(2011) 11 AHC CK 0161

In the Allahabad High Court

Case No : Writ -C No. - 6289 of 1991

Wali Mohammad and others APPELLANT

Vs

Add. District Judge, Jhansi and others RESPONDENT

Date of Decision : 03-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 93
Limitation Act, 1963 — Section 15
Mussalman Wakf Act, 1923 — Section 10, 12, 13, 3
Mussalman Wakf Validating Act, 1913 — Section 2, 3, 5
United Provinces Muslim Wakf Act, 1936 — Section 1, 1(2), 10, 11, 12
Uttar Pradesh Muslim Waqfs (Amendment) Act, 1953 — Section 12, 8(1)
Uttar Pradesh Muslim Waqfs (Recovery of Waqf Property) Rules, 1972 — Rule 7, 9(1), 9(2)
Uttar Pradesh Muslim Waqfs Act, 1960 — Section 1(2), 2, 2(1), 28, 3
Waqf Act, 1954 — Section 27, 4, 4(3), 6(1)

Citation : (2011) 11 AHC CK 0161

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon''ble Sudhir Agarwal, J.—Writ petition is directed against the order dated 14.7.1988 passed by President, Uttar Pradesh Sunni Central Board of Waqfs, Lucknow (hereinafter referred to as "Waqfs Board") purported to be u/s 57-A of Uttar Pradesh Muslims Waqfs Act, 1960 (hereinafter referred to as "Waqfs Act, 1960") observing that petitioners are unauthorized occupants of the premises which is a waqf property, namely, Waqf No. 179, Jhansi situated at Mohalla Itwariganj, Jhansi known as Waqf Qabristan, Ganj Shahidan and deciding to send a requisition to the Collector, Jhansi to recover possession of the said property and restore it to Waqfs Board through its Secretary of Committee of Management; consequential order dated 24.11.1988 issued by Collector, Jhansi requiring the petitioners to hand over possession of property in dispute failing which eviction proceedings under Rule 7 of Uttar Pradesh Muslims Waqfs (Recovery of Waqf Property) Rules, 1972 (hereinafter referred to as "1972

Rules") would be initiated, and, lastly appellate order dated 7.2.1991 passed by Special Judge (E.C Act)/ Addl. District Judge, Jhansi, rejecting appeals of petitioners.

2. Facts in brief giving rise to the present dispute are as under.

3. Petitioner no. 1 purchased a residential plot measuring 20X45 ft. part of plot no. 2902 (3902) situated at Mohalla Itwariganj, Jhansi from Sri Luxmi Narain vide sale deed dated 14.11.1977. Another plot at the same premises was purchased by wife of petitioner no. 2 and petitioner no. 3 vide two separate sale deeds dated 31.10.1977 and 24.11.1977. Wife of petitioner no. 4 similarly purchased another piece of land measuring about 695 sq. ft. from one Mohammad Wazir vide registered sale deed dated 29.7.1985. Petitioners got maps sanctioned from competent authority for construction of residential houses at the property purchased as aforesaid and executed the construction accordingly. One F.A. Mansoori claiming himself to be the Secretary of Waqf Qabristan, Ganj Shahidan, Mohalla Itwariganj, Jhansi made application before Waqfs Board complaining that a number of persons have unauthorizedly occupied land of Qabristan whereupon similarly worded notices were issued by Waqfs Board on 9.7.1987 u/s 57-A of Act, 1960 read with Rule 9(1) 1972 Rules to the petitioners and 16 other persons. Petitioners submitted reply and one of such reply dated 27.7.1987 has been brought on record as Annexure 3 to the writ petition. The Waqfs Board issued a letter dated 22.2.1988 directing petitioners to appear before the President of Board to adduce relevant evidence and avail opportunity of oral hearing. The said notice was also replied by petitioners and one of such reply dated 11.3.1988 is on record as Annexure 5 to writ petition. Thereafter, the Waqf Board passed order on 14.7.1988 holding that property in question was waqf property and therefore the Collector, Jhansi was requested to obtain possession and restore it to the Secretary of Management of Waqfs Board. Collector, Jhansi, consequently issued order of delivery of possession of property in question on 24.11.1988 which was objected by petitioners vide objection dated 31.12.1988. Petitioners also filed an appeal u/s 49-B(4) but the same has been rejected by appellate authority. Hence, this writ petition.

4. A counter affidavit on behalf of Waqfs Board has been filed which has been sworn by Sri Fazal Ahmad Mansoori, Secretary, Qabristan Ganj Shahidan, Waqf No. 149, Itwariganj, Jhansi. It is stated that property in question is a Waqf property and hence no sale deed can confer any right upon the purchaser(s) in any manner and, therefore, petitioners being in unauthorized possession of the property in question and having made illegal construction thereon are liable to be evicted from property in question. It is said that after complaint was made by the deponent of counter affidavit, the Inspector of Waqfs Board made spot inspection and submitted report where after notices under Rule 9(1) and (2) were issued for taking possession of the property in question from unauthorized occupants.

5. I have heard learned counsel for the parties and perused the record.

6. Learned counsel for petitioner raised a basic question about the applicability of the Waqfs Act, 1960 itself. Where property in question is possessed or transacted by persons including non-muslims would the provisions of Waqf Act, 1960 have application in such matter. The second question is where such a dispute is raised unless a declaration is made by the competent authority of law, can Waqf Board proceed under Waqf Act, 1960.

7. Learned counsel for petitioner also contended that impugned order passed by Waqf Board is an exparte order; no opportunity was afforded; notices has been issued by Addl. Collector, though under the Statute, it is the Collector who is empowered to issue such notice and that restoration application of petitioners was pending and had not been decided yet the proceedings for eviction has been initiated against the petitioners. He also contended that the property in dispute was not at all a Waqf property, hence, Board had no jurisdiction to proceed in the matter and entire proceedings are wholly without jurisdiction.

8. The real question up for consideration is where a non-muslim claims possession and ownership on a piece of land can proceedings under Waqf Act, 1960 be initiated and such person would be bound by entries and declaration made by the Waqf Board. In other words, the mere fact that the property is mentioned as a Waqf property in the register maintained by the Waqf Board, will it be binding on a non-muslim and the proceedings against him can be initiated under Waqf Act, 1960 and such person shall have no remedy to challenge the very claim that the property in question is not a Waqf property. Appellate Court has observed that this argument that the property in question is not a waqf property cannot be considered for the reason that the appeal lie against the order of Commissioner who is not competent to go beyond requisition received from the Waqf Board and therefore unless the order of Waqf Board is set aside, parties cannot be allowed to raise such an issue in an appeal filed u/s 49-B(4) of the Act, 1960.

9. In this regard, it would be appropriate to consider first the statutory scheme involving relevant provisions.

10. Notice was issued by Waqfs Board u/s 57-A which was inserted by Uttar Pradesh Act No. 28 of 1971 in Waqf Act, 1960 and reads as under:

57-A. Recovery of possession of waqf property from unauthorised occupants.-(1) If the Board is satisfied after making an inquiry in such manner as may be prescribed that any person is an unauthorised occupation of any immovable property entered as property of a waqf in the register of waqfs maintained u/s 30 it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

(2) The provisions of sub-sections (2), (3), (4), (5), (6) and (7) of Section 49-B shall mutatis mutandis apply in relation to a requisition under sub-section (1)as they apply in relation to a requisition under sub-section (1) of that section.

11. The condition precedent for initiating proceeding u/s 57-A is entry of a property as "Waqf" in the register of Waqfs maintained u/s 30. Unless this condition precedent is satisfied, Section 57-A would not be attracted. Waqf Board on this aspect has simply referred to the report of Circle Inspector which claims to have been submitted on 30.4.1987 and, thereafter has passed order dated 14.7.1988. In para 2 of the order dated 14.7.1988, it has simply mentioned that the Register of Waqfs maintained u/s 30 shows that property is entered therein as a waqf property but no details of such entry have been given by it. Even before this Court, in the counter affidavit nothing has been said. Petitioners no. 1, 2 and 3 who are Muslims claim to have purchased property in dispute from the persons claiming ownership and were non-muslims while petitioner no. 4 is a non-muslim who claims to have purchased property from a Muslim person. The entry in Waqfs Register, whether would be binding on a person who is not a Muslim has been considered in past also and would be a relevant question to be considered here since the very basis and foundation of entire proceeding would depend upon the said question.

12. In the counter affidavit nothing has been said about the manner in which the property in dispute is claimed to be waqf property, its area and other details.

13. Be that as it may, so for as the basic contention of learned Counsel for petitioner regarding applicability of Waqfs Act, 1960 is concerned, a similar question came to be considered by Special Bench of this Court in Sunni Central Board of Waqfs v. Gopal Singh Visharad 2010 ADJ (FB) (LB) Pag 1 wherein in majority judgment (rendered by myself) from para 1067 (Page 830) and onwards the issue relating to applicability of Waqfs Act has been considered by the Court. Relevant discussion contained in para 1087 to 1151 may be reproduced as under:

1087. The creation of waqf was held valid and lawful by the Prophet Mohammad. It is said that this rule was laid down by Prophet himself and handed down in succession by Ibn Abu Nafe and Ibn Omar. Omar got piece of land in Khaiber whereupon he came to the Prophet and sought his counsel to make the most pious use of it. The Prophet said "if you like you may make a waqf of it, as it is, and bestow it in benification". Omar thereupon bestowed it in charity on his relatives, the poor and slaves and in the path of God, and travellers in a way that the land itself might not be sold, nor conveyed by gift, nor inherited. It is said that waqf continued in existence for several century until the land became waste. The prophet of Islam not only declared such works to be valid and lawful but also encourage their creation by dedicating his own property, the little that he had, in favour of posterity. It would be useful to refer as to what constitute a lawful waqf under Muslim Law. A Division Bench decision of Calcutta High Court in Meer Mahomed Israil Khan v. Sashti Churn Ghose and others, 19 ILR (1892) (Cal) 412 where Justice Ameer Ali answering the question as to what constitute a lawful waqf under Mussulman law observed that there must be a substantial dedication for charitable or pious purpose. His Lordship further observed:

In the Mussulman system law and religion are almost synonymous expressions, and are so intermixed with each other that it is wholly impossible to dissociate the one from the other: in other words, what is religious is lawful; what is lawful is religious. The notions derived from other systems of law or religion form no index to the understanding or administration of the Mussalman law. The words "piety" and "charity" have a much wider signification in Mussalman law and religion than perhaps in any other. Every "good purpose," wujuh-ul-khair (to use the language of the Kiafaya), which God approves, or by which approach (kurbat) is attained to the Deity, is a fitting purpose for a valid and lawful wakf. A provision for one''s children, for one''s relations, and under the Hanafi Sunni law for one''s self, is as good and pious an act as a dedication for the support of the general body of the poor. The principle is founded on the religion of Islam, and derived from the teachings of Prophet.

1088. Thereafter Justice Ameer Ali proceeded to quote from "Hedaya" a commentary by "Fath-ul-kadir" said to be frequently quoted in "Fatawa-i-Alamgiri" in great detail and it would be useful to reproduce the same as under:

I will give here a few passages from some of the best known authorities to show how utterly opposed the view taken in this case is to the Muhammadan law. The Fath-ul-kadir says--" Literally, it (the word wakf) signifies detention,.... in law... according to the Disciples, the tying up of property in such a manner that the substance (asl=corpus) does not belong to anybody else excepting God, whilst the produce is devoted to human beings, or is spent on whomsoever he [the wakif] likes; and the reason of it is that, though a desire to approach the Deity (kurbat) should form the ultimate motive of all wakfs, yet if, without such an (immediate) desire, a person were to dedicate a property in favour of the affluent (aghnia), the wakf would be valid in the same way as a wakf in favour of the indigent or for the purposes of a mosque: for, in giving to the affluent there is as much kurbat as in giving to the poor or to a mosque, and though the profit may not have been given to the poor on the extinction of the affluent [still] it is wakf and will be treated as wakf even before their extinction. This principle is founded on the reason that the motive in all wakfs is to make one''s self beloved by doing good to the living in this world and to approach the Almighty in the next...

In wakf Islam is not a condition; consequently if a Zimmi makes a wakf on his children and his posterity and gives it at the end to the indigent, it is lawful [equally with that made by a Moslem]. And it is lawful in such a case to give the usufruct conditioned for the indigent to the poor of both Moselms and Zimmis. The wakif may lawfully condition to give the usufruct solely to the poor of the Zimmis, and in that will be included Jews and Christians and Magians; or he may condition that a special body of them may get the produce.... whatever condition the wakif makes if it is not contrary to the Sharaa, will be lawful. And so long as the object is not sinful, the wakif may give to whomsoever he likes.... According to Abu Yusuf the mention of perpetuity [or dedication to an object of a permanent nature] is not necessary to constitute a valid wakf, for the words wakf and sadakah conjunctively or separately imply perpetuity.... In the Baramika it is stated that, according to Abu Yusuf, when a wakf is made in favour of specific individuals, on their extinction the profits of the wakf will be applied to the poor.... Among the wakfs created by the Sahaba [Companions of the Prophet],.... the first is the wakf of Omar (may God be pleased with him) of his land called Samagh [at Khaibar].... that created by Zobair bin Awwam of his house for the support of his daughter who had been divorced (by her husband);.... that of Arkam Mukhzumi, on his children of his house called Dar-ul-Islam at Safar (near Mecca), where the Prophet used to preach Islam, and where many of the disciples, among them Omar, accepted the Faith.... Baihaki in his Khilafiat has stated upon the authority of Abu Bakr Obaidulla bin Zubair that [the Caliph] Abu Bakr (may God be pleased with him) had a house in Mecca which he bestowed in charity upon his children, and that it is still in existence.... And Saad ibn Abi Wakkas bestowed in charity his houses in Medina and Egypt upon his children, and that wakf is still in existence, and [the Caliph] Osman (may God be pleased with him) made a wakf of Ruma, which exists until to-day, and Amr Ibn al-Aas [the Amru of European history], of his lands called Wahat in Tayef and of his houses in Mecca and Medina upon his children, and that [wakf] also is still continuing.... According to Abu Yusuf the wakif may lawfully retain the governance of the trust, or reserve the profits for himself during his lifetime. This has been fully dealt with by Kuduri in two parts.... The jurists, Ahmed ibn-i-Abi Laila, Ibn Shabarma, Zahri, and others, agree with Abu Yusuf. Mohammed alone holds a contrary opinion.... Abu Yusuf bases his rule upon the practice and sayings of the Prophet himself who used to eat out of the produce of the lands dedicated by him.... Another proof in support of Abu Yusuf''s rule is that the meaning of wakf is to extinguish the right of property in one''s self and consign it to the custody of God. Therefore, when a person reserves the whole or a portion of the profits for himself, it does not interfere with the dedication, for that also implies the approval of the Almighty and is lawful.... For example, if a man were to dedicate a caravanserai and make a condition that he may rest in it, or a cistern and condition that he should take water from it, or a cemetery, and say that he may be buried there, all this would be lawful. [Further] our Prophet (may the blessings of God be with him) has declared that a man''s providing for his subsistence is a sadakah [an act of piety or charity]. This Hadis has been substantially handed down by a large number [of people] and is authentic, and Ibn Maja states from Mikdam bin Maadi Karib that the Prophet declared that no gain of a man is so meritorious as that which he earns by the labour of his hands; and that which he provides for the maintenance and support of himself, the people of his household, his children, and his servants, is a sadakah. And Imam Nisai from Balia and he from Buhair has given the same tradition in these words:-''Whatever thou providest for thyself is a sadakah.'' Ibn Haban in his Sahih states that Abu Said reports from the Prophet that any one who acquires property in a lawful manner, and provides therewith for his maintenance and for that of the other creatures of God, gives alms in the way of the Lord.... And Dar

Kutni reports from Jabir that the Prophet (may God''s blessing be with him).... declared that all good acts are sadakah and that a man providing subsistence for himself and his children and his belongings, and for the maintenance of his position, is giving charity in the way of God.... Tibrani has reported from Abi Imama that the Prophet of God declared that a man making a provision for his own maintenance, or of his wife, or of his kindred, or of his children, is giving sadakah. And in the Sahih of Muslim it is stated from Jabir that the Prophet told a man to make a beginning with himself and give the remainder to his kinsfolk.

1089. Justice Ameer Ali further on page 434 of the report observed that the words "charitable" and "religious" must be understood from a Mussulman and not from an English point of view. His view was concurred by Justice O''Kinealy and His Lordship also observed on page 437 of the report that "it must be an endowment for religious or charitable purposes; and if we want to interpret a document of that kind, what we must naturally look to is what is really meant by the words "religious" or "charitable" among Muhammadans. As an example, we know that the words "charitable purpose" in Scotland have quite a different meaning from that in which they are used in England. And so in India, in judging of what is really meant by the words "religious" and "charitable" by a Muhammadan, we must take the view which their law takes, and not what is to be found in the English Dictionary.

1090. The term "waqf" literally means detention. The legal meaning of waqf according to Abu Hanifa, is the detention of a specific thing in the ownership of the wakif or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects." According to the two disciples, Abu Yusuf and Muhammad, waqf signifies the extinction of the appropriator''s ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind". A waqf extinguishes the right of the wakif or dedicator and transfers ownership to God. By dedication and declaration the property in the wakif is divested and vests in the Almighty.

1091. For the present purpose an idea of what constitute waqf in Islam is sufficient and we need not to go into further details. With respect to ''waqf'' as recognised in Islamic Law, since hereat we are concerned with the relevant legislative aspect of the matter as it operated in India, we shall deal with Islamic Law in this respect in detail while dealing with the issue of validity of creation of waqf with respect to the property in dispute.

Administration of Waqfs

1092. The concept of waqf in India got introduced with the establishment of Muslim rule. It appear that earlier ''Sultan'' was the supreme authority over the administration of waqf properties and ultimate power vested in him. There was some decentralisation of the actual administration, control and supervision of waqf institutions. At the Centre, the Sadar-us-Sadar was entrusted with the overall control of waqfs administration in the empire. His main work was to supervise waqfs'' administration and its properties. At the provincial level, it was Sadr-e-Subha and in District, Sadre-e-Sarkar used to look into the administration of waqfs. At the local level, the waqfs used to be looked after by Qazis who also looked after waqf cases. The administration of individual waqf was the responsibility of Mutawalli, which is still continuing. This kind of arrangement finds mention in detail in Fatwai Alamgiri said to be prepared under the command of Mughal Emperor Aurangzeb.

1093. During the reign of Indian sub-continent by East India Company, in the territory under their command so far as it had charitable and religious institutions of Hindus and Mohammedans, they were regulated by British Government exercising visitatorial powers. In exercise of this power, the British Government enacted several laws to prevent fraud and waste, and to secure honest administration of such institutions. The British Government did not interfere with the personal laws of Hindus and Muslim like inheritance, succession, marriage and religious institutions.

1094. In 1810, the general superintendence of religious and charitable endowments vested in Board of Revenue and the Board of Commissioners. Vide Bengal Regulations 19 of 1810 (The Bengal Charitable Endowment Public Building and Escheats Regulations, 1810), the Board of Revenue was put in possession of landed and other properties of charitable and religious endowments, of both Muslims and Hindus. The Regulations were obviously applicable to the area under the authority of East India Company. The said Regulations, however it appears, had no application to the area or to properties situated in Oudh for the reason that under the agreement of the East India Company with Nawab of Awadh (Lucknow), the said area of Oudh continued to be ruled by the "Nawabs" till its annexation in 1856.

1095. After the transfer of power from East India Company to British Government in 1857, a series of legislation came including those which were enacted with an object of proper administration of religious and charitable endowment. The Religious Endowments Act, 1863 (Act 20 of 1863) was passed and the properties relating to religious, charitable and public endowments were placed under the control of trustees, managers or superintendents. Local Committees were appointed which exercise the powers of the Board of Revenue or local agents.

1096. In respect to the Muslim in Oudh area, Oudh Laws Act XVIII of 1876 was enacted. Vide Section 3 thereof, the laws to be administered in the case of Mohammadans would be the same as in East Panjub. The East Punjab was governed by Punjab Laws Act IV of 1872 and Sections 5 and 6 thereof provide as under:

5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family

relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be-

(1) any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;

(2) the Mahomedan law, in cases where the parties are Mahomedans,.... except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of the Act, or has been modified by any such custom as is above referred to.

6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

1097. In respect to certain specified waqfs in Husainabad area in Lucknow (Oudh), Husainabad Endowment Act,1878 (Act 15 of 1878) was enacted.

1098. In 1908, by enacting new Code of Civil Procedure, Sections 92 and 93 were incorporated for the proper administration of trusts. Under these sections two or more persons having any interest in a trust could file a suit with the prior permission of the Advocate General in relation to a matter regarding the appointment and removal of trustees, matters relating to the sale, exchange or mortgage of trust property, etc.

1099. Upto 1913 a waqf was valid if the effect of the deed of wqkf was to keep the property in substance to charitable uses. In Abul Fata Mohammad v. Rasamaya, 22 IA 76 it was held by Privy Council that if the primary object of the waqf was the aggrandizement of the family and the gift to charity was illusory whether from its small amount or from its uncertainty and remoteness, the waqf, for the benefit of the family was invalid and no effect could be given to it. This decision caused lot of protest and dissatisfaction amongst the Muslim communities in India since the said decision in particular paralyzed the power of Muslims to make a settlement in favour of family, children and descendants or what is known as waqf-alal-aulad. Consequently, the matter was represented by the Indian Muslims before Lord Curzon, the then Viceroy and Governor General of India canvassing that for family settlement by way of waqf from the time of Prophet Mohammad down to the present time an unbroken chain of evidence existed to show that the law of waqf-alal-aulad existed in all countries having Muslim population like Arabia, Central Asia, Persia, Afghanistan and India. It was represented that the precepts of the Prophet support the family settlement amongst Muslim by way of waqf. It is said that the following precepts of the Prophet were cited:

The apostle of God said:

When a Mussalman bestows on his family and kindered, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his family and children.

The apostle of God said:

There is one Dinar which you have bestowed in the Road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is the greatest Dinar in point of reward which you gave to your family.

The apostle of God said:

The most excellent Dinar which a man bestows is that which he bestows upon his own family. Omme Salma says, "I said to the Prophet, is there any good thing for me of rewards, for my bestowing on the Sons of Abu Salmas. His sons are no otherwise than mine." The Prophet said: "Then give to them, and for you are rewards of that you bestow upon them

The apostle of God said:

Giving alms to the poor has the reward of one alms, but that given to kindered has two rewards; one the reward of alms, the other the reward of relationship. "The Prophet of God declared that a pious offering to ones family (to provide against their getting into want) is more pious than giving alms to beggars.

1100. Accepting the claims of Muslims in India, Mussalman Waqf Validating Act, 1913 (Act No. 6 of 1913) (hereinafter referred to as the "1913 Act") was enacted to validate the waqf created for the benefit of the members of family i.e. waqf-alal-aulad. This Act came into force on 07.03.1913. The preamble of 1913 Act shows that it was enacted to declare the rights of Muslims to make settlements of property by way of waqf in favour of their family, children and decedents. The term "waqf" was defined in Section 2 (1) as under :

2....

(1) "Waqf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose, recognized by the Mussalman law as religious, pious or charitable.

1101. Section 5 of 1913 Act states that nothing therein shall affect any custom or usage whether local or prevalent among Musalman or any particular class or sect. The definition of ''Waqf'' under 1913 Act recognises the concept of waqf as known in Shariyat Law.

1102. As already stated, a waqf therefore is an unconditional and permanent dedication of property with implied detention in the ownership of God in such a manner that the property of the owner may be extinguished and its profit may revert to or be applied for the benefit of mankind except for purposes prohibited by Islam.

1103. It may, however, be clarified at this stage that a waqf is distinct from Sadaqah, Hiba and trust. In Islamic Law-Personal by B.R. Verma first published in 1940 (6th Edition published in 1986) (reprinted in 1991 by M.H. Beg and S.K. Verma) identify the above distinction on page 630-631 of the book as under :

Sadaqah

Wakf

(1) The corpus itself may be consummed.

(2)It is only a donation.

(3)The legal estate and not merely beneficial interest passes to charity to be held by trustees appointed by the donor. The trustee can dispose of the corpus itself.

(1)The income only can be sent.

(2)It is an endowment.

(3)The legal estate is transferred to God. It does not vest in the trustee or mutawalli who cannot deal with the corpus.

1104. The distinction between waqf and sadaqah is that in the case of former the income only can be spent while in the case of latter the corpus of the property may be consumed.

Hiba

Wakf

(1) It relates to absolute interest in the subject of the gift, the donee having a right not only to spend the usufruct but also the pro perty itself.

(2) The donee is a human being.

(3)There are no limitations as to the object for which it can be made.

(4)A hiba to an unborn person is invalid.

(1) It is only the usufruct which can be spent and the corpus cannot be disposed of except under very limited conditions.

(2) The ownership is transferred to God.

(3) It is made for the benefit of mankind.

(4) A wakf may be made in favour of a succession of unborn persons.

Trust

Wakf

(1) No particular motive is necessary.

(2) The founder may himself be a beneficiary.

(3) It may be for any lawful object.

(4) the property vests in the trustee.

(5) A trustee has got larger power than a mutawalli.

(6) It is not necessary that a trust maybe perpetual, irrevocable or inalienable.

(7) It results for the benefit of the founder when it is incapable of execution and the property has not been exhausted.

(1) It is generally made with a pious, charitable or religious motive.

(2) The wakf cannot reserve any benefit for himself (except to some extent under Hanafi law).

(3) The ultimate object must be some benefit of mankind.

(4) The property vests in God.

(5) A mutawalli is only a manager or superintendent.

(6) A wakf is perpetual, irrevocable and inalienable.

(7) The cypres doctrine is applied and the property may be applied to some other object.

1105. Apparently, Islam is not a necessary condition for constitution of a waqf. It may be made by a Muslim or a non Muslim but the necessary condition for creation of a waqf is the object thereof. Ameer Ali in his book on Mohammedan Law (Fourth Edition) Volume I at page 200 has said "Any person of whatever creed may create wakf, but the law requires that the object for which the dedication is made should be lawful according to the creed of the dedicator as well as the Islamic doctrines. Divine approbation being the essential in the constitution of a wakf if the object for which a dedication is made is sinful, either according to the laws of Islam or to the creed of the dedicator it would not be valid." Thus a non Muslim may also create a waqf for any purpose which is religious under the Mohammedan Law. But the object of the waqf must be lawful according to the religious creed of the maker as well.

1106. Section 3 of 1913 Act empowers any person professing muslim faith to create a waqf in all other respects in accordance with the provisions of Muslim Law for the following among other purposes, i.e., for the maintenance and support, wholly or partially of his family, children and descendants etc. It would be useful to reproduce Section 3 as under :

3. It shall be lawful for any person professing the Mussalman faith to create a waqf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :

(1) for the maintenance and support wholly or partially of his family, children or descendants, and

(2) where the person creating a waqf is a Hanafi Mussalman, also for his own

maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or implicitly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

1107. 1913 Act, however, having not been given retrospective effect did not remove the hardship in its entirety created by the decision of Privy Council in Abul Fata Mohammad (supra) and in some later cases it was held that 1913 Act could not be construed as validating deeds executed before 07.03.1913.

1108. On 05.08.1923 the Mussalman Waqf Act, 1923 (Act No. XLII of 1923 (hereinafter referred to as "1923 Act") was enacted with the object of better management of waqf property and ensuring maintenance of proper accounts and its publication in respect of such properties. The aforesaid Act was applicable to the whole of British India at the relevant time and in 1948 the said words were substituted by the words "all the Provinces of India". The term "benefit", "mutwalli" and "waqf" were defined in Section 2 (a) (c) and

(e) of 1923 Act, as under :

2. In this Act, unless there is anything repugnant in the subject or context,-

(a) "benefit" does not include any benefit which a mutwalli is entitled to claim solely by reason of his being such mutwalli;

(b)....

(c)"mutwalli" means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a Court of competent jurisdiction to be the mutwalli of a wakf, and includes a naib-mutwalli or other person appointed by a mutwalli to perform the duties of the mutwalli, and, save as otherwise provided in this Act, any person who is for the time being administering any wakf property;

(d)....

(e) "wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable, but does not include any wakf, such as is described in section, 3 of the Mussalman Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants.

1109. Section 3 of 1923 Act placed an obligation on a Mutwalli to furnish certain particulars in respect to waqf property, income and expenses etc. within a period of six months from the date of commencement of the 1923 Act to the Court within the local limits of whose jurisdiction the property of the waqf, for which the said person is mutwalli, is situated. Non compliance of Section 3 was made penal vide Section 10 of the said Act.

1110. Section 10 of 1923 Act provides consequences on failure to comply with the provisions of Sections, 3, 4 and 5 and reads as under:

10. Penalties.--Any person who is required by or u/s 3 or Section 4 to furnish statement of particulars or any document relating to a wakf, or who is required by Section 5 to furnish a statement of accounts, shall, if he, without reasonable cause the burden of proving which shall lie upon him, fails to furnish such statement or document, as the case may be, in due time, or furnishes a statement which he knows or has reason to believe to be false, misleading or untrue in any material particular, or, in the case of a statement of accounts, furnishes a statement which has not been audited in the manner required by Section 6, be punishable with fine which may extend to five hundred rupees, or, in the case of a second or subsequent offence, with fine which may extend to two thousand rupees.

1111. A question arose as to whether the Court while exercising power u/s 10 can proceed to look into the question as to whether any property which is denied to be a waqf property can be investigated and looked into so as to find out whether it is a waqf property within the meaning of Section 2(e) of the Act or not. This question came to be considered before a Hon''ble Single Judge of Patna High Court in (Syed) Ali Mohammad v. Collector of Bhagalpur, AIR 1927 Pat 189. The question was that of application of 1923 Act in respect to property where there was a dispute whether it was a waqf property or not. The petitioner before the High Court return a notice issued by the Collector including petitioner''s property in the list of waqf properties stating that he was not incharge of any waqf property as defined in Section 2(e) of 1923 Act whereupon the Collector referred the matter to the District Judge who held the property as a waqf property and the question was whether the order of District Judge was within jurisdiction or not. It was held by the Hon''ble Patna High Court that there is no provision in the Act authorizing the Court, as defined in the Act, to determine as to whether any property which if denied to be a waqf property, is waqf property, within the meaning of the Act. The Act neither authorizes the Court to summon witnesses or to take evidence nor any procedure is prescribed for determining the question as to whether any property is a waqf property and no provision of appeal or revision is made if any such decision is made. It held that the Act applies to admitted waqfs and not to the properties which are denied to be the waqf properties.

1112. However, this view did not find favour with a Full Bench decision of Oudh Chief Court in Mohammad Baqar and another v. S. Mohammad Casim and others, AIR 1932 Oud 210 where it was held that mere denial of a property as constituting a waqf property by a person would not deprive jurisdiction to the Court to consider whether the property is a waqf property under 1923 Act or not, otherwise, it would defeat the very objective of the Act. In the majority decision, the Court said that it is a recalcitrant Mutawalli to whom the Act intends to reach and if the jurisdiction of the Court is ousted as soon as a Mutawalli who has failed to observe the provisions of the Act denies the alleged waqf that would defeat the very objective of the legislature. It was held that the application of 1923 Act does not depend upon the attitude which a Mutawalli may take with regard to origin of an alleged waqf. The Court said:

From the definition of the word "wakf" in Cl. (e), Section 2 of the Act it is clear that a wakf of the nature described in Section 3, Mussalman Wakf Validating Act, 1913, is excluded from the operation of the Act of 1923. With a view to determine whether an alleged waqf is inside or outside the scope of the Act the Court must make some inquiry. The inquiry may be limited merely to an interpretation of the instrument creating the wakf if there is any or to the scrutinizing of the terms of an oral wakf. (page211)

1113. The Court further held:

It is true that the Act does not lay down any obligation on the Court as to the limits to which it should carry any inquiry which it may wish to make and no party is entitled to compel the Court to carry inquiry up to any particular stage. Indeed the Court may refuse to enter into any inquiry on the ground that the allegations of the parties disclose a controversy fit to be determined in a regular suit, and this, in my judgment, explains the absence of any special rule of procedure. The Court is invested with a discretion but it cannot, in my opinion, refuse to look into the merits of the case and stay its hands on the sole ground that the alleged mutawalli does not admit the alleged wakf. (page 213)

1114. It is not the case of any of the parties that any such statement was furnished in respect to the property in dispute in the Court as defined u/s 2(b) of the said Act and the provisions of the said Act were complied with at all. It is not the case of the parties, i.e., the plaintiff, Suit-4, or in general, Muslim parties, that the aforesaid Act was applicable to the property in dispute or that the compliance of the said Act was made by the concerned Mutawalli. In the absence of any pleadings in respect to 1923 Act, we have no hesitation in not considering the matter in the light of 1923 Act inasmuch as if that be so first of all it would be necessary to consider whether the property in question was a waqf made in 1528 and continued to be so thereafter and secondly whether any person as Mutawalli was in possession of the property in question in 1923 and thereafter. We have not been shown any material to show the existence of the above facts and even if so then why and in what circumstances the provisions under 1923 Act were not complied with is also not explained. We also find that it is case of none that Section 12 or 13 of 1923 Act at the relevant time were attracted to the property in dispute and/or that the said property was exempted by the competent government from the operation of 1923 Act.

1115. The next legislation is Mussalman Waqf Validating Act (XXIII) of 1930 which made 1913 Act applicable to waqfs created before the commencement of 1913 Act with the rider that the transactions already completed in respect to right, title, obligations, liability etc. shall not be affected in any manner.

1116. Then came the 1936 Act (Act No. 13 of 1936) published in Uttar Pradesh Gazette dated 20.03.1937. The above enactment was made for the better governance, administration and supervision of certain classes of Muslim waqf in the United Provinces of Agra and Oudh. Section 1 of 1936 Act provides for the commencement, and extent; and reads as under:

(1) Short title, commencement and extent.- (1) This Act shall be called "the United Provinces Muslim Waqfs Act, 1936.

(2) This section and sections 2 to 4 shall come into force at once. The rest of the Act shall not come into force until such date as the local Government may, by notification in the Gazette, appoint in this behalf.

(3) It shall extend to the whole of the United Provinces of Agra and Oudh.

1117. We may mention at this stage that Section 1(2) enforces only Sections 2 to 4 at once and the rest of the Act was to come into force on such date as the local Government by notification in the gazette may appoint in this behalf. Sections 5 to 71 of the said Act came into force on 01.07.1941vide notification dated 20.06.1941 published in Government Gazette of the United Provinces Vol. LXIII, No. XXVI, Part-1, page 311 dated 20.06.1941 which reads as under:

In exercise of the powers conferred by sub-section (2) of section 1 of the United Provinces Muslim Waqfs Act, 1936 (Uttar Pradesh XIII of 1936), the Governor of the United Provinces is pleased to declare that sections 5 to 71 of the said Act shall come into force on the 1st day of July, 1941.

1118. The reason for delay in notification giving effect to Sections 5 to 71 of 1936 Act came to be noticed in Badrul Islam Vs. The Sunni Central Board of Waqf, U.P., Lucknow, in para 8 of the judgement as under:

It is true that the provisions of Section 5 to 71 of the Act did not come in force till some time in 1941. This fact has no bearing because it appears that the late enforcement of these provisions was due to the fact that what was provided by these provisions could not have been given effect to till the Central Board had found on investigation through proper agency the waqfs which were subject to the Act. It was no use enforcing these provisions which could not have been given effect to. It was for this reason that these sections were later enforced.

1119. It is said that the Commissioner of Waqf made survey u/s 4 and submitted his report. The Boards proceeded further by issuing notifications in respect to Sunni Waqfs on 26.02.1944 and in respect of Shia Waqfs on 15.01.1954 published in the gazette dated 23.01.1954, we are proceeding further presuming as if the rest of the provisions of the Act were made operative and will try to find out the answer to the above issues accordingly.

1120. Section 2 of 1936 Act provides for applicability of the Act to certain category of waqfs and inapplicability to some other category of waqfs and reads as under:

2. Applicability of the Act.

(1) Save as herein otherwise specifically stated, this Act shall apply to all waqfs, whether created before or after this Act comes into force, any part of the property of which is situated in the United Provinces.

(2) This Act shall not apply to

(i) a waqf created by a deed, if any, under the terms of which not less than 75 per cent, of the total income after deduction of land revenue and cesses payable to Government of the property covered by the deed of waqf, if any, is for the time being payable for the benefit of the waqif or his descendants or any member of his family.

(ii) a waqf created solely for either of the following purposes :

(a) the maintenance and support of any person other than the waqif or his descendants or any member of his family,

(b) the celebration of religious ceremonies connected with the death anniversaries of the waqif or of any member of his family or any of his ancestors,

(c) the maintenance of private immabaras, tombs and grave yards, or

(d) the maintenance and support of the waqif or for payment of his debts, when the waqif is a Hanafi Musalman; and

(iii) the waqfs mentioned in the schedule : Provided that if the Mutawalli of a waqf to which this Act does not apply wrongfully sells or mortgages, or suffers to be sold in execution of a decree against himself, or otherwise destroys the whole or any part of the waqf property, the Central Board may apply all or any of the provisions of this Act to such waqf for such time as it may think necessary.

Explanation. A waqf which is originally exempt from the operation of this act may, for any reason subsequently, become subject to such operation, for example, by reason of a higher percentage of its income becoming available under the terms of the deed for public charities.

1121. The Schedule referred to in Section 2(2)(iii) of 1936 Act is as under :

1. Waqfs governed by Act XV of 1878.

2. Wazir Begam Trust, Lucknow.

3. Agha Abbu Sahib Trust, Lucknow.

4. Shah Najaf Trust, King''s side, Lucknow, and Queen''s side, Lucknow.

5. Kazmain Trust, Lucknow.

1122. Section 3 contains certain definitions as under:

3. In this Act, unless there is anything repugnant in the subject or context

(1) Interpretation clauses.--"Waqf" means the permanent dedication or grant of any property for any purpose recognized by the Musalman law or usage as religious, pious or charitable and, where no deed of waqf is traceable, includes waqf by user, and a waqif means any person who makes such dedication or grant."

(2) "Beneficiary" means the person or object for whose benefit a waqf is created and includes religious, pious or charitable objects, and any other object of public utility established for the benefit of the Muslim community or any particular sect of the Muslim community.

(3) "Mutawalli" means a manager of a waqf or endowment and includes an amin, a sajjadanashin, a khadim, naib mutawalli and a committee of management, and, save as otherwise provided in this Act, any person who is for the time being in charge of or administering, any endowment as such.

(4) "Family" includes

(a) Parents and grand-parents.

(b) Wife or husband.

(c) Persons related through any ancestor, male or female.

(d) Persons who reside with, and are maintained by, the waqif, whether related to him or not.

(5) Property includes Government securities and bonds, shares in firms and companies, stocks, debentures and other securities and instruments.

(6) "Prescribed" means prescribed by rules made under this Act.

(7) "Court" means, unless otherwise stated either expressly or by implication, the court of the District Judge or any other court empowered by the local Government to exercise jurisdiction under this Act.

(8) "Net income" means the total income minus the land revenue and other cesses payable to Government and to local bodies:

Provided that in the case of land paying land revenue the recorded income shall be deemed to be the total income.

1123. Chapter I which has Sections 4 to 24 deals with Survey of Waqfs and Central Board of Waqfs. Section 4 deals with the Survey of Waqfs; Section 5 deals with the Commissioner''s report and its publication in the Gazette; and, read as under:

4. (1) Survey of waqfs.--Within three-months of the commencement of this Act the local Government shall by notification in the Gazette appoint for each district a gazetted officer, either by name or by official designation for the purpose of

making a survey of all waqfs in such district, whether subject of this Act or not. Such officer shall be called the Commissioner of waqfs.

(2) The Local Government may, from time to time when necessary cancel any appointment under sub-section (1) or make a new appointment.

(3) The "Commissioner of waqfs" shall, after making such inquiries as he may consider necessary, ascertain and determine-

(a) the number of all Shia and Sunni waqfs in the district;

(b) the nature of each waqf;

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

(d) the amount of Government revenue, cesses and taxes payable in respect of waqf property;

(e) expenses incurred in the realization of the income and the pay of the mutawalli of each waqf if the waqf is not exempted u/s 2; and

(f) whether the waqf is one of those exempted from the provisions of this Act u/s 2:

Provided that where there is a dispute whether a particular waqf is Shia waqf or Sunni waqf and there are clear indications as to the sect of which it pertains in the recitals of the deed of waqf, such dispute shall be decided on the basis of such recitals.

(4) In making such inquiries as aforesaid the Commissioner of waqfs shall exercise all the powers of a civil court for summoning and examining witnesses and documents, making local inspections, appointing commissioners for examination of witnesses, examining of accounts and makinglocal investigations.

(5) The Commissioner of waqfs shall submit his report of inquiry to the local Government.

(6) The total cost of carrying out the provisions of this section shall be borne by the mutawallis of all waqfs to which the Mussalmans Waqfs Act, 1923, applies in proportion to the income of the property of such waqfs situated in the United Provinces.

(7) Notwithstanding anything in the deed or instrument creating any waqf, any mutawalli may pay from the income of the waqf property any sum due from him under sub-section (6).

(8) Any sum due from a mutawalli under sub-section (6) may, on a certificate issued by the local Government, be recovered by the Collector in the manner provided by law for recovery of an arrear of land revenue.

5. Commissioner''s report.-

(1) The local Government shall forward a copy of the Commissioner''s report to each of the Central Boards constituted under this Act. Each Central Board shall as soon as possible notify in the Gazette the waqfs relating to the particular sect to which, according to such report, the provisions of this Act apply.

(2) The mutawalli of a waqf or any person interested in a waqf or a Central Board may bring a suit in a civil court of competent jurisdiction for a declaration that any transaction held by the Commissioner of waqfs to be a waqf is not a waqf, or any transaction held or assumed by him not to be a waqf is a waqf, or that a waqf held by him to pertain to a particular sect does not belong to that sect, or that any waqf reported by such Commissioner as being subject to the provisions of this Act is exempted u/s 2, or that any waqf held by him to be so exempted is subject to this Act:

Provided that no such suit shall be instituted by a Central Board after more than two years of the receipt of the report of Commissioner of waqfs, and by a mutawalli or person interested in a waqf after more than one year of the notification referred to in sub-clause (1):

Provided also that no proceedings under this Act in respect of any waqf shall be stayed or suspended merely by reason of the pendency of any such suit or of any appeal arising out of any such suit.

(3) Subject to the final result of any suit instituted under sub-section (2) the report of the Commissioner of waqfs shall be final and conclusive.

(4) The Commissioner of waqfs shall not be made a defendant to any suit under sub-section (2) and no suit shall be instituted against him for anything done by him in good faith under colour of this Act.

1124. Sections 6, 7 and 8 of 1936 Act show that there shall be two Waqf Board namely, Shia Central Board and Sunni Central Board of Waqf. The constitution etc. thereof is provided from Section 6 to 17. Section 18 deals with the functions of the Central Board and reads as under:

18. Function of the Central Board.-(1) The general superintendence of all waqfs to which this Act applies shall vest in the Central Board. The Central Board shall do all things reasonable and necessary to ensure that waqfs or endowments under its superintendence are properly maintained, controlled and administered and duly appropriated to the purposes for which they were founded or for which they exist.

(2) Without prejudice to the generality of the provisions of sub-section (1) the powers and duties of the Central Board shall be

(a) to complete and maintain and authentic record of rights containing information relating to the origin, income, object, and beneficiaries of every waqf in each district;

(b) to prepare and settle its own budget;

(c) to settle and pass budgets submitted by the mutawallis direct to the Board and any budget submitted to, but not approved by, a District Waqf Committee, provided that it is in accordance with the wishes of the waqif and the terms of the deed of waqf;

(d) to settle and pass the annual budgets of the District Waqf Committees;

(e) to institute and defend suits and proceedings in a court of law relating to

(i) administration of waqfs,

(ii) taking of accounts,

(iii) appointment and removal of mutawallis in accordance with the deed of waqf if it is traceable,

(iv) putting the mutawallis in possession or removing them from possession,

(v) settlement or modification of any scheme of management;

(f) to sanction the institution of suits u/s 92 of the Code of Civil Procedure, 1908, relating to waqfs to which this Act applies;

(g) to take measure for the recovery of lost properties;

(h) to settle scheme of management and application of waqf funds in accordance with the doctrine of cypres in case of those waqfs, the objects of which are not evident from any written instrument or in cases in which the objects for which they were created have ceased to exist;

(i) to enter upon and inspect waqf properties;

(j) to investigate into the nature and extent of waqfs and waqf properties and call from time to time for accounts and other returns and information from the mutawallis and give directions for the proper administration of waqfs;

(k) to arrange for the auditing of accounts submitted by the mutawallis;

(l) to direct the deposit of surplus money in the hands of the mutawalli in any approved bank and to utilize it on the objects of waqf;

(m) to supervise and control the District Waqf Committees;

(n) to administer the waqf fund;

(o) to keep regular accounts of receipts and disbursement and submit the same in the matter prescribed;

(p) to institute when necessary an inquiry relating to the administration of a waqf: Provided that in the appointment of mutawallis or in making any other arrangement for the management of waqf property the Central Board shall be guided as far as possible by the directions of the waqif, if any.

1125. A careful reading of 1936 Act as also all the earlier enactments make it very clear that neither they create a waqf nor diminish or terminate a waqf nor affect a waqf in any other manner. On the contrary, the provisions have been made only to provide a statutory body for the better governance, administration and supervision of the waqfs to which the said Act apply. Further vide Section 2(1) of 1936 Act though it applies to all waqfs, whether created before the commencement of the Act or thereafter, if any part of the property of which waqf is situate in the United provinces but by virtue of Sub-section (2) of Section 2 certain classes of waqfs have been excluded. The exclusion under Sub-section (2) of Section 2 of 1936 Act is specific and has been categorized with precision. It would mean that only to the extent the waqfs are excluded by virtue of sub-section (2) of Section 2 all other waqfs, if a waqf validly created, would be governed by 1936 Act.

1126. The term ''Waqf'' under 1936 Act has also been defined as a permanent dedication or grant of any property for any purposes recognized by the Musalman law or usage as religious, pious or charitable including waqf by user where no deed of waqf is traceable.

1127. However a cumulative reading of the entire 1936 Act shows that it does not govern the right of worship of Hindus or Muslims. as the case may be. The object of enactment is to provide better governance and administration in supervision of certain classes of Muslim Waqfs. The Waqfs to which the aforesaid Act applies are to be supervised and maintained by the Central Boards, namely, Shia Central or Sunni Central Board, as the case may be, constituted u/s 6 of the said Act.

1128. At this stage it may be pointed out that there was some ambiguity between Section 8(1)(i) and Section 12. Noticing the same, vide Uttar Pradesh Muslim Waqfs (Amendment) Act 9 of 1953 which received the assent of the President on 26.02.1953, Section 12 was deleted and Section 8-A was inserted which was held valid by this Court in All India Shia Conference Vs. Taqi Hadi and Others,

1129. In 1954, the Parliament enacted Waqf Act, 1954 (Act XXIX of 1954) (hereinafter referred to as ''1954 Act''). The aforesaid Act though extended to whole of India except the State of Jammu and Kashmir but proviso to Section 1(3) thereof provides for the State of Uttar Pradesh , Bihar and West Bengal as under :

Provided that in respect of any of the States of Bihar, Uttar Pradesh and West Bengal, no such notification shall be issued except on the recommendation of the State Government concerned.

1130. Consequently, 1954 Act did not apply to the State of Uttar Pradesh since the State of Uttar Pradesh had its own Act of 1936.

1131. Though not necessary for the category of the issues, with which we are concerned at this stage, but just to complete the legislative history, we find that the State legislature enacted Uttar Pradesh Muslim Waqfs Act 1960 (Uttar Pradesh Act No. XVI of 1960) (hereinafter referred to ''1960 Act''). This Uttar Pradesh Act, 1960 received assent of the President of India on 27th August, 1960 and was published in Uttar Pradesh Gazette Extraordinary on 3rd September, 1960. Vide Section 1(3) of 1960 Act, it came into force at once. Section 2 of 1960 Act provides for the application of the Act and sub-section (1) thereof reads as under :

2. Application of the Act.-(1) Save as herein otherwise specifically stated, this Act shall apply to all waqfs, whether created before or after the commencement of this Act, any part of the property comprised in which it situate in Uttar Pradesh, and to all the waqfs which at the time of the coming into force of this act were the superintendence of the Sunni Central Board or the Shia Central Board constituted under the Uttar Pradesh Muslim Waqfs Act, 1936 (Uttar Pradesh Act XIII of 1936).

1132. Vide Section 85(2) of 1960 Act, 1936 Act as well as Husainabad Endowment Act, 1878 were repealed. Some more enactments were repealed by insertion of Section 11 of Uttar Pradesh Act No. 28 of 1971 whereby the following was inserted in Section 85(2) of 1960 Act :

The following enactments are also hereby repealed in their application to any waqf to which this Act applies :

(1) the Bengal Charitable Endoments, Public Buildings and Escheats Regulation, 1810 (Act XIX of 1810);

(2) the Religious Endoments Act, 1863 (Act XX of1863);(3)the Charitable Endowments Act, 1890 (Act XX of1890);

(4) the Charitable and Religious Trusts Act, 190 (Act XIV of 1920):

1133. There was saving provisions in Section 85 by way of proviso which read as under :

Provided that this repeal shall not affect the operation of those Acts in regard to any suit or proceeding pending in any Court or to an appeal or an application in revision against any order that may be passed in such suit or proceeding and subject thereto, anything done or any action taken in exercise of powers conferred by or under those Acts shall unless otherwise expressly required by any provision of this Act, be deemed to have been done or taken in exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such thing was done or action was taken.

1134. Besides, Section 28 of 1960 Act provides saving of waqfs already registered and provides as under :

Savings Uttar Pradesh Act XIII of 1986.-A waqf registered before the commencement of this Act under the Uttar Pradesh Muslim Waqf Act 1936, shall be deemed to have been registered under the provisions of this Act.

1135. 1960 Act now stands repealed by the Waqf Act, 1995 (Central Act) which has come into effect w.e.f. 1st January, 1996.

1136. Now reverting to 1936 Act, the general power of superintendence vested in the Central Board is to ensure that the waqfs or endowments under its superintendence are maintained, controlled, administered and duly appropriated to the purposes for which they were founded or for which they exist. The very functions of the Central Board, as such, do not relate directly to the right of worship of either the Hindus or Muslims in any manner. To some extent, however, it may be said that if a religious Waqfs is not properly maintained and administered, and, it causes hindrance or obstruction in observance of such religious activities for which the Waqf was created, the right of people in general who are entitled to use Waqf property for the purposes it is created, to that extent may be obstructed, but directly it cannot be said that 1936 Act in any manner deals with the right of worship of any of the member of the community for whose benefit the Waqf is created. It is more so when the question of a member(s) of a community other than Muslim arises since neither his right of worship in any manner is sought to be affected by 1936 Act nor otherwise it does appear to do so.

1137. In respect to 1936 Act this question came to be considered by the Apex Court in Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others, in an appeal taken against the judgment of this Court in Sunni Central Board of Waqf, U.P. Vs. Sirajul Haq Khan and Others, The matter pertains to Darga Hazarat Syed Salar Mahsood Ghazi situated in the Village Singha Parasi, District Bahraich. The appellants were members of the Waqf Committee, Darga Sharif, Bahraich and filed a suit seeking a declaration that the properties of suit were not covered by the provisions of 1936 Act. The Court considered the words "the Mutawalli of a waqf or any person interested in a waqf" u/s 5(2) of 1936 Act, and, construing the same, it held that it would mean "any person interested" in what is held to be a waqf and in order to find out so it is open to the Commissioner of the Waqf to find out whether a property is a waqf or not and if he includes such a property in the list of waqf, the person challenging such decision would be included by the words "any person interested in a waqf" u/s 5(2). It would be appropriate to reproduce the relevant observations in para 16 of the judgment:

The word ''waqf'' as used in this sub-section must be given the meaning attached to it by the definition in Section 3(1) of the Act and since the appellants totally deny the existence of such a waqf they cannot be said to be interested in the ''waqf''. The argument thus presented appears prima facie to be attractive and plausible; but on a close examination of Section 5(2) it would appear clear that the words "any person interested in a waqf" cannot be construed in their strict literal meaning. If the said words are given their strict literal meaning, suits for a declaration that any transaction held by the Commissioner to be a waqf is not a waqf can never be filed by a mutawalli of a waqf or a person interested in a waqf.

The scheme of this sub-section is clear. When the Central Board assumes jurisdiction over any waqf under the Act it proceeds to do so on the decision of three points by the Commissioner of Waqfs. It assumes that the property is a waqf, that it is either a Sunni or a Shia waqf, and that it is not a waqf which falls within the exceptions mentioned in Section 2. It is in respect of each one of these decisions that a suit is contemplated by Section 5, sub- section (2). If the decision is that the property is not a waqf or that it is a waqf falling within the exceptions mentioned by Section 2, the Central Board may have occasion to bring a suit. Similarly if the decision is that the waqf is Shia and not Sunni, a Sunni Central Board may have occasion to bring a suit and vice versa. Likewise the decision that the property is a waqf may be challenged by a person who disputes the correctness of the said decision. The decision that a property does not fall within the exceptions mentioned by Section 2 may also be challenged by a person who claims that the waqf attracts the provisions of Section 2. If that be the nature of the scheme of suits contemplated by Section 5(2) it would be difficult to imagine how the mutawalli of a waqf or any person interested in a waqf can ever sue for a declaration that the transaction held by the Commissioner of the waqfs to be a waqf is not a waqf. That is why we think that the literal construction of the expression "any person interested in a waqf" would render a part of the sub-section wholly meaningless and ineffective. The legislature has definitely contemplated that the decision of the Commissioner of the Waqfs that a particular transaction is a waqf can be challenged by persons who do not accept the correctness of the said decision, and it is, this class of persons who are obviously intended to be covered by the words "any person interested in a waqf ". It is well-settled that in construing the provisions of a statute courts should be slow to adopt a construction which tends to make any part of the statute meaningless or ineffective; an attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. In our opinion, on a reading of the provisions of the relevant sub-section as a whole there can be no doubt that the expression "any person interested in a waqf" must mean "any person interested in what is held to be a waqf ". It is only persons who are interested in a transaction which is held to be a waqf who would sue for a declaration that the decision of the Commissioner of the Waqfs in that behalf is wrong, and that the transaction in fact is not a waqf under the Act. We must accordingly hold that the relevant clause on which Mr. Dar has placed his argument in repelling the application of Section 5(2) to the present suit must not be strictly or literally construed, and that it should be taken to mean any person interested in a transaction which is held to be a waqf. On this construction the appellants are obviously interested in the suit properties which are notified to be waqf by the notification issued by respondent 1, and so the suit instituted by them would be governed by Section 5, sub- Section (2) and as such it would be barred by time unless it is saved u/s 15 of the Limitation Act.

1138. The above decision, however related to a matter where all the parties before the Court were Muslim and there was no question about the rights of non

Muslim being affected by a decision of the Commissioner of Waqf or Central Board constituted u/s 6 of 1936 Act. In other words the decision noted above covered the persons following the same religious namely, Mohammadan Law but where such a dispute is raised by another party namely a person of different religion like, Hindu, Christian etc. whether 1936 Act at all will apply in that case or not, is not touched by the above judgment.

1139. In our view, since 1936 Act does not provide or control the right of worship of Hindu or Muslims, the rival dispute between the persons who are not Muslims, in the matter of an immovable property, whether it is waqf or not would not be governed by the provisions of 1936 Act but it would be open to non-muslim party to stake his claim without being affected in any manner by the provisions of 1936 Act.

1140. Our view find support from a Division Bench decision of Rajasthan High Court in Radhakishan and Another Vs. State of Rajasthan and Others, This case had arisen from the Waqfs Act, 1954 (in short "1954 Act") and interpretation of the words "any person interested therein" appearing in Section 6(1) came to be considered. The Court held that it would not empower the Board of Waqfs to decide the question whether a particular property is a waqf property or not if such a dispute is raised by a person who is stranger to waqf. The Division Bench therein referred to our Full Bench decision in Mohammad Baqar (supra) and observed that in reference to 1923 Act Patna, Lahore, Bombay and Madras High Court took a view that the District Judge has no jurisdiction to hold an inquiry into the nature of property where the alleged Mutawalli deny existence of waqf though the Allahabad Chief Court of Oudh took a different view.

1141. We may notice hereat that in the Full Bench judgment of Chief Court of Oudh in Mohammad Baqar (supra) there was no question with respect to jurisdiction of the District Judge where the existence of alleged waqf is denied by a stranger and not the Mutawalli, therefore, we do not find that the decision in Radhakishan (supra) in any way can be construed as a dissenting view to the decision of Oudh Chief Court in Mohammad Baqar (supra). This is evident from what has been held by the Rajasthan High Court in paras 24 and 25 reproduced as under:

24. The present Act No. 29 of 1954 is, no doubt, an improvement on the Mussalman Wakf Act, 1923, but, in our view, this also does not empower the Board of Wakfs to decide the question whether a particular property is a wakf property or not, if such a dispute is raised by a person who is a stranger to wakf. This view is further confirmed by the provisions of section 59 of the Act which lays down that in any suit or proceeding in respect of a wakf or any wakf property by or against a stranger to the wakf or any other person, the Board may appear and plead as a party to the suit or proceeding.

25. To sum up the position, the Wakf Commissioner, though he is invested with the powers of a civil court in respect of certain matters, is not a civil court

empowered to decide a disputed question whether a particular property is a wakf property or not. He has only to make a survey of wakf property existing in the State at the date of commencement of the Act and to make a report of survey to the State Government. When the State Government forwards the report to the Board of Wakfs, it becomes the duty of the Board to examine it. Thereafter the Board should publish, in the official gazette, a list of wakfs existing in the State. The law does not require the Commissioner to make a survey of wakf properties which have already become extinct as such. If he mentions in his report that certain properties were once wakf properties and can still be recovered as such, then the proper course, in our opinion for the Board is to file a suit, get them declared as wakf properties and to recover their possession. If a dispute about existence of a wakf is raised by a person who is stranger to the wakf, then it is neither fair nor proper for the Board to include such properties in the list published in the official gazette. Section 6, in our opinion, refers only to those triangular disputes which exists between the Board of Wakf, the mutawalli and a person interested in the wakf. If there is a dispute between these three on a question whether a particular property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf, it is open to any one of them to institute a suit in a civil court of competent jurisdiction. If a suit is instituted, the decision of the Civil Court will be final. If no such suit is filed by any one of them within a year from the date of publication of the list of wakfs the Court would not entertain the suit thereafter and the list of the wakf shall be final and conclusive between them. The object of Section 6 is to narrow down the dispute between the Board of Wakf, the Mutawalli and the person interested in the wakf as defined in section 3. In our view, it does not concern a dispute if it is raised by a person who is an utter stranger to the wakf. The list cannot be final and conclusive as against a non muslim who is not covered by Section 6(1) of the Act. Again, if a dispute whether a particular property is a wakf property or not, is raised by a non-muslim and a stranger to the wakf, the Board of Wakfs has no jurisdiction to decide the matter in its own favour u/s 27 and enter it in the register. The Board''s decision u/s 27 would not be binding against such persons. For the same reason, the Board would not be able to recover possession of the property from such persons u/s 36B of the Act.

1142. The judgment of Rajasthan High Court was taken in appeal before the Apex Court in Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, Two questions raised in appeal. Firstly, the meaning of the words "any person interested therein" in Section 6(1) and (4) of Waqf Act, 1954 and secondly, the power of Waqf Commissioner to make survey of waqf properties whether it includes an inquiry about certain property as a waqf property or not. The Apex Court referring to the various judgments considered by the Rajasthan High Court held that they would be of no assistance in interpreting the provisions of Waqf Act, 1954. However, it was held in para 23 of the judgment that the High Court was right in determining the scope of Section 6(1) of 1954 Act but fell in error in curtailing the ambit and scope of an inquiry by the Commissioner of Waqf u/s

4(3) and by the Board of Waqfs u/s 27 of the Act.

1143. For our purpose, the meaning assigned by the Apex Court in Section 6(1) to the words "any person interested therein" would be relevant to answer the issues noticed above and in this regard it would be appropriate to notice hereunder paras 31, 32, 33, 34, 35 and 36 of the judgment as under:

31. That leaves us with the question as to the scope of sub-section (1) of Section 6. All that we have to consider in this appeal is, whether if the Commissioner of Wakfs had jurisdiction to adjudicate and decide against the respondents Nos. I and 2 that the property in dispute was wakf property, the list of wakfs published by the Board of Wakfs under sub-section (2) of Section 5 would be final and conclusive against them u/s 6(4) in case they had not filed a suit within a year from the publication of the lists. The question as to whether the respondents Nos.1 and 2 can be dispossessed, or their possession can be threatened by the Board of Wakfs by proceeding u/s 36B without filing a suit in a civil court of competent jurisdiction does not arise for our consideration.

32. In the present case, the respondents Nos. 1 and 2 who are non Muslims, contended that they are outside the scope of sub-section (1) of Section 6, and consequently, they have no right to file the suit contemplated by that sub-section and, therefore, the list of wakfs published by the Board of Wakfs under sub-section (2) of Section 5 cannot be final and conclusive against them under sub-Section (4) of Section 6, It was urged that respondents Nos. 1 and 2 were wholly outside the purview of sub- section (1) of Section 6 and they must, therefore, necessarily fall outside the scope of the enquiry envisaged by sub-section (1) of Section 4, as the provisions contained in Sections 4, 5 and 6 form part of an integrated scheme. The question that arises for consideration, therefore, is as to who are the parties that could be taken to be concerned in a proceeding under sub- section (1) of Section 6 of the Act, and whether the list published under sub- section (2) of Section 5 declaring certain property to be wakf property, would bind a person who is neither a mutawalli nor a person interested in the wakf.

33. The answer to these questions must turn on the true meaning and construction of the word ''therein'' in the, expression ''any person interested therein'' appearing in sub- section (1) of Section 6. In order to understand the meaning of the word ''therein'' in our view, it is necessary to refer to the preceding words ''the Board or the mutawalli of the wakf''. The word ''therein'' must necessarily refer to the ''wakf'' which immediately precedes it. It cannot refer to the ''wakf property''. Sub-section (1) of Section 6 enumerates the persons who can file suits and also the questions in respect of which such suits can be filed. In enumerating the persons who are empowered to file suits under this provision, only the Board, the mutawalli of the wakf, and ''any person interested therein'', thereby necessarily meaning any person interested in the wakf, are listed. It should be borne in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore., be logical and reasonable to

infer that its provisions empower only those who are interested in the wakfs to institute suits.

34. In dealing with the question, the High Court observes:

In our opinion, the words "any person interested therein" appearing in sub-section (1) of Section 6 mean no more than a person interested in a wakf as defined in clause (h) of Section 3 of the Act....

It is urged by learned counsel for the petitioners that the legislature has not used in Section 6(1) the words "any person interested in a wakf" and, therefore, this meaning should not be given to the words "any person interested therein". This argument is not tenable because the words "any person interested therein" appear soon after "the mutawalli of the wakf" A and therefore the word ''therein'' has been used to avoid re petition of the words "in the wakf" and not to extend the scope of the section to persons who fall outside the scope of the words "person interested in the wakf". The purpose of section 6 is to confine the dispute between the wakf Board, the mutawalli and a person interested in the wakf.

That, in our opinion, is the right construction.

35. We are fortified in that view by the decision of this Court in Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others, : Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others, While construing Section 5(2) of the United Provinces Muslins Wakf Act, 1936, this Court interpreted the expression "any person interested in a wakf" as meaning ''any person interested in what is held to be a wakf'', that is, in the dedication of a property for a pious, religious or charitable purpose. It will be noticed that sub-section (1) of Section 6 of the Act is based in sub- section (2) of Section 5 of the United Provinces Muslims Wakf Act, 1936, which runs thus:

The mutawalli of a wakf or any person interested in a wakf or a Central Board may bring a suit in a civil court of competent jurisdiction for a declaration that any transaction held by the Commissioner of Wakfs to be a wakf is not a wakf, or any transaction held or assumed by him not to be a wakf, or that a wakf held by him to pertain to a particular sect does not be-long to that sect, or that any wakf reported by such Commissioner as being subject to the provisions of this Act is exempted u/s 2, or that any wakf held by him to be so exempted is subject to this Act.

The proviso to that section prescribed the period of one year''s limitation, as here, to a suit by a mutawalli or a person interested in the wakf.

36. The two provisions are practically similar in content except that the language of the main enacting part has been altered in sub- section (1) of Section 6 of the present Act and put in a proper form. In redrafting the section, the sequence, of the different clauses has been changed, therefore, for the expression "any

person interested in a wakf" the legislature had to use the expression "any person interested therein". The word ''therein'' appearing in sub- section (1) of Section 6 must, therefore, mean ''any person interested in a waker'' as defined in Section 3(h). The object of sub- section (1) of Section 6 is to narrow down the dispute between the Board of Wakfs, the mutawalli and the person interested in the wakf, as defined in Section 3(h).

1144. The Apex Court having said so as noticed above quoted the findings of the Rajasthan High Court with reference to Section 6 in para 37 of the judgment and in para 38 it says that it is in agreement with the reasoning of the High Court. The answer has further been crystallized by the Apex Court in paras 39 and 43 of the judgment as under:

39. It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the List. Such a person is not required to file a suit for a declaration of his title within a period of one year. The special rule of limitation laid down in proviso to sub section (1) of Section 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub- section (2) of Section 5 scan be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises.

43. In view of the foregoing, the right of the respondents Nos. 1 and 2 in respect of the disputed property, if at all they have any, will remain unaffected by the impugned notification. They are at liberty to bring a suit for the establishment of their right and title, if any, to the property.

1145. As noticed above the Apex Court also referred to Section 5(2) of 1936 Act and observed that it is pare materia to Section 6(1) and (4) of Waqf Act, 1954.

1146. The above decision of the Apex Court in Radhakishan (supra) was followed in Board of Muslim Wakfs Vs. Smt. Hadi Begum and others, where in para 10 of the judgment the Court briefly reproduced what was held in Radhakishan (supra) regarding the right, title and interest of a non-muslim with reference to the Waqf Act, 1954 which also contain the provisions, pari materia with 1936 Act, and held:

The right, title and interest of a person who is non-muslim and is in possession of certain property is not put in jeopardy simply because that property is included in the list published under sub- section (2) of Section 5 and he is not required to file a suit in a Civil Court for declaration of his title within the period of one year and the list would not be final and conclusive against him. Sub- Section (4) of Section 6 makes the list final and conclusive only between the Board, the mutawalli and the person interested in the wakf. (para 10)

1147. To the same effect is a decision of an Hon''ble Single Judge in Marawthwada Wakf Board Vs. Rajaram Ramjivan Manthri and Others, With reference to Waqf Act 1954, in para 19 of the judgement, it observed:

Therefore, from the above, it is extremely clear that the respondent No. 1, who is a non-Muslim, being a Hindu, could not file a suit u/ Section 6 of the Wakf Act, 1954, but he cannot be barred from filing a suit especially in view of the fact that his right, title and interest have been jeopardised in view of the notification issued by the Government of Maharashtra aforesaid.

1148. Another Hon''ble Single Judge of this Court in Uttar Pradesh Sunni Central Waqf Board, Lucknow v. State of Uttar Pradesh and others, 2006 (6) ADJ 331 considering Act No. XVI of 1960 which contain similar provisions as that of 1936 Act, in para 9 of the judgment, observed:

There is no dispute that the respondent No. 3 by virtue of sale deed became the owner of the property is dispute. The respondent No. 3 being non Muslim, the provisions of Uttar Pradesh Muslim Waqf Act, 1960 was not applicable as held by this Court in the case of Chedda Singh and others v. Additional Civil Judge, Moradabad and others.

1149. A similar view was taken in an earlier decision of this Court in Chedha Singh and others v. Additional Civil Judge, Moradabad and others, 1996 Supp. AWC 189 which has been followed in Uttar Pradesh Sunni Central Waqf Board, Lucknow (supra).

1150. Now, therefore, it is well settled that Section 5 of 1936 Act would have no application qua the rights of Hindus in general and plaintiff (Suit-1) in particular in respect to his right of worship. He would not be bound mere by inclusion of the property in a notification issued u/s 5(1) of 1936 Act. Moreover, in this particular case since the notification itself has been held invalid so far as the property in question is concerned, meaning thereby, in the eyes of law, there was no notification u/s 5(1) of 1936 Act and, therefore, also the restriction or benefit if any under the Act would not be applicable to either of the parties. No further provision has been shown to us from 1936 Act to affect the rights of Hindus in general and plaintiff (Suit-1) in particular affecting their/his right of worship etc..

1151. Therefore, both the issues are answered in favour of plaintiff (Suit-1) and defendants (Suit-4) in particular and in favour of Hindu parties in General. Issues No. 5(b) (Suit-4) and 9(a) (Suit-1) are answered accordingly.

14. Though the above discussion is basically in respect to the Waqf Act, 1936 but in substance what has been said in absence of anything contrary would apply to Act, 1960 also and whenever such a dispute is raised which goes to the root of the matter, the same has to be dealt with sufficient details. A finding of fact must be recorded particularly when the property occupied by non muslims is involved. Unfortunately, in the proceeding in question all these aspects have not been given due consideration and, therefore, in my view matter needs be remanded to Waqfs Board to consider the objections of petitioners in correct perspective and in particular the issue whether the property in question is a Waqf property or not and whether the Waqfs Act, 1960 itself would apply to the property in question or not and such other incidental and ancillary issues which are necessary for

proper adjudication of the above issues.

15. So far as other issues raised by learned counsel for parties are concerned, it is not necessary to look into them since on the very first issue, this Court finds it appropriate to remand the manner to Sunni Central Board of Waqfs who will now consider all other issues raised by petitioners and pass appropriate order. However, I may clarify at this stage that so far as issue whether notice could have been issued by Addl. Collector or not, I find that this issue has now been answered by this Court in Full Bench in Brahm Singh v. Board of Revenue & others 2008 (5) ADJ 331 wherein it has been held that the term "Collector" includes "Addl. Collector" and, therefore, it is no more res integra.

16. In the result, writ petition is allowed. Impugned orders14.7.1988, 24.11.1988 and 7.2.1991 (Annexures VI, VII (B) and IX(A) (B) (C) (D) respectively to the writ petition) are hereby quashed. Matter is remanded to Sunni Central Board of Waqfs, respondent no.3, to reconsider the matter and pass a fresh order keeping in view the observations made above and in accordance with law.

