(2011) 12 DEL CK 0403

In the Delhi High Court

Case No : CS (OS) No. 116 of 1972

Indian Institute of Islamic APPELLANT

Vs

Delhi Wakf Board RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Waqf Act, 1954 — Section 13, 15(1), 15(2), 2, 21
Constitution of India, 1950 — Article 19(1), 25, 26, 300A
Penal Code, 1860 (IPC) — Section 489A, 489E
Societies Registration Act, 1860 — Section 5

Citation : (2011) 12 DEL CK 0403

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Shanti Bhushan, Mr. J.K. Seth, Ms. Shalini Kapoor, Ms. Promil Seth, Ms. Kriti Arora and Mr. Imtiaz Ahmed Advocates and Mr. J.K. Seth, Ms. Shalini Kapoor, Ms. Promil Seth, Ms. Kriti Arora and Mr. Imtiaz Ahmed Advocates, for the Appellant; Bharat Bhushan Sawhney with Ms. Noorun Nahar Firdausi, Advocate for Defendant., for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Justice S.Ravindra Bhat

1. This common judgment will dispose of four suits; the first by the Hamdard Dawakhana Wakf, (hereafter "the Dawakhana Wakf"-Suit No. 117/72)and the others by Institute of Islamic Studies (later Jamia Hamdard -Suit No. 116/72); Institute of History of Medicine and Medical Research (later Jamia Hamdard-Suit No. 118/72) and Hamdard National Foundation (Suit No. 119/72). These four plaintiffs claim declaration that a notification dated 12-12-1970, published in the Delhi Gazette, on 19-12-1970 ("the impugned notification") by which through entries 63, 63 (a), 63 (b) and 64, they were notified as wakfs, is illegal and void. The Dawakhana Wakf was created on 29.08.1948 by Hakim Haji Abdul Hameed Saheb (hereafter "original plaintiff"), his brother Hakim Hafiz Mohammed Said and his mother Mst. Rabea Begum Saheba. Hakim Hafiz Mohammed Said was

declared an evacuee by the Custodian''s order dated 1.8.1949 and Mst. Rabea Begum Saheba died in Delhi on 9.10.1949. The original plaintiff became the sole Mutawalli of the Dawakhana Wakf. The original plaintiff died on 22.07.1999; by virtue of the wakf Deed dated 28.8.1948 and the declarations dated 10.10.1985 and 30.09.1995 (of the original plaintiff), Abdul Mueed the senior most amongst male descendants of the sole Wakif Mutawalli became the chief Mutawalli for management of the Dawakhana Wakf.

2. The suit contends that the Dawakhana Wakf was created as the founders were desirous to setting apart and assigning a fixed portion of the income derived from the business of Hamdard Dawakhana, which after the creation of the Trust, became the Dawakhana Wakf, for public welfare and charitable purposes to advance the cause of Indian Medicine and for benefiting the countrymen from the blessings of ancient system of medicine and ensuring that it is not thwarted by selfish and unscrupulous conduct of anyone. The objects of the Wakf, inter-alia relied on, are, establishment of a research Institute for the purpose of discovering the properties, action and active principles of herbs and simple medicines; establish and conduct a Tibbia College in conformity with known standards; to establish and run charitable hospitals and clinics where poor patients are given free treatment according to the principles of indigenous systems of medicines; to establish and run educational, commercial, industrial and cultural institutions or to aid those which are already in existence; to build schools, laboratories, inns, wells, mosques, khanghas, grave-yards or such other buildings of a public nature as may benefit the community and country of those which have as their objects perpetuation of the memory of important historical incidents or historic personages or to aid in the repairs, supervision, extension and improvement of those already in existence, and to publish books, pictures, maps or literature or to aid in their publication by which the community and country are likely to benefit.

3. It is contended that initially only the net profit of the business was created as the income of the wakf, which was divided into two portions, one-fourth being named as "Khandani income" and the three-fourth as the "Quami Income". Khandani income devolved upon the founders and their heirs; the Quami income on the other hand, was dedicated to the purposes of the charity. Later, in view of the declaration dated 10.10.1985 by the original plaintiff as well as those of his two sons Abdul Mueed and Hammad Ahmed, inter-alia, provisions in the Wakf deed (dated 28.08.1948) relating to "Khandani Income" were deleted altogether. "Khandani Income" was declared not to arise even after the original plaintiff''s death and had ceased to exist for all times to come. It is asserted that the Dawakhana Wakf does not fall within the purview of the Wakf Act, 1954 (hereafter "the Act") inter-alia because the dedication of quami income for public or charitable purpose was not confined for the benefit of any particular community, but for all. It is stated that the definition of the term "beneficiary" under law is not in accord with objects of the Wakf deed, in question; the purposes for its creation are not pious, charitable objects of public utility

sanctioned by the Muslim Law, but are secular. The suit also says that from its nature, dedication of income of a business does not and cannot fulfill the twin conditions namely, permanent dedication, and existence of movable and immovable property. It appears that wakf of a running business with its assets and liabilities-as in this case was never in the contemplation of the framers of the Act. The plaintiff also contends that the provisions of Section 31 (to prepare a budget for the next year showing estimated receipts and expenditure during that financial year) or section 3 (g) defining "net annual income" and the deductions permissible under the Act cannot be applicable to it. The Dawakhana prepares and sells its products/medicines directly and through agents. It is impossible for such a concern to prepare a budget in advance for the next year showing the estimated receipts and expenditure during the financial year.

4. The plaint contends that it was never intended that a running business could be subject-matter of a Wakf under the said Act. The definition of net annual income in section 3 (g) of the Act and even the corresponding section 3 (j) of the Wakf Act, 1995 points to the fact that this definition cannot appropriately be used in relation to a business such as that of the Dawakhana. The gross income is subject to the following deductions only:

(i) Land Revenue, cess, rates and taxes payable to Government or any local authority.

(ii) Donations given or offerings made with a specific direction that they shall form part of the corpus of the wakf.

The suit points out that no provision is made for deduction on account of expenses and expenditure incurred in earning the income from a business namely cost of raw materials, packing, packaging labour cost, commission to sellers and agents, advertising, salary of staff, payment of house rents for the business premises, including godowns, purchase of ne machinery, repairs to the existing machinery, payment of provident fund to the employees etc., The permissible deductions in section 3 (g) of the Act and even the corresponding Section 3 (j) of the Wakf Act, 1995 can relate to movable and immovable properties other than the income earned form mercantile concern/business. It is also contended that the Dawakhana Wakf is an industrial concern and governed by various laws, such as Industrial Disputes Act, 1947, Delhi Shops and Establishment Act, Factories Act, 1948; Employees Provident Fund Act, 1952, Payment of Bonus Act 1965; Employees State Insurance Act, and The Drugs & Cosmetics Act etc. Under an Industrial Award, the Dawakhana is obliged to provide payments to the employees; and pay contributions to the Provident Fund scheme, as well as the Employees State Insurance Act. Absence of provision for deductions on these and other accounts in Section 3 (g) of the Act and even the corresponding section 3 (j) of the Wakf Act, 1995 conclusively shows that income from industrial business concern could not be the subject-matter of a wakf. Therefore, contends the plaintiff, the objects of the said wakf and the beneficiaries of the Dawakhana Wakf is not a "wakf" governed by the Act. The notification No. 3533/70 dated 12.12.1970 published in Delhi Gazette, on 31.12.1970 declaring the Dawakhana Wakf has therefore been impugned as illegal. The inclusion of the other plaintiffs, i.e. (i)Hamdard Research Clinic and Nursing Home, Asaf Ali Road, New Delhi; (ii) Institute of History of Medicines and Medical Research, Village Badrapur, Delhi; (iii) Jamia Tibbia Unani Medical College, Gali Qasimjan, Delhi; (iv) Ayurvedic Free Dispensary, Karol Bagh, New Delhi; (v) Unani Free Dispensary, Village, Badarpur, Delhi and (vi) Hamdard National Foundation (India), have similarly been impugned. The Hamdard Research Clinic and Nursing Home and the Institute of History of Medicines and Medical Research too were notified at serial Nos. 63 (a) and 63 (b) of the said notification. The plaintiff submits that neither the Dawakhana Wakf nor any other of the said institutions is "wakf" within the Act.

5. It is alleged that out of the institutions mentioned previously the "Hamdard Research Clinic and Nursing Home, New Delhi" was established by the Hamdard National Foundation (India), a society registered under Societies Registration Act, XXI of 1960 and is beneficiary of the Dawakhana Wakf as it is person or an object for which the Dawakhana Wakf allocates and dedicates a percentage of income. It is an autonomous body incorporated as a society and is functioning under an independent Governing Council having its Rules and Regulations and enjoined to promote specified objects, principles and functions. The Dawakaha Wakf has no control over its affairs of management or discretion. The "Quami Amdani Income" given to Hamdard National Foundation (India) is a dedication irrevocable and absolute and whatever money is donated to the Hamdard National Foundation (India) is property of the donee institutions. The donors, i.e., Dawakaha Wakf cannot in any way, legally exercise any proprietary rights or authority of ownership in dealing with or otherwise disposing of the money donated by it or have control over property acquired with such money, nor can it reclaim the money or property irrevocably dedicated or donated, or a part of it. Besides this the object of the society is to control and supervise proper utilization of the income received from any other body, person or concern, Indian or foreign, in any form, as aid, to promote support and develop indigenous systems of medicine and medical science and their utility to provide medical, educational, economic and other sorts of aid to deserving persons irrespective of religion, caste or creed and institutions or humanitarian services etc. The source of this income can be from Muslims and non-Muslims. It is obvious; therefore, that such an institution cannot be created as Wakf.

6. The plaintiff says that similarly, the then institution of History of Medicine and Medical Research, Jamia Tibbia Unani Medical College, Indian Institute of Islamic Studies, were also registered societies run for purposes which did not fail within the purpose contemplated by the Act. So far as the Ayurvedic Free Dispensary and Unani Free Dispensary were concerned, they were merely activities of Dawakaha Wakf and are not separate from it. Hamdard Research Clinic and Nursing Home was an activity of Hamdard National Foundation (India) and had nothing to do with the Dawakaha wakf.

7. The Dawakaha Wakf was renamed Hamdard (Wakf) Laboratories, in Delhi and the other above named institutions are not wakfs under the Act, and could not, therefore, be notified as wakfs under the said Act. The notification in question is, therefore, illegal, without jurisdiction, and inoperative and if it is allowed to stand, will seriously and adversely affect the wakf''s interests of which the original plaintiff was Mutawalli are interested in. The original plaintiff served upon the defendants a notice dated 24.12.1971 u/s 56 of the Act, which was received by (the defendant) on 27.12.1971 calling upon the latter to admit within two months of the receipt of the notice by it that the Dawakaha Wakf Delhi, the Hamdard Research Clinic and Nursing Home, Institute of History of Medicines and Medical Research, Jamia Tibbia Unani Medical College, Ayurvedic Free Dispensary, Unani Free Dispensary and Hamdard National Foundation, were not wakfs within the meaning of the Act and to delete the entries in the Delhi Gazette and de-notify the said wakf and the institutions holding them and their properties, declaring that they were not wakfs under the Act. The defendant failed to comply with the notice.

8. The amendment to the suit states that subsequent to the filing of the suit, developments took place such as a declaration dated 10.10.1985 made by the original plaintiff, inter-alia, that the provisions in the Wakf deed dated 28.08.1948 relating to "Khandani Income" be modified/deleted. That declaration (dated 10.10.1985) was also confirmed by two separate declarations, both dated 10.10.1985, made by both sons of the original plaintiff. Six existing institutions, namely, (a) Institute of History of Medicines and Medical Research; [b] Indian Institute of Islamic Studies; [c] Hamdard Tibia College; [d] Hamdard College of Pharmacy [e] Majeedia Hospital; and [f] Rufaida School of Nursing stood dissolved and their assets and liabilities stood transferred to Jamia Hamdard, Hamdard Nagar, New Delhi - 110 062 another society, registered under the Indian Societies Registration Act, 1860, in April 1989. It is also stated that the (i) Hamdard Research Clinic & Nursing Home, Asaf Ali Road, New Delhi, [ii] Ayurvedic Free Dispensary, Karol Bagh, Delhi, and [iii] Unani Free Dispensary, Village Badar Pur, Delhi, were closed. It is therefore, claimed that the Dawakaha Wakf and all other aforesaid institutions were not wakfs.

9. For these reasons, the plaintiff seeks a decree against the defendant declaring the Hamdard Dawakaha (Wakf) Delhi and the institutions and societies, viz. Hamdard Research Clinic and Nursing Home, New Delhi, Institute of History of Medicine and Medical Research, Jamia Tibbia, Unani Medical College, Delhi, Ayurvedic Free Dispensary, Karol Bagh, New Delhi Unani Free Dispensary, Tuglakabad, New Delhi and Hamdard National Foundation (India) and their properties are not wakf within the meaning of the Act the entries in the Notification No. 3933/70 dated 12.12.70 published on 31.12.1970 are illegal ultra vires, null and void.

The written statement

10. The Wakf Board (hereafter called "the Board") in its written statement-which

too was amended during pendency of the proceedings - contests the locus standi of the original plaintiff to file and maintain the suit. The Board refers to the background by which the impugned notification was issued, saying that the Act was enforced in the Union Territory of Delhi on October 1, 1962. Pursuant to Section 4 the State Government appointed a Wakf Commissioner to survey wakf properties existing in the State on the date of the commencement of the Act. That officer while surveying of wakf properties also made a survey of Hamdard Dawakhana wakf and after making necessary inquiries submitted his report to the State Government, u/s 4(3) of the Act, which was forwarded to the Delhi Wakf Board u/s 5 (1) of the Act. The Board after examining the report published it in the Official Gazette as enjoined by Section 5 (2) of the Act. The Board also contests the maintainability of the suit, contending that only those kinds of suits, as are mentioned u/s 6(1) of the Act, i.e. whether a particular property specified a wakf property in a list of wakfs published under sub-section (2) of Section 5 is wakf property or not, or the character of wakf (that is whether any such wakf is a Shia Wakf or Sunni wakf are maintainable and not otherwise. The present suit does not claim any of these reliefs.

11. The Board also states that after enforcement of the Act in Delhi, the original plaintiff, applied to the Board on May 18, 1964 u/s 25 of the Act for registration of the said Dawakhana Wakf that was duly registered by the board on 5December 1964. Furthermore, the Dawakhana Wakf paid wakf fee/contribution to the Board u/s 46 of the Act. A total sum of ` 43,940/11 was paid by the original plaintiff Mutawalli at different times till the year 1967. Details of the amount received for the years 1964 to 1967, have been averred in the suit. The Board also adverts to receiving a cheque for `13,871/76 but as the amount fell much short than what was due it was not cashed. Since then nothing was paid by the original plaintiff Mutawalli nor was any statement of accounts (as required by the Act) made available to the Board by the Dawakhana Wakf to enable it to assess the wakf fee. For these reasons, the Board says that the plaintiff is now is estopped from challenging the nature of the wakf and the rights and powers of the Board and its statutory obligations under provisions of the Act. The Board also contends that the suit is time barred.

12. The Board states that the objects of the Dawakhana Wakf are purposes recognized by Muslim Law and are covered by the principles of the true teachings of Islam as pious religious and charitable. While interpreting objects of the Wakf the paramount consideration has to be whether or not any a particular cause of charity falls within the ambit of Muslim Law and true teachings of Islam and in doing so the said consideration cannot be bye passed and or overlooked. The Board denies the plaintiffs'' interpretation, of the Deed, and states that its text and the document as a whole has to be seen, to discern its true meaning. It is argued that the expression "pious, religious and charitable purposes" recognized by Muslim Law have to be interpreted not narrowly and or in any restrictive sense but at a broader level of interpretation and consideration having full regard to the true R.P. teachings of Islam. This appears to be the true intention of the

founders of the instant wakf. Any charitable cause beyond those fundamental conditions are not within scope of the object of the wakf in question, and therefore all the activities of the mutawalli of the said wakf are circumscribed by the said condition and he cannot act in a manner beyond the said limit and condition. The plaintiff''s interpretation of the terms and objects of the wakf purporting to be enshrined in the wakf deed are denied as incorrect. It is also averred that defined objects and purposes of the wakf are only those purposes recognized by Muslim law and by the principles of the true teachings of Islam as religious, pious and charitable. Any deviation from those objects is impermissible contrary to the terms of the wakf. The Mutawalli cannot transgress the said basic conditions. It is averred that the wakf in the present case is a permanent dedication by persons professing Islam, of movable and immovable property for purposes recognized by Muslim law as pious, religious and charitable and as such it squarely falls within the ambit of the Act.

13. The Board submits that the reference to Section 3 (g) of the Act is not relevant. It states that return of capital investment in any activity or project cannot possibly be construed as its income. Similarly while determining income of any business concern due regard has to be given to all expenses incurred, in carrying on the business activity. It is stated that the impermanence of a business concern alleged by the plaintiff is of no consequence. The expression permanent has also to be construed in a reasonable and rational manner.

14. The Board alleges that the Dawakhana Wakf or its subsequent acquisitions made through its Quami Income are undoubtedly money belonging to and owned by the wakf and constitute wakf property; the plaintiff''s arguments to the contrary are denied. It submits that all properties, whether movable or immovable, acquired through wakf funds and wakf income - quami income - and all investments made from wakf income in any shape and form is wakf property, being additions to the Wakf.

15. The Board avers that on 29.03.1962 the original plaintiff had made a declaration that he had decided to refer quami income as Hamdard National Foundation (India) and he had the said declaration published in part IV of the Gazette of India, Simla in its issue of Saturday May, 5 1962 on page 89. It is stated that according to the Wakf Deed, in this case "Quami Income" is wakf money, an expression the plaintiff of his own volition changed to Hamdard National Foundation (India). That being so, both expressions Quami Income and Hamdard National Foundation (India) are synonymous and interchangeable and cannot be divorced from each other. The Board says that this belies the assertion that the Hamdard National Foundation (India) is a donee and beneficiary of the Quami Income of Hamdard Dawakhana wakf. It is also stated that during the period 1948-1962, according to the original plaintiff, the total Quami income accruing to the wakf - Hamdard Dawakaha - was ` 58, 22,094/91. The correctness of the said amount is not admitted by the Board, yet, it states that all the same the said sum was admittedly wakf money.

16. The Board says that the original plaintiff changed the nomenclature of "Quami Income" to Hamdard National Foundation (India) in 1962. It was out of wakf funds that a plot of land on Asaf Ali Road, New Delhi was acquired and a big three storied pukka building constructed upon. That building was furnished with necessary modern equipments and furniture and was named as Hamdard Research Clinic and Nursing Home. The said Nursing Home was created from Quami income, later labeled as "Hamdard National Foundation (India)" which is wakf money and is an acquisition of the Dawakhana Wakf and its part and parcel. The Board denies that Hamdard Research Clinic and Nursing Home are not institutions established by Hamdard National Foundation (India) and denies that they are a society and is only beneficiary of the Hamdard wakf. All the assets, (moveable and immoveable and properties) that the Dawakhana Wakf held and all investments that it was to make subsequently or shape as well as all such future acquisitions made by it out of its Quami income was to be wakf property. It is also averred that merely because the Mutawalli has the choice to associate others or other institutions with him for management purposes, to administer the wakf properties and its institutions such persons cannot assume the role of a different entity. The Board contends that the Mutawalli has no authority and power to form registered societies. The dual role of management is objected to as impermissible. The managing agency of the Dawakhana Wakf cannot possibly become a donee and or owner of the corpus of the wakf entrusted to it for management. The Board denies that the Hamdard Research Clinic and Nursing Home is not wakf; it is part of the Dawakhana Wakf. The various institutions named by the plaintiff, are parts of the Dawakhana Wakf which has acquired and created them.

17. The Board concedes that after creation of the Dawakhana Wakf, Hakim Hafiz Mohammed Saied Saheb migrated to Pakistan, and that his half share and interest in the Dawakhana was declared Evacuee Property; and that later the Dawakhana Wakf purchased the said evacuee share out of its Quami Amdani from the Custodian of Evacuee property on 22.06.1950. The said half share thus become an addition to and part of the Dawakhana and consequently, wakf property. For these reasons, the Board contends that the Dawakhana Wakf is not entitled to the reliefs it seeks.

18. In Suit No. 118/1972, filed by the Jamia Hamdard (originally known as Institute of History of Medicine and Medical Research) the plaintiff, a society registered under the Societies Registration Act 21 of 1860 with its office at 2-A/3, Asaf Ali Road, New Delhi, and a beneficiary under the Hamdard Dawakhana Wakf Delhi, claims a declaration similar to the one sought by the Dawakhana Wakf. Its objects are:

a. to promote medical education and research;

b. to study and promote the knowledge of history of medicine and to undertake research thereof;

c. to undertake scientific appraisal of the principles and practices of the various systems of medicines; and

d. to collaborate in kindred activities with other national or international organizations with similar objects.

It is alleged that pursuant to those objects, the plaintiff had been enjoined to carry out the following activities and functions:

(1) To provide, establish, maintain, control and manage educational institutions, libraries, museums, herbariums, botanical gardens, drug laboratories, research laboratories and workshops, hospitals, press, publication divisions and bureau of information and all such other things as may be necessary or incidental or conducive to the said objects;

(2) to provide funds for payment to students of educational institutions and research scholars working in such laboratories or research development workshops;

(3) to employ such staff as may be considered necessary and to make provisions for their service conditions, benevolent funds and contributory provident fund or other superannuation benefits;

(4) to conduct magazines, periodicals, issue pamphlets and disseminate information and further the aims and objects of the Society by means of lectures and all other means;

(5) to solicit, obtain or accept subscriptions, donations, grants, gifts, devices, bequests and trusts from any person, firm, corporation, trust or institutions;

(6) to acquire by gift, purchase, exchange, lease or hire or otherwise howsoever any lands, buildings, easements, gardens and any property - movable or immovable - and estate or interest in furtherance of all or any of the objects of the Society;

(7) to build, construct and maintain houses or other buildings and alter, extend, improve, repair, enlarge or modify the same and to add to or repair any existing building and to provide and equip the same with light, water, drainage, furniture, fittings, instruments, apparatuses and appliances and all other necessaries;

(8) to construct or otherwise acquire, lay out, repair, extend, alter, enlarge, improve, immovable property belonging to or held by the Society;

(9) to accept and receive in any form whatsoever any cash, securities, bond, debentures and immovable or movable property either unconditionally or subject to any trusts created by a donor.

(10) to print, publish and exhibit any books, pamphlets or posture considered desirable for the promotion of the objects of the Society;

(11) to sell, manage, transfer, exchange, mortgage, demise, dispose of or

otherwise deal with any property whatsoever belonging to the Society.

(12) to borrow and raise money with or without security or on the security of a mortgage, charge or Hypothecation or pledge over all or any of the immovable or movable properties, belonging to the Society or in any other manner whatsoever;

(13) to give loans, scholarships, free ships, prizes and monetary assistance to students of the Society''s institutions to help them in their studies;

(14) to pay out of the funds belonging to the Society all expenses incidental to the formation of the Society and management and administration of any of the foregoing objects, including all rents, rates, taxes, outgoings and the salaries of the employees.

19. Suit No. 119/1972 was filed by the Hamdard National Foundation (India) against the Delhi Wakf Board. This plaintiff ("the Foundation") is a society under the Societies Registration Act 1860 having its office at 2-A/3, Asaf Ali Road, New Delhi-1 and is a beneficiary of the Dawakhana Wakf. Its objects are:

(1) to control and supervise proper utilization of the income of the Foundation received from Hamdard Dawakhana (Wakf) Delhi as Qaumi income and from any other body, person or concern, Indian or foreign, in any form as aid, grant or bequests, with or without any conditions, to protect and promote the interests of the society and to safeguard the rights, privileges and interests of all those who derive benefit from the Society.

(2) to promote, support and develop indigenous system of medicine and medical science and their utility to mankind.

(3) to provide medical, educational, economic and all other sorts of aid to the deserving persons and institutions for humanitarian service, general welfare and charitable purposes.

(4) to collaborate and corporate with other institutions having similar objects.

20. The foundation says that donations received from the Dawakhana Wakf and amounts received from other sources were to be used by it for the above objects. Pursuant to those objects, the Foundation is required to carry out the following activities and functions:

(1) To establish and run a complete Research Institute for the reform and development of the indigenous systems of medicines and medical science.

(2) To establish, develop, aid and run medical or tibia college, pharmacy college, commercial and business management college for the education and training in the field of medicine, pharmacy and other aforesaid subjects.

(3) to establish, develop, aid and run Charitable Hospitals and Clinics on modern lines, where the destitute and others can be treated in accordance with the indigenous systems of medicines.

(4) to establish, manage and run educational and training institutions of all kinds and to aid those which are already in existence.

(5) to construct and to provide aid for the repair, maintenance, expansion and improvement of schools, colleges, study and research institutes, laboratories, rest-hoses, wells, cisterns, places of worship and similar such buildings and institutions for general public welfare.

(6) to publish and aid publication of any such books, pictures, maps or other literature as is expected to benefit the country and the people.

(7) to extend monetary aid to orphans, destitute, travelers, research scholars, authors and sufferers from calamities.

21. The Foundation avers that certain events occurred, subsequent to the filing of the suit. This was that the then existing Hamdard Research Clinic and Nursing Home at Asaf Ali Road, New Delhi, being run by the plaintiff-society, stood closed in the year 1982.

22. In Suit No. 116 filed by the Indian Institute of Islamic Studies against the (later known as "Jamia Hamdard") a declaration, as in the case of the Dawakhana Wakf, is sought, i.e. that it is not a wakf. It is alleged that the Institute (Jamia Hamdard) was a registered society with its office at Punchkuin road, New Delhi and was a beneficiary of the Dawakhana Wakf Delhi. Its objects are:

(1) to promote the study of Islamic culture and civilization:

(2) to promote intercourse between scholars and institutions engaged in Islamic studies in different countries;

(3) to conduct and provide facilities for research about the impact of Islam on India and India''s contribution to Islamic studies.

It is averred that donations received from the Dawakhana Wakf and other amounts received from other sources were to be spent on the above objects, pursuant to which the Jamia Hamdard''s activities and functions extended to doing the following: -

(1) to establish a library with facilities for research;

(2) to establish a museum of objects of Islamic arts;

(3) to acquire and preserve source-materials relating to Islamic studies;

(4) to provide residential facilities for scholars;

(5) to give financial assistance to scholars carrying on studies approved by the institute;

(6) to publish monographs and research papers, edit manuscripts and bring out periodicals, relating to Islamic learning, arts and sciences;

(7) to disseminate knowledge about Islam, Islamic culture and civilization by organizing and facilitating study courses, conferences, symposiums, seminars, lectures and research;

(8) to do all such other lawful acts, deeds or things as the institute may consider incidental or conducive to the attainment of any of the objects of the institute.

23. It is further alleged that the Jamia Hamdard is a registered society. It relies on its Regulation No. 43 (i) and (ii) which states as follows:

(i) On dissolution of the societies known as Institute of History of Medicine and Medical Research, Indian Institute of Islamic Studies, Hamdard College of Pharmacy, Hamdard Tibia College and Majeedia Hospital and transfer of Rufaida School of Nursing from Hamdard Education Society which had been sponsored by the Foundation, and are wholly or substantially funded through the said Foundation, by the Dawakhana Wakf, all property movable and immovable, and all rights, powers and privileges of the said Societies shall be transferred to and vest in the Jamia and shall be applied to the objects and purposes for which Jamia Hamdard is established.

(ii) All debts, liabilities and obligations of those societies stood transferred to the Jamia Hamdard and were to be, thereafter, discharged and satisfied by it.

24. In the written statements filed by the Wakf Board, pleas similar to its defence, in the Dawakhana Wakf''s suit have been taken; it is urged that these entities are entirely owned and set up by the said Dawakhana Wakf, and are its agencies. They are beneficiaries of the said donor trust (Dawakhana Wakf) and fulfill the objects set out by them; they are accretions to the said Wakfs property. It is also alleged that in the character as beneficiaries, these societies and entities are fulfilling the objects of the Dawakhana Trust, and themselves have objects which fulfill the description of wakfs. In these circumstances, it cannot be said that they are not wakfs; the relief claimed by them, are inadmissible, and the suits, liable to be dismissed.

25. During the course of hearing this court, by consent of parties, framed the following issues:

1. Whether Hakim Haji Abdul Hameed has no locus standi to file this suit? OPD

2. Whether the suit of the plaintiff is not maintainable in view of the provisions of Sections 5 and 6 (1) of the Wakf Act of 1954? OPD

3. Whether the plaintiff is estopped from challenging the notification of the suit property as Wakf? OPD

4. Whether the suit of the plaintiff is time barred?

5. Whether Hamdard Dawakhana Wakf created on January 28, 1948, Hamdard Research Clinic and Nursing Home, Institute of History of Medicines and Medical Research, Hamdard National Foundation, Indian Institute of Islamic Studies are

not Wakfs within the meaning of the Wakf Act, 1954? OPP.

6. Whether Hamdard Research Clinic and Nursing Home is the beneficiary of Hamdard Wakf? If so, to what effect? OPP

7. Whether the properties of Hamdard Dawakhana Wakf, Hamdard Research Clinic, Institute of History of Medicines and Medical Research, Hamdard National Foundation and Indian Institute of Islamic Studies are not Wakfs within the meaning of Wakf Act, 1954 or they are beneficiaries of Hamdard Wakf? OP parties

8. Whether item No. 63 of the impugned notification No. 3533/70 dated December 12, 1970 issued by the defendant under the Wakf Act is illegal, without jurisdiction, ultra vires, null and void? OPP

9. Relief.

Issue Nos. 1, 2 and 4:

26. These three issues were framed at the behest of the Wakf Board; during the hearing, its learned senior counsel, Shri. Sawhney did not press them; it was fairly contended that the maintainability of the suits, on the grounds set out in these issues, was not contested. These issued are therefore, held in favour of the plaintiffs, and against the defendants.

Issues 5,6, 7 and 8

27. These issues are to be considered together because they go into the heart of the dispute between the parties. As noticed in the previous portion of this judgment the Dawakaha Wakf was created by the deed subscribed to by the original plaintiff with his mother and brother (Hakim Haji Abdul Hameed Saheb, his brother Hakim Hafiz Mohammed Said and mother Mst. Rabea Begum Saheba). Hakim Hafiz Mohammed Said-the brother was declared an evacuee by the Custodian''s order (dated 1.8.1949) and Mst. Rabea Begum Saheba died on 9.10.1949. Hafiz Mohammed Said''s share (i.e the evacuee''s share) was subsequently purchased by Dawakaha Wakf. The third settler (Mst. Rabea Begum''s share) devolved, upon her death, on the sole surviving settler i.e. Wakif Mutawalli, the original plaintiff.

28. Both the parties have relied upon different parts of the deed of 1948, to say whether the intention of the original settlers was to create a trust or a wakf, within the expression as understood of Mohammedan Law. Mr. Shanti Bhushan and Mr. Seth on behalf of the plaintiffs urged that the concept of Wakf implies perpetual dedication of property or asset, with the objects that are consistent with concept of charity in Muslim Law. It was submitted that under the 1954 Act, there are three categories of Wakf; the third category was the "Wakf - Alal and Aulad"-the category defined by Section 3 (1) . It requires donation of property for any purpose recognized by Muslim Law as pious, religious or charitable. A great degree of emphasis was placed upon the circumstance that this definition did not undergo any change despite the amendment made to the Act

subsequently in 1962 which had enlarged the scope of term "beneficiary" under the Wakf Act. Learned counsel argued that the use of the terms "Wakf" in the Deed of 1948 is not conclusive of the matter because it is now well settled that nomenclature of documents or contracts are not conclusive; what the Court has to examine is to consider the substance or the contents of the document and decide whether the nomenclature is descriptive or what it intends something else. It was submitted that mere use of the expression "Wakf" in the deed of 1948 is not determinative of the question; the Court is under a duty to arrive at an independent conclusion after having gone through the relevant recitals in that document as well as the effect of its operative conditions.

29. Learned counsel placed strong reliance on the decision reported as Nawab Zain Yar Jung and Others Vs. The Director of Endowments and Another, , where it was held that the essential characteristics of a Wakf under Muslim Law, if it were to be religious, it should be only for the benefit of members of Muslim community and if it were to be secular charity should be to the poor alone. Particular emphasis was placed upon the Supreme Court''s view that public utilities like schools, colleges or hospitals etc. by their nature could not be restricted to the poor or Muslims alone. The court further held that in common law these were recognized as public utilities which would qualify as Wakf despite non-Muslim beneficiaries. However the Court added that definition in the Wakf Act excluded those and did not confer benefit to non-Muslims and such public utilities therefore could not treated as wakfs. The plaintiffs also relied upon the decision reported as The Coimbatore Athar Jamath Vs. The Tamil Nadu Wakf Board, . It was submitted that what weighed with the Court (in the Coimbatore Athar Jamath case) was that even though the objects outlined in the scheme were pious, religious and charitable yet the managing body had discretion to engage in other activities; it also provided a fund for starting and maintaining industrial or technical institution for imparting training to pupils of the Athar Jamath community or Muslim communities in general. It was held that an outline of the provisions of the scheme, the properties managed by that society could be considered as a trust but did not constitute a Wakf within the meaning of that expression in law. The judgment in The Karnataka Wakf Board Vs. State of Karnataka and others, , was relied upon to say that without an enquiry, the Wakf Board cannot designate a trust or an institution as falling within its ambit and supervisory control. It was urged that in this case no enquiry was held and the definition arbitrarily reported to the appropriate Government that the plaintiff''s societies were Wakfs, which lead to the issuance of impugned notifications.

30. Learned counsel also relied upon the Division Bench ruling in Kassimiah Charities Rajagiri Vs. Madras State Wakf Board, . In this case the Court held that the nomenclature given in the concerned document would not be decisive of the question whether the endowment would be under a Wakf, Muslim law or under the Act or some other form of trust or charity. The Madras High Court relied upon the judgment of the Supreme Court in Nawab Zain case(supra) and held that a public utility foundation like a school or college established by a Muslim in order

to come within the fold of Wakf Act should be exclusively intended for the benefit of the Muslims. In that case the school was not meant to exclusively benefit members of the Muslim community and was held not to constitute a Wakf.

31. It was argued that by clause 2(a) of the Deed (Ex. PW-1/2) in question, the present case the Wakif or the Chief Mutawalli as the case may be, was conferred with extremely wide powers such as to alter or change the conditions relating to Mutawalliship and administration, for efficient working, and also to transfer, sell, pledge, mortgage or alienate any properties belonging to the Wakf. His powers extended to opening accounts, lending money, employing persons for the functioning of the trust etc. It was urged by Clause (4) the Mutawalliship devolves as in the case of proprietorship, i.e. by hereditary succession. Any male descendant of the Wakif Mutawalli could be removed or denied the office only if he had indulged in conduct or acts of misfeasance outlined in Clause-6. Learned counsel further emphasized that by virtue of Clause 28 of the Deed even though the Trust did not own any property, at a later point out if it did acquire any, the same could not be dealt with except in accordance with the Deed.

32. Learned Senior Counsel highlighted that certain conditions in the deed such as Clauses 27, 29, 31, 33 and 44 point to the fact that the Donors/Settlers of the trust did not wish to create a Wakf and that the term was used in a very loose manner. It was submitted that having regard to the true position in law, that Wakf meant permanent dedication of some property to God with the object of achieving those goals recognized by Muslim law as charitable, these conditions pointed to the intention of the Trust or wakf running a business on commercial and profitable lines which were intricate and entailed entering into contracts, having banking transactions, purchasing shares, acquiring assets and making prudent commercial or business decisions which extended to if necessary alienating or mortgaging the assets of the business. This was wholly inconsistent with the objects of a Muslim Wakf. Learned counsel emphasized that Clause 29 expressly empowered the Wakf to protect itself against declining income from any property by providing for its sale. It also enabled the Wakf to purchase alternative property and till such arrangement was made, to deposit the money in a bank or any government securities. Even the Mutawallis and functionaries in charge of the Wakf were empowered to shut the business of Dawakaha Wakf by virtue of Clause 31 and in case its income dwindled, and continuation of business became contrary to the interest of the Wakf, instead to engage some other business.

33. Learned Counsel submitted that entire scheme outlined in the deed Ex. PW1/2 revealed that under no circumstance could such a running business be treated a Wakf; all that the settlers desired was to ensure that its income was used for purposes regarded as charity within the meaning of law but not as charitable objects within Mohammedan law.

34. It was urged in addition that the Hamdard National Foundation, Jamia Hamdard and the Indian Institute were all independent bodies though created

with the donations of the Dawakaha Wakf. Learned counsel urged that there was nothing in the objects or rules or regulations of each one of these entities - marked in the common trial as Ex. PW-5/P2, PW-5/P 16, PW5/P-10 and PW-4/4, showing that any property or asset were dedicated permanently for objects considered charitable in Muslim law. It was argued that Jamia Hamdard University is one institution created for the purpose of providing education to all and not merely in Islamic subjects or areas of special interest to the Muslim community. Similarly in other areas such as medicine the beneficiaries of these bodies were not confined to the only one section of general public but open to all. Moreover argued learned counsel each of these bodies had functional autonomy and was free to secure funding from third party source and donations. They had their own control and administrative mechanisms and were not in any way connected with or dominated by the Dawakaha Wakf. The mere fact that they were beneficiaries to some degree did not mean that they themselves were Wakfs within the meaning of the Act.

35. It was argued by Mr. Shanti Bhushan that the Deed Ex.PW1/2 further disclosed that all kind of assets such as building, tenancies, business, goodwill and even trademarks had been made over to the Wakfs. It was submitted, by placing reliance on the definition of "property" (from Words & Phrases (Permanent Edition) Page 288) that the expression means something tangible, visible and cannot be said to extend -having regard to the exposition of Muslim law, to include intangible attributes such as goodwill and trademarks. It was emphasized that concept of Wakf did not attempt dedicating business entities - fluid since they implied flexibility of capital utilization and considerable flexibility in the use and operation of assets as the subject matter of trust. Learned counsel emphasized that the objects spelt out in Clauses 44 to 46 of the Deed Ex. PW1/2 ruled out the Donor''s intention of creating a wakf. It was submitted that the objects in these were widely spelt out and included all manner of activities meant to benefit all sections of general public, though they were charitable within the meaning of taxation law or even could be regarded as objects of trust generally, they could not be regarded as Wakf within the Muslim law; they were trusts, which could be created validly.

36. Mr. Sawhney, Senior Counsel for the Wakf Board urged that the intention of the original plaintiff and his family members, when they dedicated the business of the Dawakhana Wakf, was to create a wakf within the meaning of Mohammedan Law. It was urged that even though some portion of the income of the wakf was kept for the benefit of the descendents (aulad), that condition too was done away with, during the life time of the settler, i.e the original plaintiff. This clearly demonstrated the charitable nature of the wakf. It was argued that even other-wise, the decision in: Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan, and Ahmed G.H. Ariff and Others Vs. Commissioner of Wealth Tax, Calcutta, , demonstrated that there was nothing inconsistent with the concept of a wakf in Muslim law, if beneficiaries derived some advantage or income, as that part too was considered charitable, if the dominant intent of the

settlers, was to create a wakf. These decisions were also relied on for the purpose of the submission that a mutawalli or someone discharging his duties, by whatever name called, despite possessing sweeping and wide ranging powers, is no more than a Manager. There is consequently nothing inconsistent with his duties and status, as mutawalli, if he is empowered to act in a manner consistent with a prudent businessman, having regard to the larger interests of the wakf.

37. It was argued that terms and conditions in the deed Ex. PW 1/2 regarding the powers conferred to the Wakif Mutwalli; were in conformity with the concept of Wakf. In this regard, it was submitted that the object of Wakf is to permanently dedicate the property or asset for objectives regarded as charities in Muslim law. In the discharge of his legitimate opinion Mutwalli not only has the power but the duty to guard such assets prudently and ensure that those objectives are fulfilled. In this regard, learned counsel emphasized that various powers including power to sell the asset or some portion of it in the event of distress or imminent loss are those available to a prudent manager. They were not inconsistent with the dedication being a Wakf. Learned counsel relied upon the decision reported as the Bibi Siddque case (supra), learned counsel also relied on the decision reported as Zubeda Begum (Smt) and Others Vs. Syed Shah Khursheed Ahmed Hashmi and Others, , to say that a Mutwalli is merely a Superintendent or Manager, and the founder of the Wakf can appoint himself or his children and descendants or any other person, even a female or non-Muslim as Mutwalli of the Wakf property. Reliance was further placed upon the decisions reported as Mohammad Soleman Molla and Others Vs. Tasadduq Hossain and Others, ; Mahammad S. Chamnad Vs. Jainabi and Others, ; Ghazanfar Husain Vs. Mt. Ahmadi Bibi and Others and Khalil Ahamad Khan Vs. Malka Mehar Nigar Begum and Others, to say that a Wakif or the founder were entitled to prescribe the scheme for administration of the Wakf for succession to office of Mutwalli or indicate the class of persons or heirs who might assume such office and that the office of Mutwalli can be hereditary if it is so provided in the Deed. Having regard to this settled legal position, urged learned Senior counsel neither Clause 4 nor any other condition can be construed as alien to the concept of Wakf in this case. Indeed what is necessary for the Court to examine is the objective and the purposes for which the dedication was made by the Wakif Mutwalli i.e. the original plaintiff in this case.

38. Learned senior counsel for the Wakf Board further urged that dedication of a portion of income or its reservation for family purposes is not inconsistent with or does not change the character of a Wakf to secular trust; it continues to be a wakf. In this regard reliance was placed on the decision reported as Sayyed Ali and Others Vs. Andhra Pradesh Wakf Board Hyderabad and Others, , Fazal Sheikh and Others Vs. Abdur Rahman Mea and Others, , AIR 1924 44 (Privy Council) ; P.G. Venkataswamy Vs. Mir Zahid Hussain Saheb (Sha) & Ors. AIR 1973 Mys 145 (DB), particular emphasis was placed on the Privy Council decision in Hazi Abdur Rahim (Supra) where it was stated that:

in the present case there is dedication, which has already taken effect, and it does so substantial that one half of the net income has to be devoted to specified pious purposes. It is impossible to say that this gift is only a veil to cover arrangements for the aggrandisement and the settlor''s family and a device to make the property inalienable, the most that can be said is that the provision for the settlor''s family is considerable, for the mere supervision itself is clearly permissible, as is the provision that the settlor''s heirs shall be the Mutwallis of the Wakf in their orde.

39. It was argued on behalf of the Wakf Board that the change brought about in the definition of a term "beneficiary", has rendered the previous decisions about the scope of the Wakf inapplicable. In this context it was argued that law existing prior to the introduction of the Wakf Act 1954 by which the benefits (of the Wakf) were confined only to the Muslim community, has been changed; now the beneficiaries can be Muslims as well as non-Muslims as long as the public and charitable nature of the Wakf is proved. Therefore, providing for schools in which all alike are given education; establishing hospitals in which treatment is given without discrimination; establishment of lodging houses and piyos (places where water is offered free of cost) where the benefit is reserved to all alike are all considered charitable objects constituted with a Wakf''s objects in Muslim law. The only narrow category where the object or dedication cannot be said to be Wakf is the establishment and maintenance of a religious institution which does not propagate Islam. Except such category of dedication, all charitable objectives where the benefit flows to human kind generally, would be consistent with the concept of Muslim Wakf. Learned counsel stressed on the definition of "beneficiary" and relied on the decisions reported as Faqruddin (Dead) through L.Rs. Vs. Tajuddin (Dead) through L.Rs., , Qassimiah (supra) Kachchh Wakf Board Vs. Kachchh Jamat 1988 (1) GLR 487. Learned counsel relied the decision reported as Faqruddin (Supra), the Supreme Court held that Wakf implies taking something out of one''s ownership and passing it on to God''s ownership dedicating its usufruct - without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure -for persons and individuals, or for institutions or mosques and graveyards, or for other charitable purposes. It was urged that having regard to this statement of law, the objects spelt out in Clauses 43 to 46 of the deed in the present case Ex. PW 1/2 clearly are spiritual and temporal not restricted to any one community meant for the benefit of all. They are consistent with the concept of a valid Wakf.

40. Learned Senior Counsel next argued that in the present case deployment of Dawakhana Wakf''s income to achieve the objectives spelt out in the Deed Ex. PW 1/2 has resulted in creation of several other institutions. Each of this no doubt had their own management structures and their own objectives. Some of them also owned property yet on a fair application of law declared in Bibi Siddique (supra) to shows that such property or asset acquired or created with the aid of Wakf income directly out of usufruct, amounts to accretion to the Wakf itself. Learned counsel argued that it is not necessary in this context to part with

or sell any specific property or part of the property of the Wakf. In this case, it was enough that income derived from the Dawakhana Wakf''s activities in the fulfillment of its objectives was used to create assets. They became properties or assets of the Wakf itself.

The Wakf Deed

41. Before discussing the rival merits of the case, it would be necessary to consider the recital, and terms and conditions of the Deed in question in this case, i.e Ex. PW-1/2. They are discussed in the following paragraphs.

Recitals

42. The initial recitals of the deed mention how the Dawakhana was established in 1906 and went on to progress even after the death of the original founder on 22.06.1922. It also mentioned that all claims and disputes relating to religious rights and inhabitants were settled, and properties acquired from the income of the business were in proportion to their accrued rights in the ownership of the Dawakhana. The recitals clarified that some of the immovable properties derived from the income from the Hamdard Dawakhana business were occupied by the Dawakhana and expressly stated that

Nevertheless, whatever immovable property are being used by the Hamdard Dawakhana, their relation to the said business is not such as cannot be separated from it, that is, even on our retaining as before the ownership rights in respect of the said immovable properties which are in the occupation and use of the business of Hamdard Dawakhana, we have every rights, according to law and Shariat, to transfer the said business of Dawakhana or any specific or demarcated part thereof.

43. The recital further stated that the original founder''s intention to start the Hamdard Dawakhana was not merely to benefit himself but to reform and develop the indigenous system of medicine and its medical pharmacopoeia, and the medical, educational and social relief and aid of the deserving people in the country. It stated that services of medical science and object of charity had always received full recognition in the hands of the original founders of the Dawakhana during his lifetime and later by the Settlers. The recital further stated that the settlers being mortal would eventually leave the world, thus expressing that the objects of Dawakhana would remain uncertain and, therefore, with the sincere desire that sufficient funds ought to be available for publicity, charity and relief to further the original objects which were not be to allowed to be deviated, the Deed was executed.

44. In the initial part of the dedication, the executants/settlers expressed the intention of serving humanity and advancement of charity and attaining God''s approbation; they also dedicated

as Wakf for all times to God Almighty subject to the terms, conditions and objects contained in this Wakf-Deed, the business of Hamdard Dawakhana.

The business was valued at ` 5,00,000 as per the balance sheet as on 31.12.1947. The settlers stated that they had taken-up the business and property

out of our control and possession and have delivered the control and possession of God Almighty - the real owner.

45. The executants/settlers disclaimed any further rights of ownership or its possession in the business of Hamdard Dawakhana which related to the Indian Union except the rights of Mutawalli Sahib, administration of Wakf and derivation of benefits as per rules in the deed. The recitals also stated that

Neither we, the Executants, nor our heirs and legal representatives shall have any right, power or authority to cancel or impugn the validity of this Wakf or to go behind the basic objects of the same. However, we the Executants 1 and 2 jointly during or life time and on the death of one of us, the survivor alone, shall have full right to make at his or their discretion suitable alterations in the conditions relating to the duties of Mutawalli and the administration of the Wakf including the appointment of Mutawalli and empowering them to exercise the powers exercisable by Wakf Mutawalli

46. The Wakf Deed, by its subsequent amendments noticed the demise of Ms. Rabea Begum in 1949 and that Hakim Mohammad Said was declared as evacuee and his share was taken by the Custodian of Evacuee Property, which was purchased by the Wakf''s Qaumi Income (Charity) on 22-06-1960 and merged with the Qaumi income since then. In view of this, the original plaintiff became the sole surviving Wakif Mutawalli with all rights, powers and duties. The recital also stated that the benefit contemplated in the deed was the 1/4share in the properties of Dawakhana business, as reduced by the 1/8meant for reserved fund for the family of settlers in the form of "Khandani Income" in the ratio of 7:7:2 for the original plaintiff, Hakim Mohammad Said and Mst. Rabea Begum. The latter''s share on her death devolved on the other two settlers, who came to enjoy equal rights in the residue of the said 1/4income. With the purchase of Hakim Mohammad Said''s share from the Custodian of Evacuee Property by the Qaumi Income, the benefit to settlers'' families stood reduced to 7/64 share of the total profits of the Wakf, for the branch of the original plaintiff/sole Wakif. The amendment to the Deed also stated that no Khandani Income would exist during the lifetime of the original plaintiff and nothing would be payable on that account. Of that Khandani Income, 7/64share was to commence only after the death of Hakim Mohammad Said, the original plaintiff. His children and grand children would get nothing as Khandani income, but would receive remuneration for services rendered so long as he was alive. It was expressly stated further that "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 its value or capital profits arising from which exclusively belong to the charity

having been irrevocably and perpetually dedicated for charity and delivered and put under the control and possession of God Almighty.

Conditions of the Wakf Deed

47. Clause-1 spelt-out that there would be at least a minimum of one and maximum of 5 Mutawallis, including Wakif Mutawalli and the Chief Mutawalli. The senior most among the male descendants and the Wakif Mutawalli were to hold the office of Mutawalli. After the Wakif Mutawalli ceased to be a Mutawalli, every Chief Mutawalli had the same rights and powers of administration of the Wakf and the power of making regulations. The Wakif Mutawalli had the power to decide the remuneration of the Chief Mutawalli and other Mutawalli. After he ceased to be a Wakif Mutawalli, the Chief Mutawalli enjoyed that right; in the case of the remuneration of Chief Mutawalli, it was to be by the Majlis-e-Ayan.

48. Clause-2 reserved to the original plaintiff, the full rights, powers and authority to manage all affairs of the Wakf property and the conduct of its business as well as the right to appoint Mutawalli and decide upon their duties.

49. Clause 2(a) clarified the rights, powers and authority of Wakif Mutawalli in regard to the management and business of the property except those upon which restrictions had been imposed expressly in the Deed. They included all the powers ordinarily exercised by a fully authorized proprietor or Managing Director or General Manager of a business concern for efficiently carrying out a business on modern commercial lines or for accepting and supporting such business or for saving it from loss. The clause also forbade the right of any other person to interfere or obstruct or restrict or exercise Wakif Mutawalli''s power. It indemnified him from damage or loss suffered or caused to the Trust which occurred during the reasonable exercise of such duties in regard to management of the affairs of the Trust. These powers included:

(a) appointment of employees, servants, agents, bankers, auditors etc. on appropriate terms and remuneration, commission etc, indemnification or payment of loss and damage a third party might suffer in respect of the services rendered to the Hamdard Dawakhana

(b) Advancement of money through loans or allow credit to or obtain money through credit from merchants, customers, brokers in the normal course of business;

(c) Receive monies in advance or by way of security or trust from agents, distributors, stockists, customers, etc. in the course of Wakf business;

(d) Opening post office or bank accounts in several names, depositing monies in accounts, their withdrawal, transfer and doing everything connected with such operation, including drawing negotiable instruments, and borrowing money;

(e) pledging or mortgaging any movable or immovable property of the Wakf as security against loans required for the purposes of the Wakf, leasing or hiring its properties on any terms;

(f) transfer, sale, pledge, hypothecate or encumber for the purposes of Wakf; any of its securities, shares acquired by it and do all things to effectuate that;

(g) Acquire through purchase, hire-purchase, exchange, gift, mortgage or otherwise, any movable and immovable property for the purposes of Wakf business from Wakf funds;

(h) Get all kinds of documents executed and registered;

(i) file and defend suits, prosecutions and appeals and other proceedings in Courts in relation to the business of the Wakf;

(j) With the object of developing and publicizing activities of the Wakf, to render aid and assistance to all public activities and institutions and to invite distinguished public men and officials to inspect the Wakf or in connection with other functions and to pay out of the income the expenses incurred on account of such invitations and functions.

(k) charging Wakf funds at his discretion with such expenses as were incurred directly or indirectly to benefit the Wakf.

50. Some of the important contents of the dedications are discussed below. Clause 4 sets out the scheme of succession to the office of the wakif and Chief Mutawallis. The Wakif Mutawalli was the original founder; on his death or of the Mutawalli(s) appointed as successors of the Wakif Mutawali subject to the provision of Clause 5, the male descendants of the Wakif Mutawalli, then living, had the right, in order of seniority, to be appointed as Mutawalli of the Wakf. Like this, succession to Mutawalliship was to continue in the male line from generation to generation. If there was no male successor in the direct line of succession fit to assume charge of Mutawalli of the Wakf, then anyone from the male descendants of the female issues being a rightful claimant, in succession could be appointed as Mutawalli. Clause 6 set out the disabilities and disqualifications which rendered a candidate to Mutawalliship ineligible; broadly it required a mutawalli to be a major, not insane, sufficiently educated and experienced to discharge duties; he was also required to be of sound health, so as to assume the responsibilities required of the office. Insolvency, drunkenness, habitual indebtedness, conviction of a crime involving moral turpitude were all disqualifications for appointment. If a candidate had spent wakf income or used wakf property, in violation of its terms, he was ineligible. Other conditions pertained to probity of the candidate while functioning as an employee of the wakf.

51. Some of the other terms of the Deed are that:

22. The rights of ownership of the Trade Name, Trade Marks, Patent Formulate, Prescriptions and Processes of manufacture of medicines evolved till 31st March, 1960 (Nineteen-sixty) have been divested (in their entirety and absoluteness) irrevocably in favour of the Hamdard (Wakf) for the benefit of charity only, as per Affirmatory Declaration given on the first of April, 1960 (Nineteen Sixty) in

respect of the Wakf-Deed. This absolute and irrevocable divestment being philanthropic for the noble cause of Qaumi Income of this Wakf, the Wakif Mutawalli has waived his right to claim now or in future, nor shall, any of his heirs, nor beneficiaries under the Wakf, have any right to claim from the Wakf, any royalty, rent or any other kind of monetary benefit or consideration, this relinquishment being absolutely free of charge, rent and royalty. The rights of ownership of any trade mark, patent, formulate, prescription, process of manufacture of the medicines evolved subsequently by the Wakf also vests and shall in future too, always continue to vest in the Qaumi Income and all the benefits accruing therefrom shall be exclusively for the benefits of Qaumi Income.

23. The Wakif Mutawalli, his successors, legal representatives or others shall have no right to open any office, godown, chemical works or trading institution for the purpose or manufacture and wholesale retail distribution or sale of medicines in the name of Hamdard Dawakhana within the Union of India or elsewhere or to interfere or obstruct in any manner with the use and benefit which this Wakf is entitled to derive from the registered trademarks of Hamdard Dawakhana and which have been conferred on the Qaumi Income by virtue of this Deed.

***

26. The immovable properties i.e. houses and buildings as described below belonging to the three executants and in the ownership of which the Wakf Business has no interest whatsoever, are with their consent, being presently used and occupied by the Wakf-business. If the Wakf wishes to continue hereafter their use and occupation as a tenant thereof, then its tenancy shall be deemed to be effective from Ist January, 1948 under such terms and conditions as the Wakif-Mutawallis being co-owners of the said properties may during their life time arrive at any agreement with the members of the Majlis-e-Awan and they shall be reduced to writing in the form of a deed of lease. If after the death of the Wakif-Mutawallis, it becomes necessary to amend or alter the terms and conditions of the tenancy, only such terms and conditions shall be binding and effective as may have been settled between the then owners of these properties and MAJLIS-E-AYAN.

26. (1) The whole of the building used as retail shop by the Wakf-business situate in Lal Kaun Bazar, Delhi bearing Nos.2242, 2236, 2237, 2239, 2240 Ward No. 7.

(2) The whole of the building used as a godown, office and chemical works, situate inside Katra Dina Beg Khan, Lal Kaun, Delhi bearing Nos.2231, 1348, 1350 Ward No. 7 excluding parts of the houses bearing Nos.2231, 1350 which are presently in our occupation as a residence and also exclusing other portion of house No. 2231, which is in the occupation of a tenant named Haji Abdul Shakur, Iron-smith.

(3) The whole of the double-storyed building, used as Hamdard Dawakhana Post

Office and residence by the Assistant Physician of the Dispensary, bearing No. 969, Ward No. 6, Lal Kaun Bazar, Delhi.

(4) A single storyed godown situate in Katra Dina Beg Khan, bearing No. 2238/1, Ward No. 7, Delhi.

***

28. Although no immovable property is presently included in this Wakf, yet if subject to the terms and conditions contained in this deed, any immovable properties hereinafter come to be included or attached to this Wakf by means of purchase or exchange etc., neither the Mutawallis nor the MAJLIS-E-AYAN nor the MAJLIS-E-AWAN shall have any right to alienate or subject to any encumbrance or charge any such property in violation of the objects, conditions and rules of this Wakf Deed. No Mutawallis of the wakf of the Majlis-e-Ayan or the Majlis-e-Awan shall have any right to use or spend any portion of the income or property, movable or immovable, for the purpose or in any manner contrary to the objects, conditions and rules of this Wakf-Deed. The person or persons, spending any portion of the income of the Wakf any purpose which is illegal or unbeneficial from the point of view of the wakf shall individually and collectively be responsible for restoring the same to the Wakf.

29.If any of the properties, movable or immovable owned by the Wakf, declines in value for any reason or there is serious apprehension of its declining in value of the income from any property is reduced to such an extent that it is contrary to the welfare and advantage of the Wakf or there is danger of any of the Wakf property being waste or destroyed or any of the immovable property owned by the Wakf is so old and dilapidated that it will not be conducive to the benefit of the Wakf to spend money on its repairs or the Wakf is not possessed of the sufficient funds to repair it or it is not possible to acquire some other property which is better and more remunerative than any existing property of the Wakf, movable or immovable, without first disposing of the latter property, then the Wakf-Mutawalli shall have the right to sell the said Wakf property and with its sale proceeds or by means of an exchange, acquire some other property in lieu thereof, which may be more useful and profitable for the Wakf. Till some other suitable property is acquired in lieu of the property thus sold, the money received from its sale shall be deposited in a scheduled bank or shall be invested in some Government or Semi-Government Securities. In the Wakif-Mutawalli during his term of Mutawalliship is unable to do the property with the help of the Sale-proceeds thus realized, the office Mutawallias succeeding him shall be bound to perform this duty to acquiring by purchase or exchange some other property. If in regard to transfer of any property the necessity and expediency referred to herein arises after the Wakif Mutawalli has ceased to have Mutawalli, then the succeeding Chief Mutawalli shall have the light power to transfer the said Wakf property and acquire with the aid of the sale proceeds or any exchange any of the property or properties and the property or properties so acquired shall form part of the Wakf Property and shall be subject to the conditions and rules of this

Wakf Deed.

***

31. If the Wakf-business of Hamdard Dawakhana continues to run at loss for three years in succession and there does not appear any prospect of sufficient profit thereafter or the total income from the Wakf-business is so reduced that its continuance become inexpedient and contrary to the interests of this Wakf, then the Wakif-Mutawalli during his terms of office and after him the MAJLIS-E-AYAN shall have the power by means of an Extra Ordinary Resolution to close down the above mentioned Wakf-business or to change it into some other form or to start some other profitable business in lieu thereof which is in keeping with the primary objects of the Wakf.

***

32 The restrictions imposed by the Deed on the transfer, sale and purchase of the movable properties relating to this Wakf shall be deemed to extend only to such of the movable properties as do not relate to the commercial and trading activities of the Wakf-business i.e. the Mutawallis of the Wakf and the Managers of the Wakf-business shall have full authority to sell and purchase all those goods and articles which may be dealt with in the course of ordinary trading and which may be required for use for the business of the Wakf or to acquire such valuable securities, shares in limited companies and other bonds or property, for the purpose of safe investment of the cash or for temporarily safeguarding the same as may be permissible under the law.

***

32-A. The restriction regarding movable and immovable properties mentioned in above clauses would not apply to the purchase, sale, transfer, exchange, mortgage, hypothecation or creating of charge on properties, assets, rights and effects held as business assets. Nor shall these restrictions apply to the investment or utilization of the proceeds thereof.

33. Only that profit shall be treated as the net profit of the Wakf which shall be derived from the business of the wakf and any other sources of income of this Wakf, and calculated in accordance with the prudently drawn up statements of accounts, as standing on the 31st December, 1948 and thereafter from year to year. In arriving at this annual net profit the following points shall be specially kept in view.

(1) No such income shall be included in the net profits of this Wakf as:

(a) comes within the definition of capital income;

(b) or forms part, directly or indirectly, of the income earned from the amounts transferred to reserve Fund;

The income mentioned in (a) and (b) above shall belong to Qaumi Income.

(c) or from which no deduction on account of any loss, business or administrative expenditure which is paid or is liable to be paid, has been effected. All amounts payable as remuneration to the Mutawalli, the government or Semi Government taxes, expenses incurred for repairs to the immovable properties and for recovery of rents and for safeguarding the interests of the Wakf shall be deemed to be included in the business expenses. The losses in the business and properties of the Wakf shall also include depreciation and waste of machinery and other articles or the diminution in the market value of the trading stocks and other properties movable and immovable or the losses which are likely to arise in future.

(2) To arrive at the net profits, the Wakf properties shall be valued either at the cost price or at the market price or depreciated value whichever is less and the lower of these prices will thus be entered in the balance-sheet. If, however, the market price of any of the immovable properties belonging to the Wakf suffers an extraordinary decline due to some accidental or temporary causes, the effects of which are not likely to last longer than one or two years, then in that case, the cost price or depreciated price of the said property, whichever is lower, shall be considered as its proper price and not its market price for the purpose of determining the net profits.

(3) Whatever Government or semi-Government taxes are payable by the beneficiaries of the "Khandani Income" of the Wakf in respect of the income received by them from out of the net profits of the Wakf, the same shall not be chargeable to the expenses of the Wakf and the responsibility for payment of such taxes will rest on those beneficiaries in the family and not on the Wakf. But the taxes payable in respect of that income of the Wakf, which shall not be divided amongst the beneficiaries in the family, shall be charged to the expenses of the Wakf.

***

40-A. The beneficiaries of the Khandani Income as per Shariat Law would be collectively entitled only to a share of 7/64 of the divisible income of the Wakf, and they shall have no right or claim whatsoever in the properties, the corpus or the assets of the whole Wakf which have been irrevocably and perpetually dedicated and delivered to the control of the God Almighty, the real owner.

42. During the life time of Wakif Mutawalli 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 Mutwalli as per shariat law.

***

44. The "Qaumi Income" of the Wakf i.e. 57/64 share of the divisible net profits and any other income, profits and gains, earmarked for the purpose of public charity and relief, shall be spent only within the territories of the Union of India

and only on objects of public charity which satisfy the following two cumulative tests:

(a) They must be objects of public charity for the benefit of all persons irrespective of caste, colour or creed, such as, relief of the poor, education, medical relief and the advancement of any other object of general public utility not involving the carrying on of any activity of profit, and

(b) They must be consistent with the principles of the true teachings of Islam.

Provided, however, that in spending the income on objects of public charity, priority shall be given to the collective needs of the country or to such needs as may benefit the largest number of persons or their future generations.

45. Priority may be given to the following:

(1) To establish and run an Institute for the promotion of medicine, education and research with emphasis on indigenous systems of medicine.

(2) To establish and successfully conduct a Tibbia College in conformity with the recognized standards.

(3) To establish and run charitable hospitals and clinics where poor patients are given free treatment.

46. Qaumi Income may also be spent on the following:

(1) To establish and run education institutions, and/or to aid those which are already in existence.

(2) To build schools, laboratories, wells, or such other buildings of a public nature as may benefit the largest number of people in the country.

(3) to publish books, pictures, maps or literature or to aid in publication of the same by the publication of which the objects of the Wakf are fulfilled or achieved.

47. Help may also be given to needy orphans, needy widows or helpless persons, needy authors and research scholars and victims of unforeseen

calamities without restriction of caste, colour or creed.

52. The earliest authoritative pronouncement of what constitutes a wakf, may be found in the following observations of the Privy Council in Vidya Varuthi Thirtha Swamigal v Balusamy Iyer, AIR 1922 PC 123, that Wakf constitutes the

tying up of property in the ownership of God, the Almighty and the devotion of the profits for the benefit of human beings.

Ameer Ali, the renowned jurist, (in his work The Personal Law of Muhammedans) described the origin of the wakf to the Holy Book, the Qur''an, and in the words and deeds of the Prophet of God. The author referred to a well authenticated tradition when Omer sought the Prophet''s advice about a pious use of a piece of land called Sammagh in Khaibar, when the Prophet remarked:

Tie up the property and devote the usufruct to human beings and it is not to be sold or made subject to gift or inheritance; devote its produce to your children, your kindred and the poor in the way of God.

Tradition has it that Omer dedicated the property and the wakf continued in existence for several centuries till the land became waste.

53. The law relating to establishment and management of wakfs, was, for long administered by English courts in India, in accordance with opinion of textbook writers and Islamic jurists on the issue. Thus "common" or unwritten law pertaining to wakfs held sway. In the course of one of its judgments, the Privy Council, held that dedication of property for family purposes could not be characterized as wakf. This led to discontent, and consequently, the Wakf Validation Act, 1913 was brought into force. That was the first legislative foray into the subject. Having regard to the almost century old law expounded by the Courts, Parliament codified the legal position, by enacting the Wakfs Act, 1954.

54. The relevant provisions of the Wakf Act are now discussed. Section 3(a) - which defined a "beneficiary", before its amendment in 1964, read as follows:

Benefiary means a persons 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 this benefit of Muslim community.

After the amendment of 1964, the definition read as follows:

(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

By Section 3 (l) , "wakf" has been defined in the following manner:

"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;

(ii) 1[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;

55. The first authority on the question as to what is a "wakf" is the judgment of the Supreme Court, in Nawab Zain Yavar Jung (supra) where it was held that:

"wakf" means any person making such dedication. Consistently with this definition of "wakf", a "beneficiary" has been defined by Section 3(a) a meaning a person or object for whose benefit a wakf is created and it includes religious, pious and charitable objects and any other objects of public utility established for the benefit of the Muslim community. It is thus clear that the purpose for which a wakf can be created must be one which is recognised by Muslim law as pious, religious, or charitable, and the objects of public utility which may constitute beneficiaries under the wakf must be objects for the benefit of the Muslim community.

***

10. The Muslim character of the wakf is also emphatically brought out by certain other provisions of the Act. The proviso to Section 15(1) , for instance, requires that in exercising its powers under the Act in respect of any wakf, the Board shall act in conformity with the directions of the wakif, the purposes of the wakf and any usage or custom of the wakf sanctioned by the Muslim law. Similarly, Section 15(2)(j) lays down that the Board has power to sanction leases of property for more than three years or mortgage or exchange properties according to the provisions of Muslim law. Section 21 requires that there shall be a Secretary to the Board who shall be a Muslim and he shall be appointed by the State Government in consultation with the Board; and Section 13 provides that a person shall be disqualified for being appointed a member of the Board if he is not a Muslim. There can, therefore, be no doubt that the wakfs with which the Act deals are trusts which are treated as wakfs under the definition of Section 3(1) and as such, a trust which does not satisfy the tests prescribed by the said definition would be outside the Act. This position is not disputed.

In Kassimiah Charities, the Madras High Court held that:

Therefore public utility charities can come under the Act only if they partake of the character mentioned in the Act i.e. if they are intended for Muslims alone. For section 3 (a) says that a public utility in order to constitute a valid object the Act should be intended exclusively for the

Muslim Community.

56. The significance of the change brought about by the amendment to the expression "beneficiary", in 1964 was noticed in more than one judgment. For instance, in Kachch Wakf Board (supra), the Gujarat High Court observed that, after the amendment, the beneficiaries could be non-Muslims, so long as the objects of dedication were consistent with the concept of a wakf:

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 ceremonies 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 utilise 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 Dharmshala, a place of abode for wayfarers.

Similarly, in Miriam Bai (supra), in 1973, the Madras High Court observed as follows:

But the Wakf Act of 1954 has been amended by Act 34 of 1964 under which the definitions of ''beneficiary'' and ''wakf'' have been amended by including wakf sanctioned by the Muslim law as coming under the Wakf Act. In V.S. Mani Vs. Controller of Estate Duty, Madras, Kailasam, J. has held that the coming into force of Act XXXIV of 1964 amending the Wakf Act of 1954 will have to be taken into account and that the donation of an immovable property 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.

The office of mutawalli and succession to it, under the Deed

57. The scheme of management in the Deed in the present case, i.e Ex. PW-1/2 undoubtedly suggests that the right to administer the wakf devolved by succession, or inheritance; in the first instance, the original plaintiff was constituted as the wakif mutawalli; the line of succession to the organization was clearly demarcated. On the death of the wakif mutawalli -or of the Mutawalli(s) appointed by him-the successors were his male descendants, then living, in order of seniority. They had the right to be appointed as Mutawalli of the Wakf. The succession to Mutawalliship was to continue in the male line from generation to generation. In the contingency of no male successor in the direct line of succession existing being fit to act as Mutawalli of the Wakf, anyone from the male descendants of the female issue was constituted the rightful claimant to succession could be appointed as Mutawalli. Clause 6 set out the disabilities and disqualifications which rendered a candidate to Mutawalliship ineligible. The plaintiffs argue, and the Wakf Board resist-that the manner of succession is a pointer to the arrangement not being a wakf, but other species of trust.

All authorities are agreed - right from the decision in Nawab Zain Yavar Jung, onwards, that a mutuwalli is only a superintendent or manager of the wakf properties; they do not vest in him, in the manner known to other branches of law, such as in the case of Hindu endowments, or in the case of trusts. The question therefore, is whether any stipulation in the dedication or the deed, that a class of heirs or specific category of people, either by description, or family ties, as successors to the wakif mutuwalli, would militate against the arrangement being a wakf.

58. It has been recognized (Ref. Rugghan Prasad and Another Vs. Mt. Dhanno and Others, ; In Re: Ramanath Bholgothra (of Jammu),) that a wakif mutuwalli possesses power, not only to appoint the first mutuwalli but also lay down the scheme for succession to that office; if he reserves the right of manangement of the trust to himself, he can appoint someone to the office of mutuwalli during his lifetime; he may nominate a successor by name, or indicate a class from which the appointment may be made. This power may extend to even nominating females as mutuwallis (AIR 1947 31 (Nagpur)). It has also been held that even if no provision is made in the wakf deed and a vacancy in the office (of mutuwalli) arises, the primary right to appoint a successor is that of the wakif, and failing him, that of the executor; it is not of the court (Ruggham v Dhanno supra). In the light of these clear authorities, it is held that the provisions in the Deed (Ex. PW-1/2) which require succession to the office of Chief Mutuwalli and Mutuwalli from amongst the male heirs of the Wakif Mutuwalli, does not militate against its being a wakf, if it otherwise fulfils that description.

Is provision for heirs as beneficiaries, inconsistent with the concept of wakf

59. Some deal of argument was made by the parties, in the light of the plainntiff''s submission that the intent of the original settlers was to provide for both charity as well as benefit to their heirs. It was emphasized that originally, 3/4ths of the income of the wakf was reserved to fulfil the general objectives; the remainder, 1/4was reserved for the benefit of the heirs and successors. This proportion changed considerably. The contention was that having regard to the original intent, the reservation of a sizeable quantum for benefit of the heirs and the family meant that the arrangement was not a wakf.

60. This court is clear on this aspect. The issue again, is no longer open for debate; in Bibi Saddiqa Fatima (supra) it was held that:

It is further indisputably clear from the waqf deed that except a portion of money which was to be spent for public, religious or charitable objects the waqf was primarily of a private nature for the benefit of the settlor''s family and their descendants, which is called wakf -alal-aulad. The ultimate object of the wakf was to spend income, if any, in the service of the Almighty God. In Abdul Fata Mahomed v. Rasamaya 22 Indian Appeals, 76 their Lordships of the Privy Council held that the gift to charity was illusory, and that the sole object of the settlor was to create a family settlement in perpetuity. The waqf of this kind was, therefore, invalid. This decision aforesaid caused considerable dissatisfaction in the Mohamedan community in India. This led to the passing of the Mussalman Wakf Valildating Act, 1913 which was made retrospective in operation by a subsequent Act of 1930. In view of the Valildating Act of 1913 the validity of the wakf was beyond the pale of challenge.

13. Although in respect of the law applicable to waqfs there is some difference in

regard to some matters between the Shia law and the various other schools of Mohamedan law applicable to Sunnis, in very many fields the law is identical. After the Valildating Act of 1913, on the basis of the law as it prevailed even before, creation of a waqf for the purpose of the maintenance of the members of the waqif''s family and their descendants is

also a charitable purpose.

This position was again reiterated, in Trustees of Sahebzadi Oalia Kulsum Trust Vs. The Controller of Estate Duty, A.P., , thus:

Ameer Ali explains the position in Mahommadan Law by saying that the provision for one''s children and descendants is regarded as a pious duty by which nearness (kurbat) to God is attained. The mention of the poor is required by Mohammad (not by Abu Yusuf with whom is the Fatwa) not to give validity to the wakf, but to ensure perpetuity; and as human beings are liable to become extinct and as a wakf must be a permanent dedication Mohammad required that the poor should be expressly named or implied by the use of the word "sadakah". Abu Yusuf, on the other hand, held that whether the poor were named or not, or whether the word "sadakah" was used or not, the word "wakf" implied perpetuity, and, therefore, unless some other object was named, on failure of the wakif''s posterity, the income would be applied for the poor. There is no question about the validity of the wakf; the mention of the poor does not make the wakf per se more or less valid; it only ensures perpetuity insisted upon in the law (pages 296-297).

10. Asaf A.A. Fyzee in his book "Outlines of Muhammadan Law", Fourth Edition at page 303 states that according to the ancient texts, wakfs for the support of a man''s descendants and family were considered to be proper and lawful. He says, " The Prophet is reported to have said that ''When a Muslim bestows on his family and kindred, hoping for reward in the next world, it becomes alms, although he was not given to the poor, but to his family and children.'' What in the estimation of the English lawyers would be a pernicious perpetuity, calculated to aggrandize the family of the founder, is, according to the shariat, the best of charities." The position in Islamic Law is summed up by Fyzee at page 303 by quoting the words of Ameer Ali:

From the promulgation of Islam up to the present day there has been an absolute consensus of opinion regarding the validity of wakfs on one''s children, kindred and neighbours. Practical lawyers, experienced judges, high officers of every sect and school under Mussulman sovereigns are all in unison on this point. There are minor differences, viz. Whether a wakf can be created for one''s self, whether the unfailing object should be designated, whether the property should be partitioned or not, whether consignment is necessary or not; but so far as the validity of a wakf constituting one''s family or children the recipients of the benefaction, in whole or in part, is concerned, there is absolutely no difference. A wakf is a permanent benefaction for the good of God''s creatures: the wakif may bestow the usufruct, but not the property, upon whomsoever he chooses and in whatever manner he likes, only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist to prevent their falling into indigence, it is a pious act, -more pious, according to the Prophet than giving to the general body of the poor. He laid down that one''s family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater ''reward'' than to bestow on the indigent stranger. And this is insisted upon so strongly that when a walf is made for the indigent or poor generally, the proceeds of the endowment is applied to relieve the wants of the endower''s children and descendants and kindred in the first place (see Baillie''s Dig., 2nd ed., p.593). When a wakf is created constituting the family or descendants of the wakf [sic, for wakif] the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in not for the purpose of making the wakf charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made), but simply to impart permanency to the endowment. When the wakif''s descendants fail, it must come to the poor. So it is an enduring benefaction - an act of abadat or worship, to use the language of the Jawahir-ul-Kalam-an act by which kurbat or ''nearness'' is gained to the Deity, according to the Bahr-ur-Raik.

61. In the light of the above discussion, it is held that provision in the Deed PW-1/2, for the benefit of the heirs of the wakif Mutuwalli, or the original settlers, does not ipso facto militate against the arrangement being a wakf.

Benefit flowing to all sections of the community

62. The pre-existing law, i.e before the amendment of 1964, in respect of what were beneficiaries limited to religious purposes, and other objects of "public utility established for this benefit of Muslim community." It was while interpreting that state of law, that the Supreme Court, in Nawab Zain Yavar Jung, held that if the objects comprehended benefits (of the wakf) flowing to non-Muslim, or constituting secular purposes, the arrangement would not be a wakf. This was sought to be done away by the amendment of 1964, when the definition of "beneficiary". Now, the expression means "...pious and charitable objects and any other objects of public utility sanctioned by the Muslim law."

63. In Mariambai (supra) the question was whether a valid Wakf under the Act 1954 had been created under a compromise decree in a suit for administration of the estate of deceased S.M. Zacharia. In terms of the compromise decree two brothers of Zacharia were to hold suit properties for the purpose of constituting a trust to establish a maternity hospital in the name of Zacharia Sait. The question was whether the charitable trust created by and under the compromise decree was a wakf within the meaning of Act; as the benefit of the charity went not only to Muslims, but also to non-Muslims. The Division Bench of the Madras High Court after referring to the decision of the Supreme Court in Nawab Zain Yar

Jung and the earlier decision in Kassimiah Charity cited the Amendment Act 34 of 1964 and ruled that the charitable trust was a "wakf".

64. A Division Bench of the Karnataka High Court in the Karnataka State Board of Wakfs (supra) had to consider the question of dedication by a Muslim woman of her house and the appurtenant vacate site for the use of residents of other places. The Court referred to the amended definition of "beneficiary" but relied upon the decision of the Supreme Court in Nawab Zain Yar Jung v Director of Endowment and held that a secular charity under Muslim law should be to the poor alone and since the property in this case dedicated for the travelers irrespective of religion and the position of the persons, it was not a wakf within the meaning of the Act. This court is of the opinion, with respect that that this decision since under the amended Act, there can be a dedication of a public character for the benefit of not only Muslims but also of non-Muslims and not only for the benefit of the poor but also for the benefit of the rich. What the Muslim law prohibits is a dedication exclusively for the rich.

65. The objects of the document Ex. PW-1/2, in this case include objects of public charity "for the benefit of all persons irrespective of caste, colour or creed, such as, relief of the poor, education, medical relief and the advancement of any other object of general public utility not involving the carrying on of any activity of profit...". The clause also says that the benefit should be "consistent with theprinciples of the true teachings of Islam." At the same time it clarifies that

in spending the income on objects of public charity, priority shall be given to the collective needs of the country or to such needs as may benefit the largest number of persons or their future generations....

Other objects include establishment and running an Institute for the promotion of medicine, education and research with emphasis on indigenous systems of medicine; establishment and conduct a Tibbia College in conformity with the recognized standards; establishing and running charitable hospitals and clinics where poor patients are given free treatment. Clause 46 provides that:

46. Qaumi Income may also be spent on the following:

(1) To establish and run education institutions, and/or to aid those which are already in existence.

(2) To build schools, laboratories, wells, or such other buildings of a public nature as may benefit the largest number of people in the country.

(3) to publish books, pictures, maps or literature or to aid in publication of the same by the publication of which the objects of the Wakf are fulfilled or achieved...

The plaintiffs had urged, on the basis of the judgment in Nawab Zain Yavar Jung, that the secular nature of the objects ruled out the Deed creating a trust. As discussed earlier, the change brought about by the 1964 Amendment, which was noticed by the judgments of the Madras and Guajrat High Courts (in Miriam Bai and Kachch Wakf Board supra) makes it clear that inclusion of such general or temporal objects, intended as public utilities, does not militate against the dedication being a wakf.

Nature and object of dedication in the present case

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.''

67. For the creation of a valid wakf, there should be (1) permanent dedication or "tying up" perpetually, (2) to God Almighty (3) of some property (4) for attaining Divine pleasure (5) the objectives of the wakf being charitable, consistent with Muslim law.

68. The previous discussion would reveal that on the heart of doctrine of Wakf - derived from the sayings of Holy Prophet was the idea of dedicating something for a specific or specified objects to achieve divine pleasure. For some time there was a cleavage of opinion between various High Courts whether moveable property including money could be the object of a valid Wakf. The High Courts of Calcutta, Bombay and Madras (Kulsoom Bibi Vs. Ghulam Hossain 10 CWN 449; Fatima Vs. Ariff Ismail Jee, 9 CLR 66; Fatima Bai Vs. Ghulam Hossain 9 Bom LR 1337) held that Wakf of moveables was invalid unless it was an accessory to immovable property or unless it was proved Wakf of movables was allowed by custom. The Allahabad High Court on the other hand (Haji Amir Ahmad and Another Vs. Mohammad Ejaz Husain and Another, , Muhammad Ismail and Another Vs. Muhammad Ishaq and Others,) held that Wakf of movables was valid though Wakf of mesne profits apart from the land was invalid. The

authorities however, appear to be uniform that Wakf of money simplicitor was not valid if it were not a dedication of a permanent nature. Therefore a Wakf of a simple money decree was not considered valid (Ghulam Mohuddin Vs. Abdul Rashid AIR 1947 All 137). Similarly Wakf of the unpaid dower of a widow was not held to be valid in Nosh Ali & Ors. Vs. Shamsunnesa Bibi & Anr. This controversy has now been settled by the Act which has permitted Wakf of any property, even of movable property (refer to Section 2 (l) which states that Wakf can be "of any moveable or immovable property"). There is some authority to the effect that there should be no uncertainty in the subject of the Wakf and that anything which is indistinct or unspecified - as the subject matter of dedication would not be valid. In this regard, it would be useful to notice that B.R.Verma''s commentaries on the Mohammedan Law (9Edn. 2005) Section 221 Para 8 reads as follows :

There should be no uncertainty in the subject of Wakf. The Wakf of anything which is not ayn or distinctively specified (but is of deyn or indeterminate things) is no valid.

69. The author refers to Baille''s Digest of Mohammedan Law Para 2, (1869) in this regard. Similarly, the jurist and former Chief Justice (of India) Mohd.Hidayatullah, in his Mulla''s Principles of Mohammedan Law 9Edn 1990 says this in para 175 :

175. Subject of wakf. -The subject of wakf under the Wakf Act may be "any property." A valid wakf may, therefore, be made only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money (j) Abdulsakur v. Abubakkar (1930) 54 Bom.358, 369-370, 127 I.C. 401, (''30) A.B. 191. Cf. Syed Ali Zamin v. Syed Akbar Ali Khan (1937) 64 I.A. 158 (a Shia case); Sattar Ismail v. Hamid Sait (1944) 2 M.L.J. 92. (''44) A.M.504. In case before the Wakf Act, there was a conflict of opinion whether a valid wakf could be made of movables. It was held in Calcutta, Bombay and Madras, that a valid wakf could not be made of movables, unless the movables were accessory to immovable property, such as cattle attached to agricultural land and implements of husbandry, or unless a wakf of movables was allowed by custom (k) Kulsom Bibee v. Golam Hossein (1905) 10 Cal. W.N.449 ; Bai Fatmabai Vs. Gulam Husen, ; Kadir Ibrahim v. Mahomed (1909) 33 Mad. 118, 4 I.C.136. This was in accordance with the view taken by Mahomedan jurists on the subject: Baillie, 570-571; Hedaya, 234-235. On the other hand, it was held in Allahabad that a valid wakf may be made of movables, and that a wakf even of coins or shares in a joint stock company was not invalid (l) Abu Sayid v. Bakar Ali (1901) 24 All.190; see Hashim Haroon v. Gounsalishah (1942) Kar. 179, (''42) A.s.137. Such a wakf would be valid under the Wakf Act. In a Privy Council case the question arose whether a valid wakf can be made under the Wakf Act of Government promissory notes, but it was not decided, as the wakf had been acted upon for a number of years and it was held valid on that ground (m) Mohammad Sadiq v. Fakhr Jahan Begam (1932) 59

I.A.1, 17-18 : 6 Luck.556 : 136 I.C. 385 : (32) A.PC.13. It has been held that a wakf of a money decree is not valid, as the decretal amount may not be realized (n).

In the recent work "The law of Wakfs - an analytical and critical study" (2Edn. 2008) S.K. Kadar a former Judge of the Madras High Court says this

Third Ingredient subject of dedication The property dedicated must belong to the settler at the time of dedication (Mashuddin V. Bullabah Das ILF (1912) 35 All 68; 17 IC 471 ; Mahammad Ali Vs. Dinesh Chandra Roy Choudhury and Others, . There can be a valid wakf of a property subject to a lease or a mortgage (Shahzadee v. Khaja Hussain (1869) 12 WR 498 ; Bibi Jinjira Khatun and Others Vs. Mahomed Fakirulla Mea and Others,). But a usufructuary mortgage cannot be the subject of a valid revert to the mortgagor on redemption and there is no permanency. (Rahiman v. Bagridan AIR 1936 Oudh 213 : ILR (1936) 11 Luck 735 : 160 IC 495 ; Abdul Qavi Khan Vs. God Almighty through Asaf Ali Khan and Others,). The Wakf of a house on a leasehold land and the lease is not permanent has been held invalid, in Mst. Peeran Vs. Hafiz Mohammad Ishaq and Others, . Where the lease is of a permanent character and the lease cannot be ejected from the land, the lessee is entitled to dedicate any building on such land. (Ameer Ali:; Mohommedan Law, 1985 Ed., Vol I, Page 267). A property in the possession of the Wakif under a contract for sale can be subject of a valid wakf, provided the sale is eventually completed. (AIR 1927 85 (Oudh)).

Mushaab A Mushaa is an undivided share in property. There is a divergence of opinion among the original jurists as to the validity of a wakf of Mushaa. According to Imam Muhammed it is unlawful while according to Abu Yusuf the Wakf of Mushaa is valid. The accepted view is tht of Abu Yusuf. (Vishwanath Prasad Pathak Vs. Parkash Chandra and Another, ; Md. Ayub Ali and Another Vs. Amir Khan and Others,). Moveables Any property whether moveable or immovable may be the subject of a wakf. Shares in joint stock companies, Government Promissory Notes and even money can be the subject of a wakf. Prior to the Wakf Act there was a conflict of juristic and judicial opinion whether a valid wakf could be made of movables. According to Abu Hanifa and Abu Yusuf wakf of moveable property is altogether invalid. Imam Muhammed holds otherwise. The High Court of Calcutta (Kulsoom Bibi v. Gulam Hussain 10 CWN 449)

70. The term "property" has in the context of other enactments, been given wide interpretation. The Supreme Court in Ahmed G.H. Ariff''s case (supra) and Purshottam N. Amarsay and Another Vs. The Commissioner of Wealth Tax, Bombay, held that even if an asset is non-transferable and un-saleable in the open market, (such as shares in an unlisted company) is yet capable of valuation, for the purposes of the levy of wealth-tax. Arif was concerned only with beneficial interest to get share of income from a wakf. Similarly, in Purshottam N. Amarsay ''s case was concerned with the right to get income from Trust property which was a personal estate. This right was not transferable; yet

the Supreme Court held it to be an asset. The Supreme Court in its decision in Commissioner of Wealth-tax, Kolkata Vs. Smt. Anjamli Khan, held that intangible rights can be regarded as ''assets'' in terms of the definition under the taxation laws (Income Tax and Wealth Tax Act). Therefore, right to receive compensation, right to receive shares and dividends, etc, are regarded as "assets" under taxation law. The recent decision of the Constitution Bench in K.T. Plantation Pvt. Ltd. and Another Vs. State of Karnataka, has held that "property" (in the context of the right under Article 300A, i.e. right against being deprived of property without authority of law) has to be interpreted widely, and that it can include all manner of interests, including intangibles like intellectual property rights, etc.

71. One has to, at the same time, recollect that it is a settled principle of statutory interpretation that the meaning assigned to a term or phrase, in one enactment cannot be the basis for interpreting another enactment, containing the same term. In Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. Vs. Custodian of Vested Forests, Palghat and another, it was held that:

Judicial interpretation given to the words defined in one statute does not afford a guide to construction of the same words in another statute unless the statues are pari materia legislations

Msco (Pvt) Ltd v Union of India 1985 (2) SCC 51:

In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts. "It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone." (Macbeth & Co. v. Chislett (1910 AC 220, 223 : 79 LJKB 376 : 102 LT 82 (HL))

5. When the word to be construed is used in a taxing statute or a notification issued thereunder it should be understood in its commercial sense.

Similarly, in State of Kerala Vs. Mathai Verghese and Others, , upsetting the decision of the Kerala High Court which held that "currency" notes, for the purposes of the Indian Penal Code, meant currency as defined under the Indian Paper Currency Act, held that:

The High Court also fell in error in being influenced by the definition of currency notes embodied in the Indian Paper Currency Act (Act 20 of 1822). The High Court has overlooked the obvious fact that definition contained in R.P. No. 126/2010 in OMP 660/2009 Page 58 Section 2 of the said Act is only for the purposes of that particular Act and it cannot be imported into Sections 489A to 489E of the Indian Penal Code, as has been done by the High Court [Says the High Court : "The expression ''currency notes'' in Section 489A to 489E should naturally refer to currency notes as defined in Act XX of 1822."].

9. The High Court was thus wholly wrong in exerting itself unnecessarily and bending backwards in order to hold that Section 489A to 489E are not applicable

to currency notes other than Indian currency notes; and in holding that counterfeiting of or possessing of counterfeit dollar bills or dollar notes is not an offence under the Indian law, thereby issuing a carte blanche to the counterfeiters of the world to establish their headquarters within the State of Kerala with a view to carry on their activities with impunity under the umbrella unwittingly opened for them by the judgment of the High Court.

Upon a fair application of the above principle, the expression "property" has to be understood in the context of its setting, under the Wakf Act, having regard to its history, and the concept of wakf in Muslim law.

72. In this case, the intention of the Wakif Mutuwalli and the other settlers can be gathered on an overall reading of the recital, and the relevant provisions of the Deed Ex. PW-1/2. The recitals, undoubtedly mention that the settlers, to gain divine pleasure, are dedicating the subject matter of the wakf in perpetuity. The crucial matter however, is that the dedication and the subject matter is expressly described as follows:

as Wakf for all times to God Almighty subject to the terms, conditions and objects contained in this Wakf-Deed, the business of Hamdard Dawakhana.

The distinction between the business being the object of the dedication, and the property, being used by the business, was studiously maintained. For instance, Clause 26 states that:

26. The immovable properties i.e. houses and buildings as described below belonging to the three executants and in the ownership of which the Wakf Business has no interest whatsoever, are with their consent, being presently used and occupied by the Wakf-business. If the Wakf wishes to continue hereafter their use and occupation as a tenant thereof, then its tenancy shall be deemed to be effective from Ist January, 1948 under such terms and conditions as the Wakif-Mutawallis being co-owners of the said properties may during their life time arrive....

The said clause later goes on to describe what are the properties used by the wakf.

Clause 28 provides that in the future, the wakf may acquire other properties, and in that event, its alienability would be regulated by the Deed. The relevant part of Clause 28 reads thus:

28. Although no immovable property is presently included in this Wakf, yet if subject to the terms and conditions contained in this deed, any immovable properties hereinafter come to be included or attached to this Wakf by means of purchase or exchange etc., neither the Mutawallis nor the MAJLIS-E-AYAN nor the MAJLIS-E-AWAN shall have any right to alienate or subject to any encumbrance or charge any such property in violation of the objects, conditions and rules of this Wakf Deed.

Importantly, Clause 29 empowers the mutuwallis to dispose of any property of the wakf, if it reduces in value, or there is apprehension of its depreciation. The managers are empowered to buy some other property in its stead, and if that is not immediately possible, to invest the amounts in Government securities, at favourable terms, till such time other properties can be acquired. Clause 31, very pertinently says that:

31. If the Wakf-business of Hamdard Dawakhana continues to run at loss for three years in succession and there does not appear any prospect of sufficient profit thereafter or the total income from the Wakf-business is so reduced that its continuance become inexpedient and contrary to the interests of this Wakf, then the Wakif-Mutawalli during his terms of office and after him the MAJLIS-E-AYAN shall have the power by means of an Extra Ordinary Resolution to close down the above mentioned Wakf-business or to change it into some other form or to start some other profitable business in lieu thereof which is in keeping with the primary objects of the Wakf.

The tenor of Clauses 33, and 44 is that the business activities of the wakf should yield "net profits" which are to be dedicated for the specified objects of charity.This is apparent from the repeated use of the expression "net profit" (Clause 31) and "divisible net profits" and "other income, profits and gains"(Clause 44).

73. It is thus apparent that the subject matter of dedication by the settlers (including the wakif mutuwalli) was pure and simple, business or commercial activity; even the properties used by that business were expressly kept away from the subject matter (of the wakf). The question is whether a business enterprise, simplicitor - without the property used by it can be the subject matter of a Muslim wakf. If one understands the concept of a wakf correctly, it is the permanent dedication or tying up of something. Though that thing, may be an intangible like a trademark, or intellectual property, or the right to receive something (like right to compensation or dividend) an activity, and one as fluid as a trade or commercial activity, cannot be a thing, an object. In a country like India, where citizens and collectivities (such as religious denominations) have clearly spelt out fundamental rights, (Articles 19 (1) (g) , Articles 25 and 26) to engage in trade, or business, or some form of income generating capability, the assignation of a business, with the choice of stopping or closing it down (in the eventuality of loss or depletion of income or profit) as the subject matter of a wakf can hardly be called as property. This is because every business or commercial activity, or enterprise carries within it the seeds of uncertainty; it is subject to viccitudes of the peculiar activity. Authorities in this regard are lacking; however, the discussion by Islamic scholars and jurists, seem to veer around to the opinion that "tying up" of the subject matter is essential for a valid wakf. Quoting Bailee (supra), the Bombay High Court, in its decision reported as Fatma Bibi v The Advocate General of Bombay & Anr 6 (ILR) Bom. 42, said that:

A wakf must be certain as to the property appropriated, unconditional, and not subject to an option. It must too, have a final object which cannot fail and this object it seems, must according to the better be expressly set forth..

Applying the proper test, on the basis of previous authorities, there can be no "tying" up of a commercial venture; in this case, the settlers have given sufficient flexibility to the managers, to even wind up the business, if it is unprofitable, or incurs losses. Profit, or sufficient income, appears to be the important element of the subject matter; the net profit has to be used for the objects. However, it is possible that for some time-may be even more than 5 years (ie period of 3 years as per clause 33, and another two years if a new business is established by the wakf) there is no income generated by the thing tied up, i.e the business. This situation can replicate any number of times, with failed or indifferent ventures, thus defeating the objects sought to be achieved, ie. the charitable objectives outlined in Clauses 44 and 45 of the Deed.

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 (Ref. Puzhakkal Kuttappu Vs. C. Bhargavi and Others, and Faqir Chand Gulati Vs. Uppal Agencies Pvt. Ltd. and Another,). The question is whether such bodies and trusts can be validly created by Muslims. This precise issue was addressed by a decision of the Supreme Court, in Mohammed Khasim Vs. Mohammed Dastagir and Others, as follows:

According to Mohammedan jurists, the term "Wakf" literally means dedication or as noted by Mulla in his "Principles of Mohammedan Law", the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by Mussalman law as religious, pious or charitable. The desire of Mohd. Imam Saheb to tie up the properties so that they would not be dissipated and the objects on which the usufructs of the properties were to be spent, most certainly appears to have influenced the thinking of the trial court in holding that Mohd. Imam Saheb had wanted to create a wakf. The said reasoning was not accepted by the High Court. However, the High Court also went wrong in holding that a valid trust had not also been created by the document of 29February, 1960. In fact, while we agree with the High Court on the first count, we are unable to agree with the High Court on the second count. In other words, we agree with the High Court''s finding that no wakf had been created by the aforesaid document but at the same time we are also of the view that it was Mohd. Imam Saheb''s intention to create a valid trust.

22. As urged both by Dr. Siddiqui and Mr. Mushtaq Ahmad, in order to constitute a wakf, there must be a permanent dedication of the properties in question in favour of God Almighty and while the objects of the wakf may initially be for the benefit of the wakif''s family and other descendants, the ultimate beneficiary had to be God. Neither of the two above conditions are fulfilled by the document

dated 29February, 1960. The other important test is the nature of inalienability of the properties forming the nucleus of the wakf. Once a wakf is created, the title of the wakif in the dedicated property is extinguished and vests in God. The wakif is entitled to reserve power to alienate any portion of the wakf properties, but for the benefit of the wakif. In the instant case, the executant had reserved to himself the power to alienate the trust properties, but one of the conditions stipulated in the deed was that his two minor daughters were to be given immovable properties worth Rs. 8,000/-. A further direction was given by the executant that after his death his daughters, Mymoona Bi and Fathima Bi, were each to be given a share of the immovable properties of the value of Rs. 8,000/- on condition that they would not be entitled to the said immovable properties if they had no male issues. A specific direction was given that the properties given to Fathima Bi or Asha Bi would also revert to the Trust if they had no male issues.

23. 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.

24.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 Vs. Madras State Wakf Board, . 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 recognized 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.

It is therefore held that the Dawakhana Wakf is not a "wakf" under the Act, even though it might be a valid trust.

75. The Question which arises for determination is whether the other entities, i.e

Nursing Home, the Institute of History of Medicines and Medical Research, Hamdard National Foundation, Indian Institute of Islamic Studies are wakfs within the meaning of the Wakf Act, and the Hamdard Research Clinic and Nursing Home is beneficiary of the Dawakhana Wakf and if that is so, what is the effect. These issues were framed at the behest of the defendant, the Wakf Board.

76. Now, it is a fact that there is some authority to the effect that if a body is a Muslim wakf, any acquisitions made out of its assets, to further its objects, would also become additions or accretions to the wakf itself. This was stated in Bibi Sadiqa Fatima (supra) in the following terms:

True it is that the property was not acquired by the sale of the corpus of any of the waqf property but even acquisition of an immovable property directly with the waqf fund was an accretion to the waqf property. The Raja had no power while administering the waqf to acquire a property for a particular beneficiary by way of maintenance and support of such a beneficiary. As indicated earlier, 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...

Similarly, in Wali Mohammed (dead) by Lrs. Vs. Smt. Rahmat Bee and Others, , the Supreme Court held that:

Further, the house property covered by the gift deed Ex. B-1 was constructed in the graveyard and it was, as we shall presently show, meant to be used for religious purposes and therefore it became an accretion to the wakf property and bore the same character as the other properties in the compound in view of the principle laid down in Mohd. Shah v. Fasihuddin Ansari

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.

78. In view of the above discussion, Issue Nos. 5, 6, 7 and 8 are held in favour of the plaintiffs and against the Defendant. The Dawakhana Wakf and the other plaintiffs are not wakfs; the properties of each one of them are not wakf properties. Consequently, the notification, declaring them as wakfs are unsustainable. The plaintiffs should not describe themselves as "wakf" in any manner, since that is misleading. It has throughout been the Dawakhana Wakf''s case that it is not a wakf. Therefore, in fairness it should not call itself that. The plaintiffs are entitled to the declarations, but subject to these directions.

Issue No. 3-Estoppel

79. The next question which the court has to address, and which the parties are at issue on, is whether the suits are barred by the principle of estoppel. This issue was struck at the insistence of the Defendant Wakf Board; it contended that after the enforcement of the Act in Delhi, the original plaintiff, applied to it (the Board) in 1964 u/s 25 of the Act for registration of the said body. It was duly registered by the Wakf Board on 05-12-1964. Furthermore, the Dawakhana Wakf paid wakf contribution to the Board under of the Act. A total sum of ` 43,940/11 was paid by the original plaintiff Wakif Mutawalli at different times till the year 1967. The Board therefore alleges that the plaintiff Dawakhana Wakf is now is estopped from challenging the nature of the wakf and the rights and privileges of the Board and its statutory obligations under provisions of the Act.

80. The plaintiff Dawakhana Wakf refutes estoppel and contends that the wakf contribution and the application filed to the Board, was under a mistaken belief that the body was covered under the Act. It is urged that what the plaintiffs are doing in this case is to assert that they are not wakfs, which is their legal right. Furthermore, the payment of contribution under mistaken belief is akin to payment of levies which are inapplicable; if there is no warrant or authority, of the agency, or the Government, such payments are extractions, and cannot be set as estoppels. Senior counsel for the plaintiffs also urged that there can be no estoppel against law, or legal rights.

81. Estoppel is a rule of evidence; it is also an equitable principle, which disables a party from resiling from asserting something, which he accepted previously. As stated in S. Sethuraman v. R. Venkataraman, (2007) 6 SCC:

Principle of estoppel has no application in a case of this nature. The appellant did not and in fact could not confer upon an authority a jurisdiction which he did not derive under the statute. If jurisdiction cannot be conferred by consent, it cannot clothe the authority to exercise the same in an illegal manner

Similarly, in A.C. Jose Vs. Sivan Pillai and Others, , while rejecting the plea of estoppel, raised by a party to non-suit another on the ground, that he had agreed to follow the procedure in issue, it was held that:

it was argued by the counsel for the respondents that the appellant would be estopped from challenging the mechanical process because he did not oppose the introduction of this process although he was present in the meeting personally or through his agent. This argument is wholly untenable because when we are considering a constitutional or statutory provision there can be no estoppel against a statute and whether or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines, if such a process is not permissible or authorised by law he cannot be estopped from challenging the same.

In another decision, Kalidas Dhanjibhai Vs. The State of Bombay, , the Supreme Court ruled out estoppel, in such situations:

11. The learned High Court Judges were influenced by matters which we consider inconclusive. The appellant applied for registration under the Bombay Act and in the statement made u/s 7 he called his establishment a "workshop" and described the nature of his business as a "factory". The learned Judges considered that this imported an admission that his establishment was a "shop" because of the use of the word "shop" in "workshop." This might have raised an inference of fact against the appellant had nothing else been known but when the facts are fully set out as above and admitted, the appellant''s opinion about the legal effect of those facts is of no consequence in construing the section. No estopped arises. The appellant explained that the matter seemed doubtful, so, to be on the safe side and avoid incurring penalties for non-registration should it turn out that his concern was hit by the Act, he applied for registration. It is to be observed that though he applied on 12th April, 1949 he was not registered till 4th May, 1950 and the certificate was not given to him till 8th January, 1951. The present prosecution was launched on 4th April, 1951. Government itself seems to have been in doubt. However, that is neither here nor there. What we think was wrong was placing of the burden of proof on the appellant, in a criminal case, because of a so-called admission. The learned High Court Judges also advert to the fact that though the appellant''s concern was registered as a "shop" he made no protest and did not have recourse to Section 7(3) of the Act.

12. We do not think Section 7(3) has any application. The appeal is allowed. The conviction and sentence are set aside and the judgment of the learned trying Magistrate acquitting the appellant is restored. The fines, if paid, will be refunded.

82. For the above reasons, this court holds that estoppel cannot be validly set up against the present plaintiff; the defendant Wakf Board derives its authority from statute; only if the body is a wakf would it possess jurisdiction over it. In the present case, no amount of conduct, by an institution, indicative of its belief that it is a wakf would confer jurisdiction or power over it, unless it is actually a wakf. Therefore, the Board cannot legitimately claim authority over the Dawakhana

Wakf, or the other plaintiffs, on the basis of such estoppel. This issue is answered against the Defendant, and in favour of the plaintiffs.

Issue No. 9: Relief

83. In view of the above discussion and findings, it is held that the plaintiffs are entitled to the declarations sought. The court holds and declares that the plaintiffs in these four suits, and the entities described in Entries 63, 63 (a), 63 (b) and 64 of Notification No. 3553/70 dated 12-12-1970 published in the Delhi Gazette at pages 1318-1321 (dated 19-12-1970) are not wakfs under the Wakf Act, and their inclusion as Wakfs are illegal and ultra vires the Wakf Act, and are not wakf within the meaning of that expression known to law.

84. Each plaintiff is entitled to costs throughout, in all the suits. The four suits, i.e. CS (OS) No. 116/1972; 117/1972; 118/1972 and 119/1972 are accordingly decreed, subject to the directions (in para 78) in the above terms.