorandum or Articles of Association, indicative of perpetual dedication, or its being in favour of the Lord Almighty, to obtain divine pleasure. In other words, the controlling instruments, or documents which have created these institutions, are singularly silent about the essentials elements which signify a wakf. The court therefore, holds that the said institutions are not wakfs, even though some of them are beneficiaries of the Dawakhana Wakf. The issues are answered against the Defendants, and in favour of the plaintiff.”

38. Thus, the nature of Hamdard was settled that it is not Wakf as is defined in the Wakf Act, 1995 and that the property, movable and immovable, belonging to it would be deemed to be vested in its governing body.

39. We do not find any merit in the argument that the consent of the parties in an appeal against an interim order passed on an application under Order XXXIX Rules 1 and 2 of the Code related to issues which are required to be framed after completion of the pleadings in a suit. The appeal was directed against interim injunction, therefore, the expression “issue” used in para 3 of the consent order is not the issues in the suit, but the questions which arise for consideration at the ad-interim stage. The parties have agreed that the question of considerable importance relates to the appointment of Chief Mutawalli at the time of consideration of an interim application. Both the courts have examined the Deeds to consider as to whether the Appellant can be said to be Chief Mutawalli.



40. The learned Single Judge held that the Appellant is a Chief Mutawalli by interpreting the Wakf Deed, whereas, the Division Bench has taken a different view. In fact, the Division Bench relied upon A. Aruputham case (supra) which was in respect of a construction of a Will relating to vesting of the estate of the testator-a Hindu Male. The said judgment is not applicable in respect of appointment of a Chief Mutawalli which is not a case of succession of the property of the deceased governed by Muslim personal law but appointment of successor under a deed executed by Wakif Mutawalli for the management of Hamdard. The question relates to construction of the Wakf Deed as amended in the year 1973 for the management of Wakf as to who shall have the right to manage the affairs of Hamdard and not the succession of an estate of the deceased. Therefore, we find that the Division Bench has wrongly relied upon A. Aruputham case (supra).

41. The learned Division Bench referred to Faqrudin's case (supra) that under Personal Law the rule of lineal primogeniture is not applicable as a rule of succession amongst Muslims, is not a ground to overrule its application if a deed (testamentary or otherwise) so directs. It is thereafter, the Division Bench has interpreted the amended deed of wakf and also the resolution of 04.07.1995 to hold that lineal male primogeniture is the rule of succession applied to the office of Chief Mutawalli rather than an uncertain collegial ambulatory lineal succession.

42. The rule of primogeniture is not a rule applicable to the Muslims as per the Personal Law as held in Faqrudin's case (supra). Therefore, the primary question between the parties relating to appointment of Chief Mutawalli has to be decided on the basis of construction of 1948 Deed and the amendments made in the year 1973 by the Wakif Mutawalli. The 1948 Deed is unambiguous that two brothers Haji Hakim Abdul Hamid and Hakim Mohd. Sayeed shall be Trustees and that in case of death of any one of the Trustee then the deceased Trustee will be replaced by his elder son and in case of death of other Trustee he will be replaced by his elder son (Clause 3 as reproduced above). Similarly, Clause 4 of the Deed is that the Trustees of the Trust will be appointed from their sons who will be eldest in age and after that from the sons of their sons, the elder son will be appointed as Trustee.

43. The 1973 Deed is not a new document but includes amendments in the 1948 Deed based upon the declarations made by the Wakif Mutawalli from time to time compiled on 02.07.1973. Last page of document Annexure "P-1" would show that it is not a new document but the document incorporating amendments which were counter signed by Wakif Mutawalli on 26.06.1973. Clause 3 of the declaration as also the amended Deed of Wakf and Deed in the year 1973, referred to by the parties, read as under:

Deed as amended in the year 1973 Declaration

3. The First Chief Mutawalli will Clause 3: This clause is be appointed by Wakif Mutwalli substituted by the following text:

thereafter the senior most male descendant in line of succession (of "The First Chief Mutawalli will be Wakif Mutawalli) and then holding appointed by Wakif-Mutawalli. an office of Mutawalli will be the And thereafter the senior most Chief Mutawalli.

male descendant in line of succession (of Wakif-Mutawalli) and then holding an office of Mutawalli will be the Chief Mutawalli.”

44. We find that in the declaration dated 02.07.1973, in the first line there is a full stop after the word “mutawalli” and thereafter, new line starts. But in the 1973 Deed (Annexure P-1), the full stop is missing. It appears to be an inadvertent omission as the Deed as amended in the year 1973 in the absence of full stop is not coherent and appears to be incomplete.

45. The well-known principle of interpretation of document is that one line cannot be taken out of context. It is a cumulative reading of entire document which would lead to one conclusion or the other. Some of the judgments relevant for determining as to the principle of interpretation of documents are delineated hereinafter. One of the judgments relating to the interpretation of documents is Delhi Development Authority v. Durga Chand Kaushish 13. It was held that the meaning of the document or of a particular part of it is to be sought for in the document itself. The Court held as under:-

“19. Both sides have relied upon certain passages in Odgers' “Construction of Deeds and Statutes” (5th ed. 1967). There (at pages 28-29), the First General Rule of Interpretation formulated 13 (1973) 2 SCC 825 is: “The meaning of the document or of a particular part of it is therefore to be sought for in the document itself”. That is, undoubtedly, the primary rule of construction to which Sections 90 to 94 of the Indian Evidence Act give statutory recognition and effect, with certain exceptions contained in Sections 95 to 98 of the Act. Of course, “the document” means “the document” read as a whole and not piecemeal.

20. The rule stated above follows logically from the Literal Rule of Construction which, unless its application produces absurd results, must be resorted to first. This is clear from the following passages cited in Odgers' short book under the First Rule of Interpretation set out above:

Lord Wensleydale, in Monypenny v.

Monypenny<sup>14</sup> said:

“the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions.” Brett, L.J., in Re Meredith, ex. p. Chick<sup>15</sup> observed:

“I am disposed to follow the rule of construction which was laid down by Lord Denman and Baron Parke.....They said that in construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used.”

21. Another rule which seems to us to be applicable here was thus stated by this Court in *Radha Sunder Dutta v. Mohd. Jahadur Rahim and Others*<sup>16</sup> :

“Now, it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render 14 (1861) 9 HLC 114, 146 15 (1879) 11 Ch D 731, 739 16 AIR 1959 SC 24, 29 one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim ‘ut res magis valeat quam pereat’.”

46. Therefore, the entire 1948 Deed as amended in the year 1973 has to be read together to find out the process of appointment of Chief Mutawalli.

47. The argument that the rule of primogeniture is explicit in the amended clauses of the 1948 Wakf Deed, as the eldest son and after his death his son has been given the preferential treatment than the other male descendants, is not tenable. The question is not succession in the matter of immovable property but line of succession for the management of Wakf.

48. The Clause 1 of 1973 Deed is that the senior most among the male descendants of the Wakif-Mutawalli holding an office of Mutawalli will be the Chief Mutawalli. The Clause 3 of the same deed is that the First Chief Mutawalli will be appointed by Wakif Mutawalli thereafter the senior most male descendant in line of succession (of Wakif Mutawalli) and then holding an office of Mutawalli will be the Chief Mutawalli. Thus, at least two provisions of the 1973 Deed are that the senior most male descendant in the line of succession of Wakif Mutawalli shall be Chief Mutawalli.

49. The argument that the constitution of the Board of Mutawallis on 04.07.1995 negates the argument raised by the Appellant that the senior most male descendant has to be the Chief Mutawalli and second in line as Nazir (Secretary). No doubt in the constitution of the Board on 04.07.1995, the second senior most male descendant was not nominated as Nazir (Secretary) but such fact alone will not negate the various provisions of the document which support the contention raised by the Appellant that it is the senior most male descendant who shall be the Chief Mutawalli. May be, Abdul Majeed was nominated as Secretary of the Board keeping in view his age and educational qualifications but such action will not negate cumulative reading of the 1973 Deed.

50. The action of the Wakif Mutawalli in nominating the senior most male descendant Abdul Mueed and his younger son-the Appellant as Mutawallis in terms of 1948 Deed shows that his both lines of successors were treated equally. After the composition of the Board of Management was increased to five after amendment in the year 1973, the Wakif Mutawalli appointed Abdul Majeed eldest son of the Abdul Mueed (born on 23.12.1969) and Hamed Ahmed eldest son of the Appellant (born on 25.03.1977) on 30.05.1995 as Mutawallis. On that day, Asad Mueed (born on 1.09.1973) younger son of Abdul Mueed but older in age than the Hamed Ahmed was not made Mutawalli. It was only on 17.04.2000 i.e. after the death of Wakif Mutawalli, he was made the fifth Mutawalli. If the line of management has to be in the hands of senior most male descendant of Abdul Hamid, the Wakif Mutawalli should have appointed Asad Mueed instead of Hamed Ahmed in the year 1995.

51. 1973 Deed is not a new document but the amended 1948 Deed by Wakif Mutawalli from time to time. Since, the Board of Trustees was contemplated to be five Mutawallis including Wakif Mutawalli or Chief Mutawalli, therefore, the induction of grandsons was not in order of date of birth but keeping in view the representations to both sons of the Wakif Mutawalli. Therefore, the 1948 Deed as amended does not show the applicability of principal of rule of primogeniture but equal representation to the heirs of both sons of Wakif Mutawalli.

52. The judgment of Division Bench of Madras High Court in Secretary of State for India (supra) is consequent to the judgment of Full Bench reported as The Secretary of State for India in Council vs. Syed Ahmad Badsha Sahib Bahadur<sup>17</sup>. The Full Bench was examining the applicability of principle of res judicata in view of findings recorded in an earlier suit. It was held by the Full Bench that decision in the previous suit is not conclusive but is only evidence and it is open to the plaintiff to establish his title as against the Government. Consequent to the opinion of the Full Bench, the appeal was taken up for hearing on 09.05.1921. It was consequent to the opinion of the Full Bench; the appeal was taken up for hearing on 09.05.1921.

53. The Division Bench held that plaintiff has proved that he is lawful successor by hereditary right as the office cannot be enjoyed by several heirs in common, therefore, succession must be by lineal primogeniture. The said order does not support the argument raised <sup>17</sup> (1921) 14 L.W. 128 (F.B.) by the respondent as it is not a single heir who is holder of the office. In fact, the Wakif Mutawalli has constituted a Board of five Mutawallis. Therefore, it is a body of Mutawallis which has been vested with the right of management of Hamdard and senior most male descendant amongst them contemplated to be Chief Mutawalli.

54. The argument that there is delay and laches on the part of the Appellant to dispute the existing mechanism of the management is again not tenable. The entire argument is based upon the constitution of the Board on 04.07.1995. Mere failure to dispute the constitution of Board would not mean that the 1948 Deed or 1973 Deed is rendered otiose. The constitution of the Board by the Wakif Mutawalli is in relation to the requirements of the Hamdard to carry out the functions of the Board but that does not rewrite the Rule of Succession contemplated after amendments in 1948 Deed in the year 1973.

55. The argument that the Appellant is involved in criminal cases is again not relevant at this stage. 1973 Deed provided for disqualification of conviction in criminal case involving moral turpitude. None of the criminal prosecution launched against the Appellant have ended up in conviction, therefore, there is no disqualification attached to the Appellant at this stage.

56. The grant of mandatory injunction is not prohibited even in Samir Narain Bhojwani case (supra). It has held that unless clear and prima facie material justifies a finding that status quo has been altered by one of the parties the order in mandatory injunction can be given.

57. The ad interim mandatory injunction, is to be granted not at the asking but on strong circumstance so that to protect the rights and interest of the parties so as not to frustrate their rights regarding mandatory injunction. In Deoraj vs. State of Maharashtra and Others<sup>18</sup>, this Court held

that Court would grant such an interim relief only if it is satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Therefore, in appropriate case, ad-interim injunction in mandatory form can be granted. The Court held as under:-

“12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case — of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being 18 (2004) 4 SCC 697 perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the court may put the parties on such terms as may be prudent.”

58. The argument that under Order XXXIX Rules 1 and 2 of the Code, the Court has the jurisdiction to maintain the status of the parties on the date of filing of the suit or on the date of passing of the order but cannot direct the parties to do something which was not in existence at the time of filing of the suit, is not a general rule of universal application. The nature of the orders claimed by the Appellant are not passed ordinarily in a routine manner as the Plaintiff is required to have a case which should be of higher standard than mere prima facie case. But in view of the agreement between the parties, as recorded by the Division Bench in an earlier round of litigation the primary question was agreed to be that who is to act as Chief Mutawalli. Both learned Single Judge and the Division Bench has examined such question only. Even, before this Court, the parties have argued primarily on the question as to who shall be Chief Mutawalli. Therefore, a prima-facie opinion would lead to consequential order in respect of management of the affairs of the Hamdard.

59. Thus, in view of above the appeal is allowed. The order passed by learned Division Bench on 27.11.2018 is set aside and that of the order of learned Single Bench on 25.10.2017 is restored. The parties will additionally continue with the arrangements arrived at in respect of the management of the Hamdard in terms of the resolution dated 28.04.2015.

60. It is needless to say that decisions of the suits shall be on the basis of evidence to be led by the parties as the present order is in the context of deciding ad interim injunction application only.

61. Keeping in view the nature of disputes and the evidence to be led, we further order that an endeavour shall be made to decide the suit expeditiously by granting maximum period of three months to each of two sets of parties to conclude their respective evidence so that an early decision is arrived at to finally conclude the first stage of disputes between the parties.

.....J. (UDAY UMESH LALIT) .....J. (HEMANT GUPTA) New Delhi April 3, 2019.