CHAPTER X

MUSLIM RELIGIOUS ENDOWMENTS: WAQF

Introduction

So far has been considered the approach of the judiciary in India regarding the Hindu law of religious and charitable endowments and the issues involved therein. Muslims are the second largest community in India. Having been the rulers of the major part of the Indian subcontinent for over four hundred years, the Muslim community has always acted as an assertive minority even after independence. The Government of India has followed the policy of least interference in the affairs of this community. The Government has not taken any steps, so far, to amend Muslim personal law regarding marriage; nevertheless, the law regarding religious endowments has been modified. The concern of this chapter is to analyse some decisions of the Supreme Court regarding Muslim religious endowments, particularly the waqf.

Like Hindu Law, Mahomedan or Muslim Law\(^1\) is a personal

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\(^1\) In this connection various expressions are used: Mohommedan (Baillie), Mahomeden (The Judicial Committee of the Privy Council and most Indian High Courts) Mahomeden (Ameer Ali) Mussalman (various Indian Acts).

The religion taught by the Prophet was Islam, not Muhammadanism; the people who believe in it are Muslims and therefore I have preferred the expression Muslim Law, though in the quotations, original expressions are retained.
law. It applies to all those who answer a given description that is, to those who are Muslims by birth or by conversion. Muslim law centers round the personality of the Prophet Mahomed, the founder of the faith of Islam.

What Is Islam?

Literally, the term Islam means belief in the unity of God. It is a religion, a body of doctrines and beliefs clustered round the principles of Tawhid which teaches that God is the ultimate spiritual basis of life. It enjoins three basic principles namely:

1) Unity of all - comprehensive authority of one sovereign power who, as creator, reflects himself in creation and yet is independent of it; and, further, that the entire creation endures in the law and its continued existence is made possible by the sustenance it derives from law;

2) The Universality of divine revelation of the pre-Islamic period of human history, belief in Mahomed's Mission and the acceptance of the entire pre-Islamic development of religion; and

3) Man's direct responsibility and accountability for all actions that he may do or omit doing.

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2 Tawhid means asserting oneness.


Definition of Muslim

There are three divergent views about the definition of Muslim. They are:

1) He who believes in Muhammad as a prophet belongs to the Muslim community;

2) Every person who says -

\[ \text{LA ILAHA ILL LILAH} \]
\[ \text{MAHOMED-DUR RASHULULLAH} \]
(There is no God but God i.e. there is only one God and Mahomed is His Prophet) is a Muslim.

3) Some theologians hold that in addition to the belief in God and the Prophet, a number of other beliefs are also necessary.

The Courts in India, however, have followed a simple doctrine. "Any person who professes the religion of Islam, accepts the unity of God and the prophetic character of Muhammad, is a Moslem and is subject to Musulman Law." 4

Sources of Muslim Law

Contemporary Muslim Law is derived from the following sources.

1) Quran - The Quran is the highest authority in Islam. The religion of Islam is inconceivable without the Quran and without it Islam loses its identity.

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2) **Hadis** (Tradition) are the sayings of the Prophet and they are recognised as true by Muslims.

3) **Ijma** - means only the power to extend or limit the application of the Quranic rule of law and not the power to repeal or supersede it by another rule of law. The theory of Ijma was that the learned men of the community had the authority delegated to them to lay down the rules of conduct by the exercise of their Ijtihad. The Evolution of Islamic Law had been made possible through Ijtihad. Literally it means 'to exert', and in the terminology of Muslim law it means 'to exert oneself with a view to forming an independent judgement on a legal question'. In the early phase of the Caliphate, there was no written law of Islam except the Quran. In later years, Muslim thinkers exercised Ijtihad creatively and thus mitigated the rigidity of Quranic laws by providing the Muslim community with broader interpretations as and when necessary.

4) **Giyas** - is judgment based on analogical reasoning which is considered to be followed by the ruler while deciding matters that come up before him, especially when

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5 The genuineness of Hadis has been a matter of controversy since the death of the Prophet.


8 Ibid.
the Book of God contains nothing to guide him in the matter.

The Schools of Muslim Law

The Muslims in India are divided into two schools or sects viz. Sunnis and Shias, and there are corresponding schools of Muslim Law in India. This division did not originate from differences of legal or religious doctrine but was caused by a dispute which was wholly political in character. The Sunnis base their doctrine on the entirety of the traditions and regard the concordant decisions of the successive Imams as supplementary to the Qur'anic rules and as equal in authority to them. The Shias, on the other hand, reject not only the decisions of the jurists but also all traditions not handed down by Ali or his immediate descendants i.e. those who had seen the Prophet and had family relations with him.

Waof : Waqf literally means dedication. It is perhaps the most prominent form of charity amongst the Muslims. It is defined as 'the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious,

9 Mahomed died without leaving any male issue and on his death a quarrel arose regarding the succession to the Imamate. One group maintained that the Imamate was to be confined to the family of the Prophet only. This group was recognised as the Shias. While the other group insisted on the principle of election in choosing the Imam and this group was known as Sunnis.
religious or charitable. The Shia Waqf is one governed by the Shia law and the Sunni Waqf is one which is governed by the Sunni law. One essential feature of Waqf is that it is made with a religious motive - a desire to approach God. An approach to God may be made only by an act that is meritorious in Islam. Waqf may strictly be made for any object not prohibited by Islam. The requirement of a valid Waqf is substantial dedication of the usufruct of the property to religious or charitable purpose as understood in Muslim law. The dedication may take any form but the transfer of ownership to God is of course only notional as is the case under the law of Hindu Religious Endowments noted before.

Purposes of the Waqf

Waqf can be created for the family of the settlor as well as for religious and charitable purposes. We are confining ourselves to religious and charitable purposes only. Waqf may be created for charitable purposes such as schools, hospitals or for distributing food to the poor and needy while the valid religious purposes are such as the

10 Section 3 of the Waqf Act of 1954.
11 Section 3(k) of the Waqf Act of 1954.
13 Ibid., p. 488 (footnote comment).
14 Supra p. 222 of this thesis.
creation and upkeep of Mosques or Masjids and worship therein, feasts in honour of the saints, annual performance on the occasion of Muharram, or for paying expenses of the religious office bearers such as the Imam, etc.

The person who dedicates his property for the Waqf is called the founder, settlor or Waquif. The property dedicated is called the Waqf property and the persons who benefit from the Waqf are known as the beneficiaries. When the dedication is in writing, the written document is known as the Waqfnama. The person entrusted with the fulfilment of the object of the Waqf is called the Mutawalli.

Mutawalli

Under Muslim Law, the moment a Waqf is created, all rights of property pass out of the Waquif and they are vested in the Almighty God. As we have already noted before, the property is vested in God in the notional or figurative sense only. Usually the founder or the settlor appoints a Mutawalli to manage or administer the Waqf. His primary duty is to fulfill the objects of the Waqf for which it is created. The Waquif may appoint himself as the Mutawalli. In the absence of any such appointment, the executor or ultimately the court itself acts as the

15 Muharram signifies the commemoration of a tragedy when the favourite grandson of the apostle of God was slain brutally. It is a tragic occasion and does not involve pompous celebration. On this occasion alms are distributed to the poor and needy.
Mutawalli. When the office of the Mutawalli is hereditary, a minor may be appointed as a Mutawalli but the court in such a case appoints another person to discharge the duties of the Mutawalli during the minority of this person. A female is not disqualified for being appointed as a Mutawalli.16 The founder may appoint even a non-Muslim as Mutawalli provided the Waqf does not involve the performance of any religious duty.

Where the Mutawalli is to perform religious or spiritual duties, neither a female nor a non-Muslim can be appointed as a Mutawalli, as they are not competent to discharge these duties. There is no legal prohibition against a woman holding a Mutawalliship when by its nature it involves no spiritual duties such as a woman could not properly discharge in person or by deputy. 17

Mutawalli and Sajjadanashin

The office of Mutawalli must be clearly distinguished from that of Sajjadanashin.18 Usually the Khanqah is under governance of a Sajjadanashin. Khanqah is a Muslim monastery or religious institution analogous in many respects to the Math of the Hindus. In this institution Dervishes and other seekers after truth congregate for religious instruction

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18 The term literally means the one seated on a prayer mat.
and devotional exercises. Normally a place of abode of a Fakir is called Takia before he attains sufficient public importance. After his death he is often respected as saint and his humble abode, Takia, grows into a Khanqah and his tomb or Dargah transferred into a shrine. Such a Khanqah is governed by a Sajjadanashin who acts not only as a Matawalli or manager of the institution and adjoining Mosque, but is also a spiritual preceptor of the adherents.

Sajjadanashin is the curator of the Darga, where his spiritual ancestor is buried, in him is supposed to continue the spiritual line. The Founder is generally the first Sajjadanashin and after him the spiritual line extends through a number of Sajjadanashins, generally members of his family, or according to directions given by him in his lifetime, or selected by Fakirs.

Sajjadanashin, like the Mahant of a Hindu Math, has full powers of disposition of the surplus incomes of the institution. He is the teacher of religious doctrines and rules of life, and manager of the institution and administers its charities. He has a larger interest in the usufruct

19 Takia literally means a resting place. The burial ground is sometimes called a Takia. In common parlance, it means the resting place of a Fakir who relinquishes the world and imparts instruction to his disciples. Takia is recognised by Muslim law as a religious institution and a grant to the same is a valid Waqf.

20 Dargah means 'a shrine of a Muslim saint, a place of religious resort and prayer.'
than an ordinary Mutawalli. He has no right in property belonging to the Waqf; the property is not vested in him because he is not a trustee in a technical sense.

The status of a SaJJadanashin is higher than that of a Mutawalli. The Mutawalli is merely in charge of the secular affairs of the institution, he is a manager or superintendent, but has no beneficial interest in the endowment and is not connected with the preaching of religious doctrines. The management of the property of the institution by the Mutawalli is subject to the supervision of the SaJJadanashin. A SaJJadanashin is not only a religious preceptor but also a manager and administrator. He is entitled to take by way of remuneration, the balance of rents and profits of Khanqah property after defraying the costs of religious ceremonies. Cases of mismanagement or incapacity will not ordinarily be sufficient to remove a SaJJadanashin from his office. It must be shown that the man is not only incompetent to manage the property but that he is of such a low morality that his continuance as the superior of a religious institution is repugnant and undesirable to the religious interests of the institution.

Mutawalli and a Trustee

The office of a Mutawalli must also be distinguished from that of a trustee in the English sense. In so far as the Waqf property is concerned, the Mutawalli has more
restricted powers than the trustee under the provisions of the Indian Trusts Act. In trustees, the property is absolutely vested. The Mutawalli is a trustee in a general sense in so far as every man is a trustee to whom is entrusted the duty of managing and controlling property that belongs to others.

"The property itself is not transferred to the Mutawalli. It remains either in the Waqif or is transferred to God or to the beneficiaries ... he may be considered to be the holder or trustee of the usufruct for the beneficiaries. He has control over the usufruct alone, and he has to see that the beneficiaries get the advantage of the usufruct." 21

Functions and Powers of Mutawalli

It is in his capacity as a manager, the Mutawalli is expected to do all acts, reasonable and proper for the protection of the Waqif property, and for the administration of the Waqif. He has to look after the maintenance of the Waqif property including its repairs. When the Waqif property is a mosque, he has the power of appointing the Imam, but he has no authority to make or expend on mere improvements unless it is necessary in the interests of the prayers. 22

As a manager, he has to maintain accounts of the Waqif

21 M. Tayyibi, supra n. 12, p. 498.
22 Indian Trusts Act, Section 36.
property and the audited accounts of the same are to be maintained and made available for inspection to members of the public.\textsuperscript{23} He can appoint agents or administrators or subordinate managers when it is in the interests of the institution; similarly, he can borrow money provided the dedication of the Waqf or the court authorises him to do so in the interests of the Waqf property.

As a general rule, Waqf property is inalienable. Therefore, unless expressly authorised to do so by the terms of the deed of dedication, the Mutawalli has no power without the sanction of the court to sell or mortgage the Waqf property and it is to be seen that lease is made for pious purposes such as dedication to the poor or any other charitable object held valid under the dedication.\textsuperscript{24} The civil courts have very wide jurisdiction with respect to the management of the public, religious and charitable trusts, such as mosques, therefore, he may be deprived of his remuneration if he is guilty of malversation in the discharge of his duties.\textsuperscript{25}

\textbf{Mosques}

A mosque is a Muslim place of religious worship. It is a place where all Muslims are entitled to go and perform

\textsuperscript{23} Provisions to this effect are contained in the statutes enacted by national or state government. See Indian Waqf Act, 1954.

\textsuperscript{24} supra n. 12, pp. 597-600.

\textsuperscript{25} Ibid.
their devotions as of right, according to their conscience. In Jangu v. Ahmadulah, the Allahabad High Court observed that a mosque must be mosque for all, it must be a building dedicated to God without any reservation. It cannot be used only by particular persons holding particular views of the ritual.

There are, however, religious communities, Jammats, possessing property and places of worship and the courts have recognised mosques for the exclusive use, or at any rate, in the exclusive management of particular Jammats. Yet, as a matter of practice, no one who is not a member of a particular Jammat ever enters the mosque belonging to it, without being invited to do so or by obtaining leave.

The general result of the decisions of the courts in this connection has been that the courts do not favour sectarian mosques, or reservations in dedications excluding other Muslims from the right to pray in any mosque under some special circumstances. The courts have presumed that any Muslim has the right in good faith to enter any mosque and offer prayers according to his own religious tenets, so long as he has no intention of causing and does not, in fact, cause any disturbance to others.

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26 (1889) 13 All. 419.
28 Supra n. 12, p. 615.
Waqf Act of 1954

Waqf Act (29) of 1954 was passed by the Government of India for the better administration and supervision of Waqfs. The Act contemplated a separate division of Shia and Sunni Waqfs, on the basis of a preliminary survey. The Act also envisaged the establishment of a Board for the administration of these Waqfs, and this Board was to consist of both Shia and Sunni members. It was laid down that 'in regard to the appointment of the members of the Board, the state government shall take into consideration the number and value of Shia Waqfs and Sunni Waqfs and the number of Shia and Sunni members of the Board shall be so determined by the state government.'

The powers of the Board shall be exercised in case of a Sunni Waqf by the Sunni members of the Board only and in the case of a Shia Waqf, by the Shia members of the Board only. In exercising its powers under the Act, the Board shall act in conformity with the directions of the Waqf, the purposes of the Waqf and any usage or custom of the Waqf sanctioned by the Muslim law.

It is provided that there shall be a secretary of

29 Section 4(3) Waqf Act, 1954.
30 Proviso to Section II, Waqf Act, 1954.
31 Explanation to Section 15, Waqf Act, 1954.
32 Proviso to Section 15(1), Waqf Act, 1954.
the Board who shall be a Muslim and that he shall be appointed by the state government in consultation with the Board.\textsuperscript{33} The Muslim character of the Board is emphatically brought out by the Act by providing that a person shall be disqualified from being appointed a member of the Board if he is not a Muslim.\textsuperscript{34}

In Nawab Zain Yar Jung and others v. the Director of Endowments,\textsuperscript{35} the question to be decided was whether the trust in dispute was a Waqf or a secular trust and whether the Waqf Board constituted under the Waqf Act 1954 was justified in registering the trust under section 26 of the Act. If the trust was not held to be a Waqf, then its registration would be invalid.

The Supreme Court, after noting the broad distinction between the Waqf and the secular trust of a public religious character, says:

"... That under Muslim law, there is no prohibition against the creation of a trust of the latter (secular) kind. Usually followers of Islam would naturally prefer to dedicate their property to the Almighty and create a Waqf in the conventional Mohammedan sense. But that is not to say that a follower of Islam is precluded from creating a

\textsuperscript{33} Section 21, Waqf Act, 1954.
\textsuperscript{34} Section 13, Waqf Act, 1954.
public religious or charitable trust which does not conform to the conventional notion of a Waqf and which purports to create a public religious charity in a non-religious secular sense.\textsuperscript{36}

The main question, according to the Court was to decide whether the Waqf executed by the Nizam was a trust to which the provisions of the Waqf Act applied or whether it was a public charitable trust falling outside the said act. This question would obviously depend, for its solution, on the construction of the document by which the trust was created.

It was contended on behalf of the Board that a significant feature of the document of the trust was that the settlor had dedicated a substantial part of his remaining assets to being utilised for religious purposes and therefore the document was intended to create a Waqf and not a secular trust. Secondly, it was argued that the intention of the document was the desire of the settlor to dedicate the property to purposes recognised as charitable by Muslim Law and so, though the appellants were described as Trustees, the basic concept which actuated the settlor should not be lost sight of, and that the concept was dedication on which waqfs are based.

The Supreme Court on the other hand points out that

\textsuperscript{36} \textit{Ibid.}, p. 289.
there are certain other broad features of the transaction which are wholly inconsistent with the notions of a Waqf. The outstanding impression which the document creates is that the settlor wanted to create a trust for charitable purposes and objects in a secular and comprehensive sense, unfettered and unrestricted by the religious considerations which govern the creation of a Waqf. The document also made it clear that amongst the objects for which the trust was created were included other charitable purposes, without distinction of religion, caste or creed, and that obviously transgressed the limits prescribed by the requirements of a valid Waqf.

In this connection, the Court specifically refers to the provision in the document according to which the trust funds were to be used for the maintenance, upkeep and support of public religious institutions and advancement of religion in the State of Hyderabad and that the benefits referred to in this provision were not to be restricted to any particular religion. A public charitable purpose which is not limited by considerations pertaining to one religion or other could not have been more eloquently expressed. The dominant intention of the settlor in creating the trust was to help public charity in the best sense of the word, public charity not confined to any caste, religion

37 Sub-clause 3(c)(ii) of the Document.
or creed, and it is in that sense that the religious institu-
tions which are within the purview of the trust are
religious institutions not confined to any particular
religion. 38

Secondly, the Court points out that the document39
provided that the trust property could be utilised for the
advancement of any other object of general public utility,
particularly in the State of Hyderabad. This shows that
the settlor preferred the general public utility institu-
tions within the territorial limits of Hyderabad, but 'it
is plain that it was farthest from the mind of the settlor
to impose a limitation that the objects of general public
utility should be confined to those recognised as such by
Muslim Law.'

The Supreme Court admits that certain provisions of
the document were consistent with the view that the docu-
ment created a Waqf while certain other provisions were
consistent with the view that the document created a public
charitable trust as distinguished from Waqf. The Court
states:

"It is, however, patent that there are some clauses
which are inconsistent with the first view, whereas with

38 Supra n. 35, p. 291.
39 Clause 3(c)(v) of the document."
the latter view all the clauses are consistent. In other words, if the construction for which the Board contends is accepted some clauses would be defeated, whereas if the construction for which the respondents contend is upheld, all the clauses in the document become effective. In our opinion, it is an elementary rule of construction that if two constructions are reasonably possible, the one which gives effect to all the clauses of the document must be preferred to that which defeats some of its clauses.\(^4^0\)

It is on the basis of this construction that the Court conceives the document as one which evidences a public trust and not a Waqf. The intention of the settlor was, according to the Court, to help not only charities which would fall within the definition of a Waqf\(^4^1\) but also charities which would be outside the definition, far beyond the narrow limits of the said definition.

There is one more argument which favours the interpretation of the document as creating a public charitable trust. The document provided for the appointment of non-Muslims as trustees, and this was specifically prohibited by the Waqf Act of 1954. The appointment of non-Muslims as trustees is an indication that the settlor did not regard the trust as falling within the said statutory prohibition.

\(^4^0\) Supra n. 35, p. 292.

\(^4^1\) Supra n. 10.
It is also to be noted that the scheme of management of the trust, which the trustees are given liberty to adopt in administering the trust, is completely free from the regulations based on Muslim law.

After careful consideration of the several provisions of the document, the Court concludes:

"We are satisfied that on a fair and reasonable construction, the document must be held to have created a trust for public charitable purposes, some of which are outside the limits of the waqf and so the conclusion is inescapable that the trust created is not a waqf but a secular comprehensive public charitable trust."\(^{42}\)

**The Appointment of Mutawalli**

In *Hazrat Syed Shah Mastareshid Ali Al Quadari V. The Commissioner of Waqfs, West Bengal* and others,\(^{43}\) the appellant contended that the order of the Commissioner appointing a temporary Mutawalli was illegal because under the rules framed by the government, only the Board constituted under the Bengal Waqf Act could make the appointment. The Commissioner could only make the recommendation and therefore the appointment by the Commissioner was illegal.

The dispute was centred round the interpretation of

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\(^{42}\) *Supra* n. 35, pp. 292-93.

\(^{43}\) *S.C.J.* 1962 II p. 587.
Sections 40 and 29\(^4\) of the Bengal Waqf Act.

The appellant argued that under the second rule,\(^5\) the Commissioner was bound to make his report and recommendation only, and the Board alone was empowered to appoint a temporary Mutawalli under Section 40. This reasoning of the appellant was not accepted by the Supreme Court. The Court maintains that the rules made by the Government and on which the appellant relies cannot be separated from the main provisions of the Act, on the basis of which these rules are made. They are to be interpreted together. According to the Court, Sections 40 and 29 show only too plainly that a temporary Mutawalli can be appointed either by the Board, or if the powers and duties be delegated to the Commissioner, by the Commissioner.

When the Board has not delegated its functions, under Section 40, to the Commissioner, the latter being governed by the rules, has no power to appoint the temporary Mutawalli.

44 Section 40 provides:

"In the case of any waqf of which there is no Mutawalli or where there appears to the Board to be an impediment to the appointment of a Mutawalli, the Board, subject to any order of a competent Court, may appoint for such period as it thinks fit, a person to act as Mutawalli."

Section 29 provides:

"The Board may, from time to time, authorise the Commissioner to exercise and perform, subject to the control of the Board, any of the powers and duties conferred or imposed on the Board by or under this Act."

45 Ibid.
But this is not the case when the Board has delegated its functions to the Commissioner. In this connection, the Court refers to the resolution adopted by the Board, according to which such power was clearly and categorically delegated to the Commissioner by the Board. The Court states: "once that delegation has been made, the Commissioner acts for and on behalf of the Board, and the rules cease to apply. The rules cannot affect the power of the Board to delegate its functions under Section 29, and harmonious construction requires that the rules should give way when there is a delegation of the powers of the Board. The Commissioner was thus competent to make the appointment." 46

While the case was being considered by the High Court one question engaged its attention. The question was whether the delegation was only of powers or also of duties of the Board. Even though this point was not argued before the Supreme Court, the Court expresses its opinion on the same by saying that "the powers and duties are interconnected and it is not possible to separate one from the other in such wise that powers may be delegated while duties are retained and vice versa; the delegation of powers takes with it the duties." 47

The Supreme Court makes a caustic comment while dismissing the appeal. It says:

46 Supra n. 43, p. 588.
47 Ibid., pp. 588-89.
The appellant chose the extraordinary course of dragging the respondents twice to the High Court and again to this Court merely to challenge an order of temporary duration, while the main controversy remained outstanding for years and could have been decided by now. 48

Removal of a Mutawalli

In Bashiruddin Ashraf V. State of Bihar, 49 the Supreme Court of India tested the constitutional validity of Section 58 of the Bihar Waqfs Act (VIII of 1948). This Act was passed in 1948 by the Government of Bihar for the purpose of providing for the better administration of the Waqfs in that State. 50 The general superintendence of all Waqfs in the State was vested in the Majlis, which was expected to do all the things necessary and reasonable to ensure that the Waqfs were properly administered and the income thereof was duly appropriated and applied to the objects of such Waqfs and in accordance with the purposes for which such Waqfs were founded. 51

The Mutawalli was subordinate to the Majlis which had the power of removing the Mutawalli from his office under certain conditions. 52 The Mutawalli was to carry out all

48 Ibid.
50 Preamble to the Bihar Waqfs Act (1948).
51 Section 27, Bihar Waqfs Act (1948).
52 Sub-section 2, Section 27, Bihar Waqfs Act (1948).
directions which might from time to time be issued to him by the Majlis under any of the provisions of the Act.\textsuperscript{53}

The appellant in this case, Bashruddin Aahrafi, who was acting as the Mutawalli of Cholamahia Waqf (Bihar) was removed from the office of Mutawalli by an order passed by the Majlis, under the Bihar Waqfs Act, 1947, alleging that he had failed to prepare the Budget of the Waqf as expected of him under Section 58 of the Act.\textsuperscript{54} It was alleged that the appellant deliberately failed to comply with the provision and, therefore, had committed an offence punishable under Section 65(1)\textsuperscript{55} of the Act. The appellant was subsequently tried and found guilty, was sentenced to pay a fine, in default of which to undergo simple imprisonment for fifteen days. All the appeals above had failed and hence

\textsuperscript{53} Section 56, Bihar Waqfs Act (1948).

\textsuperscript{54} Main provision of Section 58 was -

Sec. 58(1) The Mutawalli of every Waqf shall, before the 15th day of January on each year, prepare a budget of the estimated income and expenditure of such Waqf for the next succeeding financial year and shall forthwith send a copy thereof to the Majlis. ...

(5) If the Mutawalli fails to prepare and send a copy of the budget as required by sub-section (1), the Majlis shall prepare a budget for the Waqf concerned and such budget shall be deemed to be the budget of the Waqf for the year in question. ...

\textsuperscript{55} Section 65 of the Bihar Waqf Act provided:

If the mutawalli fails, without reasonable cause, ... to comply with any order or direction made or issued ... he shall be punishable with fine which may extend, in the case of the first offence, to two hundred rupees and in case of second or subsequent offence, to five hundred rupees.
the appellant obtained special leave to appeal to the Supreme Court.

It was contended by the appellant that section 56 of the Act was an invalid provision to the extent to which it gave unrestricted power to the Majlis to alter or modify the budget prepared by the Mutawalli without a right of appeal against the action of the Majlis, altering or modifying the budget. The provisions of section 56 imposed an unreasonable restriction on the Mutawalli in carrying on his occupation as such. These provisions, therefore, offended Article 19(1)(g) of the Constitution of India.

The Supreme Court while rejecting the contention of the appellant maintained that the Mutawalli occupied the position of a manager or a custodian and that some kind of control or supervision over him by the Majlis with respect to the due administration of the waqf property and due appropriation of the funds was certainly necessary. The Court, therefore, was of the opinion that the provisions of Section 56 of the Act, did not place unreasonable restrictions on the exercise of his duties as a Mutawalli and these provisions did not offend any of the provisions of the constitution.

56 Article 19(1)(g) refers to the power of the state to impose reasonable restrictions on the right of a citizen to practise any profession, or carry on any occupation, trade or business.

57 Supra n. 49, at p. 717. Italics mine.
The Supreme Court, in this connection reiterates the stand adopted in the Swamiar case,\textsuperscript{58} where it is considered that a budget is indispensable in all public institutions and it is not per se unreasonable to provide for the budget of a religious institution being prepared under the supervision of the appropriate authority like the commissioner or Area Committee. The situation, in case of the Waqf, is analogous and the Mutawalli has to prepare the budget, and the Majlis which has the supervisory power over the Mutawalli, has the power to alter or modify the budget and this power is also not unrestricted. For example the Act expressly provides that 'nothing in Section 58 shall be deemed to authorise the Majlis to alter or modify any budget in a manner or to an extent inconsistent with the wishes of the waquf, so far as such wishes could be ascertained ... or inconsistent with the provisions of the Act.'\textsuperscript{59} Thus the Supreme Court upholds the right of the Majlis to remove the Mutawalli, in the event of the failure of the latter to prepare the budget of the Waqf as expected by the Act.

The appellant Bashiruddin Ashraf preferred another appeal\textsuperscript{60} to the Supreme Court against the decree and judgment of the High Court of Bihar delivered in December 1960.

\textsuperscript{58} S.C.J. (1954) p. 335.
\textsuperscript{59} Sub-section 6 of the section 58 of the Bihar Waqfs Act.
\textsuperscript{60} Bashiruddin Ashraf V. The Bihar Subei Sunni Majlis S.C.J. 1966 I p. 72.
The Judgment of the High Court related to an application for removal of the appellant, Bashiruddin, from the office of Mutawalliship on numerous charges, including mismanagement, misappropriation, wanton waste and dissipation of Waqf property, falsification of accounts, etc. The charges of misappropriation were proved in the findings of a properly constituted accounting authority and, therefore, the appellant was ordered by the Sadr to deposit an amount of Rs. 9662, an amount due from the appellant. In the event of the failure of the appellant to do so, the Sadr ordered his removal from the office and appointed Maulvi Mohammad Shoeb in his place as a temporary Mutawalli. The appellant challenged both the orders of his removal and of the appointment of a temporary Mutawalli contending that both the Majlis and the Sadr were not competent authorities to do so. The High Court rejected both the contentions of the appellant. Two important points were raised by the appellant before the Supreme Court.

One of the contentions of the appellant was that a number of his arguments on facts were brought to the notice of the Hon'ble Judges of the High Court but they were not considered by them. This contention involved an important matter of procedure and the Supreme Court spares no pain commenting pointedly on the growing practice of discrediting the High Courts. Though lengthy, this comment deserves to be noted in full. The Supreme Court says:
"We did not permit the learned Counsel to raise these grounds and we may say here that we deprecate the growing practice of making such allegations against the High Courts. The judgement (of the High Court) is fairly long and considered and it appears to take note of arguments on questions of fact and law. It is not necessary that the judgment should record and repel each individual argument however hollow. If any material point does not come under scrutiny, the fact should be brought to the notice of the High Court before the judgment is signed and an order of the High Court on such submission obtained before it is raised in appeal. This Court will ordinarily regard the details of the argument given in the judgment of the High Court as correct and will not enter upon an enquiry as to what was or was not argued there. To permit points to be mooted on the plea that they were raised before the High Court but were not considered by it would open the door to endless litigation and this would be destructive of the finality which must attach to the decision of the High Court on matters of fact. The High Court is a Court of Record and unless an omission is admitted or is demonstrably proved this Court will not consider an allegation that there is an omission." 61

The Supreme Court, on the basis of this argument

61 Ibid., at p. 75. Italics mine.
contends that the appellant had a very fair trial and so the appellant was not allowed to have the whole issue debated again because he has thought out fresh arguments.

As regards the power of the Majlis and the Sadr to remove the Mutawalli and appoint a new one on temporary grounds, the appellant referred to the amendment made in 1951 to the Bihar Waqf Act and contended that this amendment did not have retrospective effect and therefore the powers of the Majlis could only be exercised after the date on which the amendment came into force and not in respect of orders issued previously. The Supreme Court does not accept this contention. It says that the amendment no doubt conferred jurisdiction upon the Majlis to act prospectively from the date of amendment but the power under the amendment could be exercised in respect of orders and directions issued by the Majlis and disobeyed by the Mutawalli before the amendment came in force. To hold otherwise would mean that in respect of the past conduct of the Mutawalli, neither the Majlis nor the District Judge possessed jurisdiction after the amendment came in force. This could hardly be intended. The enquiry had commenced before the Majlis which was competent to do so. A statute is not necessarily used retrospectively when the power conferred by it is based on conduct anterior to its enactment, if it is clearly intended that the said power must reach back to that conduct. It would be another matter if
there was a vested right which was taken away but there could be no vested right to continue as Mutawalli after mismanagement and misconduct of many sorts were established. The Act contemplates that such a Mutawalli should be removed from his office and that is what is important. 62

It has already been noted that the followers of Islam usually prefer to dedicate their property to the Almighty and create a waqf in the conventional Muslim sense; but this does not mean that a Muslim is precluded from creating a public religious or charitable trust which does not conform to the conventional notion of a waqf and which creates a public religious charity in a non-religious secular sense. Under Muslim law, there is no prohibition against the creation of a secular trust of a public and religious character. 63

This logic was adopted by the Supreme Court in Nawab Zain Yar Jung V. Director of Endowments 64 and it served as a guideline in many cases of a similar nature. Kassimiah Charities V. Secretary M.S.W. Board, 65 is for example, a representative case in point. In this case, the donor had established a school and dispensary for the benefit of

62 Ibid., p. 76. Italics mine.
63 Supra n. 35 at p. 289.
64 Ibid.
65 A.I.R. 1964 Mad. 18.
Muslims and non-Muslims alike. In order to meet the expenditure of both the institutions, the donor created a Waqf and endowed certain properties for their upkeep and maintenance. These properties came to be known as Kassimiah Charities, after the name of the founder and came to be vested in a Board of Trustees. In 1959, the Waqf Board of Madras, which was constituted under the Muslim Waqfs Act 1954, called upon the Kassimiah Charities to get the Waqf registered under the Act and to submit the accounts. The Kassimiah Charities contended that the Act did not apply to them. The main issue, before the Court, therefore, was to decide whether a charitable endowment of a non-communal character (secular character) made by a Muslim can be considered as a Waqf within the scope of the Muslim Waqfs Act, 1954.

The Court points out that there exists a well-marked distinction in Muslim Law of Waqfs between an endowment, strictly religious and charitable in its nature, e.g. one made for building and maintaining places of worship, where beneficiaries must be the members of Muslim community and one that is purely secular in character, e.g. for a public utility like a school or hospital. The latter is also considered by Muslim Law as charitable, but the beneficiaries can be both Muslims as well as non-Muslims.
After mentioning this distinction, the Court poses the question whether the Muslim Waqfs Act, 1954, covers all kinds of endowments which might constitute a Waqf under the Muslim Law as provided in section of the Act.  

The Court feels that in order to arrive at a correct understanding of the concept of Waqf as defined in the Act, it is necessary to know the beneficiary under the Act. The Court analyses the definition of the 'Beneficiary' as given in section 3(a) of the Act, and points out that public utilities are not, under the Act, intended to be comprehended by the words religious, pious and charitable as they are separately referred to therein. Public utility charities could come under the Act only if they partook the character mentioned in the Act, that is if they were for Muslims alone. Because Section 3(a) lays down that public utility, in order to constitute a valid object within the Act, should be intended exclusively for the Muslim community.

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66 Section 2 provides: Save as otherwise expressly provided under this Act, this act shall apply to all Waqfs whether created before or after the commencement of this Act.

67 Supra n. 10.

68 Section 3(a) of the Act reads: Beneficiary means a person or object for whose benefit a waqf is created and includes religious pious and charitable objects and any other objects of public utility established for the benefit of the Muslim Community.

69 Supra n. 67, p. 22.
This shows that the Muslim Waqfs Act, 1954 is considered by the Court as one enacted with a view to excluding those endowments which confer benefits on non-Muslims and, therefore, a public utility foundation like a school or college, established by a Muslim, as in the instant case, in order to come within the terms of the Act, should have been one exclusively intended for the benefit of the Muslims. As the endowment of Kassimia Charities was not of that nature, its registration with the Madras State Waqf Board was not necessary.70

The case, dealing with a question regarding administration of Waqf property, apparently did not propound any new principle affecting the substantive law of Waqfs in India. But from a functional angle, it may be regarded as of outstanding importance. It has tried to promote the idea of secularism in India in its own way. Thus, by holding that the Muslim Waqfs Act, 1954, was enacted to cover only those waqfs where the beneficiaries were solely Muslims, it has tempted a Muslim Waqif who would not like any interference in the management of his Waqf property by the Waqf Board established under the Act, to bequeath his property in such a way that it gets a secular character and is not confined in its benefit to the Muslim community only. But that is not all. It goes a step ahead and tries at

70 Ibid., p. 22.
least to weaken, if not uproot, the dogmatic Muslim concept that Hindus are among those infidels and idolaters against whom the Quran contains stern commandments. In this connection the observation of Justice Iyer is worth noting:

"Notwithstanding what certain misguided Muslim zealots thought or did in by-gone times, it appears that the idolaters referred to in the Quran must have been those amongst the Arabs."  

The observations of the Supreme Court in Katheessa Uma V. Narayannath Kunhamu regarding the role of the courts in interpreting the Muslim law are worth noting. The Court observes that the courts may expand the principles of Muslim Law by means of Giyas or analogy, and may even make use of the doctrines of Istehsan and Istislah for deciding questions which cannot be solved by analogy. In other words, the Court considers itself on the same footing as a Mujtahid, a person who can make Ijtihad. Some commentators on Muslim Law have held that the age of independent juristic thought in Islam has come to an end, and that there can be no further exposition and development

72 Supra n. 65, p. 21. Italics mine.
74 Supra n. 8.
75 Abdur Rahim, Muhammadan Jurisprudence 173 (1911), quoted by J.N. Saxena, supra n. 71.
of the doctrines even of a particular school. All that can be done is to imitate (Taqlid) and work upon the principles of law already laid down by the four Imams of the Sunni world.

The cases referred to before point out that the courts in India are trying to be a little progressive in assailing the orthodox view that one’s personal law is so sacrosanct that no interference with it should be permitted. The Courts also seem to be quite conscious of the fact that for a successful democracy in India the promotion of secularism is essential.

It can be observed that it is a very bold step to lay down that the court can avail of the powers of Mujtahid and expand the law in the same way as he used to do under Islamic jurisprudence. This becomes all the more commendable if it is kept in view that the Government of India is feeling shy of introducing any legislation on Islamic Law.

Section 92, Civil Procedure Code

The question of the application of the Section 92 of the Civil Procedure Code to Muslim Public trust like a mosque was considered by the Supreme Court in Ahmad Adam

76 Abu Hanifa, Malik, Shafii, and Hanbal.
77 Supra n. 65 and 73.
78 Supra n. 71. Italics mine.
The respondents in this case were the Sunni Muslims of Bangalore who claimed that the Mosque in question constituted a public trust created for public purposes of a religious nature coupled with charity, and the Dakkhan Muslins as well as the Cutchi Memons residing in Bangalore were the beneficiaries of the trust and had an abiding interest in its proper management, control and direction. The appellants disputed the claim of the respondent on the ground:

1) that the Cutchi Memons alone were entitled to the exclusive management of the trust.

2) that the present claim was barred by res judicata.

3) that the respondents had not any interest in the trust and had no locus standi to file the present suit under section 92 of the Civil Procedure Code.

The High Court, on the basis of evidence, was satisfied that the Mosque really belonged to the whole of the Sunni Muslim community and not the Cutchi Memons only, in view of the fact that all the Sunni Muslims in Bangalore had contributed towards the construction of the Mosque. On these findings the High Court set aside the decree of the District Court and asked the same to frame a new scheme for the administration of the trust taking into account the fact that the Mosque belonged to all the Sunni Muslims in the area.

79 S.C.J. 1965(1) p. 31.
The Supreme Court took an exhaustive survey of case history as well as the history of the building of the Mosque and the various interests represented in the construction of the trust. The Supreme Court agreed with the High Court in its finding that the Mosque belonged to all the Sunni Muslims of Bangalore and noted 'Once it is found that the Mosque is a central Mosque and the Dakhani Muslims residing in the area (Bangalore) were responsible for the construction of the Mosque and were vitally interested in offering of worship in the Mosque and taking part in the administration of it, its affairs, its properties, the scheme framed in the year 1927 must be revised bearing in mind the interests of the other sects of the Muslim community as well.'

The Supreme Court admits that '... a scheme in regard to public trust once framed should not be altered light heartedly unless there are substantial reasons to do so.' But it also points out that 'it has now been discovered that the scheme framed in 1927, proceeded on the erroneous assumption that the Mosque belonged to the Cutchi Memon community and that the said community alone was entitled to its exclusive administration. This assumption has clearly introduced a serious infirmity in the scheme.'

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80 Ibid., at pp. 34-37.
81 Ibid., at p. 40.
As regards the other claims of the respondent, the Court maintained that the suit instituted on the basis of the contention that the Mosque belonged to the Cutchi Memons alone cannot be regarded as a representative suit so far as the interests of the sects of the Muslim community are concerned. Similarly it points out that even after a scheme is framed in suit property instituted under Section 92 of the Code, if supervening considerations justify its alteration or modification, the bar of res judicata cannot be pleaded against such alteration or modification. A suit under Section 92 is a representative suit and covers not only the parties thereto, but all those who are interested in the trust.

Conclusion

The foregoing analysis shows that the judiciary in India has adopted the same approach in the case of Muslim denominational institutions as has been done in case of Hindu endowments. The Government has enacted laws to improve the administration of religious institutions and the courts have had to see whether these laws have been in conformity with the denominational freedom of religion and whether the interests of the parties concerned are duly protected.

82 Raje Anandrao V. Shamrao and others 1962(I) S.C.J. p. 584.