

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2906 OF 2004

1. Shaikh Yusuf Bhai Chawala
2. Mudreka Bhai Saheb T.
3. Shaikh Yusuf Bhai Qasamjee
4. Shaikh Ismail M.F. Potia
5. Shaikh Abdul Tayeb Shaikh Qasimji
...Petitioners

v/s.

1. State of Maharashtra
2. Maharashtra State Board of Wakfs
3. The Settlement Commissioner
and Director of Land Records,
Maharashtra State
4. Shahjzada Qaid Johar Bhai
Saheb Ezuddin Saheb
5. Mustafa Bhai Saheb Safiyuddin
6. Shahzada Ali Asgar Bhai Saheb
Kalimuddin
7. Shaikh Ebrahim A.K. Faizullahoy
8. Shaikh Mansoor Bhai M.J. Terai ...Respondents

WITH

WRIT PETITION NO.899 OF 2011

...

1. Mrs. Zainub Moriswala
2. Mr. Zulfikar Moriswala
3. Mr. Yusuf Nagarwala
Trustees of Rehmatbai Widow
of Noorbhoy Jeewanji Morishwalla
Charity Trusts ...Petitioners

v/s.

- 1.State of Maharashtra
- 2.Maharashtra State Board of Wakfs
- 3.The Charity Commissioner,
- 4.The Settlement Commissioner
and Director of Land Records
- 5.The Chief Executive Officer ...Respondents

WITH

WRIT PETITION (L) NO.357 OF 2011

- ...
- 1.Shaikh Yusuf Bhai Chawala
 - 2.Shaikh Ismail M.F.Potia
 - 3.Shaikh Mansoor Bhai M.J.Terai ...Petitioners
- v/s.

- 1.State of Maharashtra
- 2.Maharashtra State Board of Wakfs
- 3.The Charity Commissioner,
- 4.The Settlement Commissioner
and Director of Land Records ...Respondents

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Mr.Y.H.Muchhala, Sr.Advocate with Mr.Sagheer Khan and Mr.Javed R. Patel and Mr.Vaibhav Nagvekar i/b Judicare Law Associates for the Petitioners in Writ Petition (L) No.357 of 2011 and Writ Petition No.2906 of 2004.

Mr.Javed Shaikh, Special Counsel for Wakf Board.

Mr.Milind Sathe, Sr.Advocate with Ms.Jyoti Sinha i/b M/s.Negandhi, Shah & Himaytullah for Petitioners in Writ Petition No.899 of 2011.

Mr.Ravi Kadam, Advocate General with Mr.S.R.Nargolkar Addl.G.P., Ms.Geeta Shastri, Mr.Milind More for Respondent No.1 in Writ Petition No.2906 of 2004, Respondents Nos. 13 & 14 in WP (L) No.357 of 2011 and Respondents Nos. 1 & 3 in WP No.899 of 2011.

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CORAM: D.K.Deshmukh &
Anoop V. Mohta, JJ

DATED: 21st September, 2011

JUDGMENT: (PER D.K.DESHMUKH, J.)

1. The subject matter of all these Petitions is the same namely challenge to the incorporation of Respondent No.2/ Maharashtra State Board of Wakfs and things connected therewith. Therefore, these petitions can be conveniently disposed of by a common order.

2. The Petitioners in Writ Petition No. 2906 of 2004 are Muslims belonging to Shia Fatemi Ismaili Tyebia Sect of Islam. They follow Shia Fatimid Ismaili Tayebi Schol of Muslim Law., which Shia School known as Fatimid Law. In short, they are Shia Muslim. Petitioners Nos. 1 to 3 are trusttes of "Sir Admji Peerbhoy Santorium" created by a Scheme settled by this court by its order dated 16-6-1931 in Suit No.

1560 of 1927. The said Trust is also registered as a Public Trust under the Bombay Public Trust Act. The Petitioners Nos. 4 & 5 are trustees of "Anjuman-i-Null Bazaar Chhabdi Bazaar Niaz Hussein Charitable Trust, which is registered as a public Trust under the Bombay Public Trust Act.

3. The Petitioners in Writ Petition No.899 of 2011 are also Dawoodi Bhora Muslims and they are trustees of Rehmatbai widow of Noorbhoy Jeewanji Morishwalla Charity Trusts registered under the Bombay Public Trust Act.

4. The Petitioners in Writ Petition (L) No.357 of 2011 are Muslims belonging to Shia Fetemi Ismaili Tyebia sect. The Petitioners in this petition are trustees of Sir Adamji Peerbhoy Sanatorium, referred to above as also Anjuman-i-Null Bazaar Chhabdi Bazaar Niaz Hussein Charitable Trust, referred to above.

5. In Writ Petition No.2906 of 2004 the

Petitioners are challenging the Notification dated 4-1-2002 issued by the Government of Maharashtra. They are also seeking a directions to the Government of Maharashtra to conduct a fresh survey of Wakfs in the State of Maharashtra. They also challenge the notification dated 13-11-2003 issued by the Wakfs Board, whereby the list of Wakfs was published.

. In Writ Petition No.899 of 2001, the Petitioners challenge the Circular dated 24-7-2002 issued by the Charity Commissioner of State of Maharashtra stating therein that in view of the provisions of Section 43 of the Wakf Act, the Wakfs which are registered as Public Trusts would cease to be governed by the provisions of the Public Trust Act. It is there case that because the incorporation of the Wakfs Board by Notification dated 4-1-2002 is itself invalid and because they are not Wakfs within the meaning of Wakfs Act, they continue to be governed by the provisions of the Bombay Public

Trust Act.

. The Petitioners in Writ Petition (L) No.357 of 2011 challenge the Notification dated 20th October, 2010 issued by the State of Maharashtra for resurvey of the Wakfs in the State of Maharashtra. They also claim a direction that the list of Wakfs dated 13-11-2003 and dated 30-12-2004 stand rectified as per the finding of the Five Members Committee. They also seek a direction to the Charity Commissioner that the Charity Commissioner should continue to supervise the working of the Trusts of which they are trustees.

6. The aforesaid reliefs are claimed by the Petitioners in these three petitions in following factual background:

. The Parliament enacted the Wakf Act, 1995 (hereinafter referred to as "the Act"). The said Act came into force on 1st January, 1996. On

1st December, 1997 the State Government issued a Notification in exercise of its powers under sub-section 1 of Section 4 of the Wakf Act. That Notification reads as under:

"In exercise of the powers conferred by sub-section (1) of section 4 of the Wakf Act, 1995 (43 of 1995), Government of Maharashtra hereby appoints, -

(a) Settlement Commissioner and Director of Land Records, Maharashtra State, Pune to be a Survey Commissioner of Wakfs; and

(b) Additional Commissioners of Konkan, Nashik, Pune, Nagpur, Amravati and Aurangabad Revenue Divisions to be a Additional Survey Commissioner,

for the purpose of making a survey of Wakfs existing on the 1st day of January, 1996 in the State of Maharashtra."

The Government of Maharashtra issued a Notification dated 4th January, 2002. That Notification reads as under:

"In exercise of powers conferred by sub-clauses (i) and (iii) of clause (b) and clause (c) of sub-section (1) read with sub-section (3) of Section 14 of

the Wakf Act, 1995 (43 of 1995), the Government of Maharashtra hereby, -

(a) establishes a Board by the name of "The Maharashtra State Board of Wakfs", having its Headquarters at Aurangabad; and

(b) nominates, -

1. Shri Khan Yusuf Sarwar, Member of Parliament (Rajya Sabha);
2. Smt. Shabana Azmi, Member of Parliament (Rajya Sabha);
3. Shri Harun Adam Solkar, Muslim Ex-member of the Bar Council of the State; and
4. Shri Chand Pasha Inamdar, Member of Muslim Organisation, to be the Members of the said Board.

. Thus, by the Notification quoted above, a Wakf Board for the whole State of Maharashtra with Headquarters at Auragabad was established and four persons named in that Notification were appointed as Members of that Wakf Board. Pursuant to the Notification dated 1st December, 1997, quoted above, the Officers appointed to conduct the survey, submitted the survey report to the State Government on 31-1-2002. As observed above, by Notification dated 4-1-2002, four persons were appointed as Members of the

Wakf Board. Thereafter, appointment of members of the Wakf Board were made by Notification dated 20-2-2002, 16-8-2002, 2-6-2002, 24-7-2002 and 13-11-2003. On 24th July, 2003, the Charity Commissioner of the State of Maharashtra issued a Circular directing its office not to exercise their powers under the Bombay Public Trust Act or deal with any of the Muslims Public Trusts. The said Circular stated that according to Section 43 of the Wakf Act, Wakf registered as public trust should not be tried under the Bombay Public Trust Act and because of that Circular the authorities under the Bombay Public Trust Act refused to entertain any application or change report submitted by the trustees of the Trusts, which though registered under the Bombay Public Trust Act, according to the Charity Commissioner and his sub-ordinate were Muslims Public Trusts. There were several Writ Petitions filed in this court challenging incorporation of the Wakf Board as also challenging its constitution and appointment of various persons as its members.

There were also Petitions in this court challenging the Circular issued by the Charity Commissioner referred to above. On 13-11-2003, the Wakf Board published a list of Wakfs treating all Muslims Public Trusts listed in B category in Maharashtra and suburban districts of Maharashtra by the Charity Commissioner as Wakfs. Writ Petitions were filed in this court challenging the list of Wakfs prepared by the Wakf Board.

7. According to the Petitioners, trustees of several Muslims Trusts, who felt aggrieved by the list of Wakf pulished by the Wakf Board formed an Association called "Association for protection of Muslims Wakfs and Trusts". That Association made a representation to the State Government requesting it to cancel the Notification dated 13-11-2003. According to the Petitioners, on 11th August, 2004, pursuant to the representation made by the aforesaid Association, a Committee under the Chairmanship of the Charity

Commissioner was constituted to verify the list of Wakf published by the Wakf Board in the light of the representation made by the Association. According to the Petitioners, this Committee bifurcated the list of Wakfs and submitted the bifurcated list to the State Government. The State Government forwarded that list to the Wakf Board. According to the Petitioners, the Wakf Board by its Resolution No.3 dated 9th March, 2005 unanimously resolved to accept the report of the Bifurcation Committee (Five members Committee) which was appointed under the Chairmanship of the Charity Commissioner. According to the Petitioners, the Wakf Board even published a modified list of Wakf on 5th May, 2005. According to the Petitioners, however, on 3rd April, 2008 the Wakf Board passed a Resolution resolving to revoke the rectified list of Wakf dated 5th May, 2005. It appears that, there were several complaints made about the survey conducted. There were complaints made even with the Joint Parliamentary

Committee and the Joint Parliamentary Committee issued a direction on 20th October, 2008 to the State Government to conduct resurvey of the Wakfs in the State. In this background, on 20th October, 2008 a Notification has been issued by the State Government deciding to resurvey the Wakfs in the State of Maharashtra and in exercise of its power under sub-section (1) of Section 4 again appointing a survey officer for conducting resurvey in the State of Maharashtra.

8. In these facts, these Petitions have been filed. By these Petitions the Petitioners challenge the Notification dated 4-1-2002, whereby the Wakfs Board for the State of Maharashtra is constituted. The Petitioners also challenge constitution of the Wakf Board. The Petitioners also challenge the list of Wakfs prepared and published by the Wakf Board. It is the contention of the Petitioners that while conducting the re-survey the survey officer must consider the report submitted by the Five Members

Committee, which was constituted by the State Government under the Chairmanship of the Charity Commissioner and the list prepared by it and submitted to the Wakf Board and also the rectified list of Wakfs which was prepared by the Wakf Board. It is the contention of the Petitioners that until a new Wakf Board is incorporated and the list of the Wakfs is published by the newly constituted Wakf Board, because these Wakfs are also the Public Trusts registered under the Bombay Public Trust Act, the working of these trusts should be controlled and supervised by the authorities of the Public Trust Act.

9. So far as challenge to the incorporation of the Wakf Board in State of Maharashtra is concerned, the Petitioners relying on the scheme of the Act, particularly Section 4, Section 13 and Section 14 of the Act submitted that until the State Government has before it the report of the survey, the State Government cannot

take a decision in relation to the establishment and constitution of the Wakf Board and any decision taken by the State Government to incorporate the Wakf Board in the absence of survey report submitted by the Survey Officer in invalid and inoperative.

10. So far as the challenge to the constitution of the Wakf Board is concerned, it is the submission of the Petitioners that in order that constitution of the Wakf Board is valid, there must be at least seven members in the Board. Therefore, the constitution of the Board made on 4-1-2002 is invalid. In support of its challenge to the validity of the list of Wakfs published by the Wakf Board, it is submitted that that list was based on the survey report submitted to the State Government on 31-2-2002. As that report itself is found to be defective by by the Joint Parliamentary Committee as also by the State Government, the list of Wakfs based on that report obviously is also

defective and therefore has to be set aside. It is submitted that considering the importance of survey and the purpose for which the survey is to be conducted, the persons who may be interested in the Wakfs are entitled to make representations to the survey officer representing their point of view and the survey officer appointed under Section 4 is under a duty to take into consideration such representations made by the interested persons. It is submitted that as the Committee under the Chairmanship was constituted by the State Government and that Committee prepared the list, that will be the relevant material to be taken into consideration by the survey officer while conducting the resurvey pursuant to the Notification dated 20th October, 2010. It is submitted that the Muslims Wakfs which are registered under the Bombay Public Trust Act are to be governed by the provisions of the Bombay Public Trust Act till the machinery is in place constituted under the Wakf Act to control the administration of the

Wakfs and till that event takes place, the Charity Commissioner should be directed to entertain the applications and supervise the working of the Muslims Public Trusts, which are registered under the Bombay Public Trust Act.

11. We have heard the learned Advocate General on behalf of the State Government. In so far as the challenge to the Notification dated 4-1-2002 incorporating the Public Trust is concerned, submission of the learned Advocate General is that availability of the survey report cannot be said to be a condition precedent for the State Government to exercise its power of incorporating the Wakf Board. The learned Advocate General relied on the provisions of Section 13 of the Act. The learned Advocate General also invited our attention to the provisions of Section 106 of the Act. The learned Advocate General submitted that the information in relation to the Wakfs can be available to the State Government not only

through the Survey Report, but also from other sources a Wakf Board was in existence in a part of the State under the Act repealed by Wakf Act, 1995, information with that Wakf Board can also be used. The learned Advocate General also submitted that though it is true that initially only four persons were appointed on the Wakf Board, but however subsequently appointments were made by the State Government. It is only in Category under Section 14(1)(b)(iv) that there is a problem about electing the representatives, otherwise, the representatives from all categories were nominated on the Wakf Board.

12. Now, first taking up for consideration, the question whether the Notification dated 4-1-2002 incorporating the Wakf Board for the State of Maharashtra is valid or invalid is concerned, for consideration of this question sub-sections 1 to 3 of Section 4 of Wakf Act are relevant. They read as under:

4(1) Preliminary survey of Wakfs.- The State Government may, by notification in the Official Gazette, appoint for the State a Survey Commissioner of Wakfs and as many Additional or Assistant Survey Commissioners of Wakfs as may be necessary for the purpose of making a survey of wakfs existing in the State at the date of the commencement of this Act.

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

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

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

(b) the nature and objects of each wakf;

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

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

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

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

. Thus, Section 4 vests powers in the State Government to appoint the survey officer for the purpose of making "a survey of Wakfs existing in the State at the date of commencement of the Act. The date of commencement of the Act is 1-1-1996. In making the survey, the survey officers have to collect the information on the number of Wakfs in the State and also to find out how many of them are Shia Wakfs and how many of them are Sunni Wakfs. The survey officers have to collect the information about the income, expenditure, properties of such Wakfs. Under Section 13 of the Wakf Act, the State Government is empowered to establish a Board of Wakfs. The State Government has also been given power to constitute a separate Wakf Board for Shia and Sunni Wakfs, under certain conditions specified in the Act. The same Section provides that the Wakf Board would be a body corporate having perpetual succession and a common seal. Section 13 reads as under:

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

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

(3) The Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.

13. Perusal of the above quoted provisions of Section 13 shows that sub-section 1 of Section 13 vests powers in the State Government to

establish a Board of Wakf. Sub-section 2 lays down the manner in which that power is to be exercised. At the time of taking a decision to constitute the Board of Wakf, the State Government has to consider as to whether it wants to constitute one Board of Wakf or in view of the provisions of sub-section (2) of Section 13, it is necessary for it to constitute a separate Board of Shia Wakfs. It was submitted by the learned Advocate General that the power conferred on the State Government by sub-section 2 of Section 13 is a discretionary power. The State Government may constitute a Shia Board or may not constitute a Shia Board. In our opinion, the submission is not well founded. Because once it is established that Shia Wakfs in the State constitutes in number more than fifteen percent of the Wakfs in the State or if it is established that the income of the properties of Shia Wakfs in the State constitutes more than fifteen percent of the total income of the properties of all the Wakfs in the State, the State Government

cannot deny constitution of a separate Wakf Board for Shia Wakfs. In that situation, the State Government will have to constitute two Boards. In our opinion, the provisions of sub-section 2 of Section 13 have to be read with the provisions of sub-section 3 of section 4 of the Act. Sub-section 3 of Section 4 of the Act casts a duty on the Survey Commissioner to collect information as to the number of Shia Wakfs and Sunni Wakfs separately. He is also required to collect information on the income, expenditure and properties of Shia Wakfs and Sunni Wakf separately. A duty on the Survey Commissioner is cast by sub-section (3) of Section 4 to collect information in that regard obviously to enable the State Government to take a decision, which is contemplated by sub-section (2) of Section 13 of the Act. In our opinion, the provisions of Section 13 and Section 4 will have to be read together and the State Government will have to wait for making a decision in relation to incorporation of Wakf Board in the State till it

receives the report of survey conducted under Section 4. Section 13 does not contemplate constitution of additional Board for the Shia. Section 13 contemplates constitution of one Board for Shia and Sunni Wakfs or constitution of separate Board for Shia and Sunni Wakfs depending on the number and income of Shia Wakfs in the State. In our opinion, therefore, the power to establish the Wakf Board will have to be exercised at the same time and it is at that time that the State Government will have to decide whether it wants to have one Board for the Shia and Sunni wakfs or taking into consideration the number and income of the Wakfs a separate Board for Sunni Wakfs and Shia Wakfs. The survey that is to be done under Section 4 is survey of the wakfs as on the date of commencement of the Act. There is no period fixed by the Act for the state Government to order survey. Whenever the State Government decides to conduct survey, the survey in terms of Section 4(1) has to be survey of Wakfs on the date of

commencement of the Act. The Act also does not fix any time limit for the State Government to exercise its power of establishing the Wakf Board. There is no direct provision in the Act which lays down that before establishment of the Wakf Board under Section 13 the State Government must make any order for survey. If the argument of the State Government/Respondent in this case is accepted, it will have to be held that the State Government can establish the Wakf Board under Section 13 without ordering the survey. But for preparing the list of Wakfs under Section 5(2) survey is necessary. Therefore, can the State Government without ordering survey in exercise of its power under Section 13(1) establish a common Wakf Board and thereafter order survey. If the report of survey received after establishing the Wakf Board shows that the number of Shia wakfs in the State is such that according to Section 13(2), the Shia wakfs are entitled to have a separate Shia Wakf Board, in that situation the State Government will not be

in a position to constitute a separate Board for Shia Wakfs, because the Act does not contemplate the Government establishing any additional Board or Boards. It also does not provide for bifurcation of one Board into two Boards. Had it been the intention of the Legislature to empower the State Government to constitute additional Board, it would have made the provision for division or bifurcation of the existing Board, because without bifurcating or dividing the existing Board, it will be impossible to constitute additional Board. If the State Government has already constituted the unified Board for both Shia and Sunni Wakfs, then if the additional Board for Shia wakfs is to be constituted, it would be necessary to delete from the unified Board, the Shia wakf. There is no provision made in the Act for such bifurcation. In such situation, therefore, in our opinion, the State Government has to order survey first and then wait for the survey report and after receiving the survey report the State Government

has to take proper decision about establishment of Wakf Board. After incorporating or establishing a Board the State Government has to take steps for constitution of the Wakf Board immediately, because without making appointment or nominating members on the Wakf Board mere establishment of the Wakf Board serves no purpose. When the State Government considers the question of constitution of the Wakf Board, it has to take into consideration the provisions of Section 14(6) of the Act. Section 14(6) reads as under:-

14(6) In determining the number of Shia members or Sunni members of the Board, the State Government shall have regard to the number and value of Shia Wakfs and Sunni Wakfs to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

. Thus, the number and value of Shia and Sunni Wakfs become relevant for constitution of the Wakf Board. Authentic information can become available to the State Government regarding the

number and value of the Wakfs only from the report of the Survey Commissioner appointed under Section 4 of the Act.

. In this view of the matter, therefore, in the present case as it is an admitted position that the State Government issued the Notification incorporating the Wakf Board in the State of Maharashtra on 4-1-2002, when it did not have before it the report of the survey conducted under Section 4. That report became available to the State Government only on 31-1-2002. By incorporating Wakf Board in the State of Maharashtra on 4-1-2002, the State Government denied to itself an opportunity to consider the survey report to find out whether the information disclosed by that report requires it to exercise its power under sub-section 2 of Section 13 of constituting a separate Board for Shia Wakfs. In our opinion, the State Government was not justified in denying to itself the exercise of power under sub-section 2 of Section 13 by not

waiting to receive the survey report. The State Government itself had appointed the Survey Officer in the year 1997 and it waited till 4th January, 2002 to incorporate the Wakf Board when it was to receive the survey report on 31st January. The only reason that is given for incorporating the Wakf Board on 4-1-2002 is the provisions of sub-section 1 of Section 5. It reads as under:-

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

14. It was submitted by the learned Advocate General relying on the provisions of sub-section 1 of section 5 of the Act that sub-section (1) of Section 5 casts obligation on the State Government to forward a copy of the survey report to the Board. According to the learned Advocate General, therefore, it is obligatory for the State Government to constitute a Board before it receives the survey report from the

survey officer, so that as soon as the report is received, , copy of that report can be forwarded to the Board.

. In our opinion, this submission is not well founded. The words "on receipt of the report" , in our opinion, do not imply that a copy of the report is to be forwarded by the State Government immediately on receiving the report. The State Government on receiving the report can consider the question of incorporating the Board under Section 13 and on constituting the Board can forward a copy of that report to that Board.

. In our opinion, therefore, the Notification dated 4-1-2002 incorporating the Wakf Board is contrary to the scheme of the Act and is, therefore, liable to be set aside.

15. So far as the challenge to the constitution of Wakf Board is concerned, it is

Section 14 of the Act which is relevant. It reads as under:-

14. Composition of Board.-

(1) The Board for a State and the Union Territory of Delhi shall consist of-

(a) a Chairperson;

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

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

(ii) Muslim Members of the State Legislature;

(iii) Muslim Members of the Bar Council of the State, and

(iv) mutawallis of the Wakfs having an annual income of rupees one lakh and above;

(c) one and not more than two members to be nominated by the State Government representing eminent Muslim Organisations;

(d) one and not more than two members to be nominated by the State Government, each from recognised scholars in Islamic Theology;

(e) an officer of the State Government not, below the rank of Deputy Secretary.

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

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

Provided further that where there are no Muslim Members in any of the categories mentioned in sub-clauses (i) to (iii) of Clause (b) of sub-section (1) the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied for reasons to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of Clause (b) of sub-section (1), the State Government may nominate such persons as the members of the

Board as it deems fit.

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

(5) Where there are Shia Wakfs but no separate Shia Wakfs Board exists, at least one of the members from the categories listed in sub-section (1), shall be a Shia Muslim.

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

(7) In the case of the Union Territory other than Delhi, the Board shall consist of not less than three and not more than five members to be appointed by the Central Government from amongst the categories of persons specified in sub-section (1):

Provided that there shall be one mutawalli as the member of the Board.

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

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

16. It is common ground that by Notification dated 4-1-2002 only four Members were appointed on the Board. Perusal of the above quoted provisions show that Section 14(1)(b) defines only the electoral colleges. It does not lay down eligibility for being a candidate to be elected from the electoral colleges defined by Section 14(1)(b). For example, it lays down that one and not more than two members as may be decided by the State Government may be elected from the electoral colleges consisting of Muslims Members of Parliament from the State. It does not lay down as to who can be a candidate at such election. In any case, it does not lay down that only the Muslims Members of Parliament from the State can be a candidate to be elected from this electoral colleges. Same is the case with the electoral college constituted under Section 14(1)(b)(ii) , (iii) & (iv). Perusal of the

Notification dated 4-1-2002, however, shows that the State Government was under the impression that it is only the Muslims members of the Parliament from the State, who can be nominated or elected from his constituency. Same is the case with Section 14(1)(b)(iii) nomination. So far as constitution of the Maharashtra Board is concerned, we have been pointed out the Eighth Report of the Joint Parliamentary Committee on the functioning of the Wakf Board. In paragraph 2.33 of that report it is observed "The Principal Secretary informed that the Government of Maharashtra had constituted Maharashtra State Board of Wakfs. The Board constituted of 4 Members i.e. 2 Members of Parliament, 1. Ex-Member of the bar Council of the State and one Member from Muslim Organisation vide Government Notification No.Wakf-10/2001/C.R.154/L-3 dated 4th January, 2002. The process of appointing the remaining members of the Board was underway. The Sub-Committee asked him to check up from their Law Department as to whether the Wakf Board

constituted by Maharashtra Government can be treated as the wakf Board constituted under Section 14(1) of the Wakf Act, 1995, which requires minimum seven members for a Wakf Board to be duly constituted and share their opinion with the Sub-Committee".

17. So far as Ninth Report of the Joint Parliamentary Committee on wakfs is concerned, it is paragraph 3.32 and 3.33 of that report are relevant. They read as under:

3.32 After the enactment of the Wakf Act, 1954, Maharashtra did not adopt the Act for the entire State of Maharashtra. Only Marathwada Region of Maharashtra had Wakf Board and in the other region of Maharashtra, the Wakf properties were governed by the Bombay Public Trust Act. After the enactment of the Wakf Act, 1995, the State of Maharashtra adopted the Act and implemented the Act for the entire State and constituted the Wakf Board. The present position of the Board is that six of its members have retired and two have resigned in 2005. Currently, there are only two members in the Board. The Government with just two member on the Board cannot function and as such the Board practically does not exist.

3.33 The Principal Secretary, Minority Development, Government of Maharashtra, further submitted the position of the Maharashtra Wakf Board before the Committee on the 24th July, 2008, and stated that the two members who had resigned in 2005 and 2007 would continue to be members as per the provisions of the Act, till their successors were appointed. The Committee was assured that the State Government would be able to constitute the Board within three months. As regards the elected members, it would take a little more time. The Committee is unable to appreciate the explanation of the Principal Secretary. For all practical purposes there is no Board in Maharashtra. The Government has neither appointed Administrator to discharge the functions of the Board nor it has superseded the Board as per Section 99 of the Wakf Act.(emphasis supplied)

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

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

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

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

4.16 The earlier JPC on Wakf, in its Eighth Report, presented on 29.07.2003 noted that the survey was almost completed, except in Bombay suburban District. However, it was alleged by the members of the public during the visit of the Committee that the survey work had not been properly carried out and a large number of Wakf properties had been left out. It was also informed that even those properties which physically existed and were Wakf by user, were not included in the survey on flimsy grounds. It was revealed that in the revenue records, the Wakf properties were mentioned in the name of Mutawallis or in the name of lessees and were not shown as Wakf properties which made the sale of the properties easy. It was also informed that no physical survey was done and only proformas were sent to the Mutawallis for furnishing the details of the Wakf properties. The State Government had also admitted that there were errors in identifying the Wakf properties. Later on, the State Government informed that the survey in Bombay sub-urban areas had also been completed and they supplied a list of the Wakf properties surveyed to the then Committee. The lists so received prima facie showed the properties of Marathwada region; the Wakf properties in other regions were negligible which might not be true. Keeping the situation in view, the then Committee recommended that the provisions of the Wakf Act, 1995 should be followed scrupulously for the survey of Wakf properties and the procedure adopted be made transparent and open to the public, with a remedy to correct errors in the survey. The Survey

Commissioner should undertake a physical survey of all the Wakf properties after giving wide publicity through the media. The Committee further recommended that after the survey was completed, the lists of Wakf properties should be published properly in the Official Gazette as required under the Act. The Committee further recommended that the entries of Wakfs should be properly made in the revenue records.

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

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

"The survey of Wakfs and its properties was taken up by the Government of Maharashtra vide Revenue and Forest Department Notification No. WKF-1097/L- 3/CR95 dated 01.12.1997 and survey was

completed and submitted to the Government. Thus, the survey was completed before receipt of proceedings of the Joint Parliamentary Committee's VIIIth Report, which had suggested the survey to be carried out again in a transparent way. It has yet not been initiated.

. . . The decision to conduct fresh survey in a transparent manner lies with the State Government."

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

19. Thus, the Joint Parliamentary Committee found the survey to be defective. The decision of the Joint Parliamentary Committee has been accepted by the State Government when it issued the Notification dated 20th October, 2010. The reason that has been given by the State Government for ordering resurvey in the Notification dated 20th October, 2010 is " And whereas the Joint Parliamentary Committee

received complaints that the survey was not conducted properly and therefore the Committee issued direction dated 20th October, 2010 to the State Government to conduct the resurvey of the wakfs in the State....." .

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

21. Now, taking up for consideration the submission of the Petitioners that the survey

officers who are conducting the survey pursuant to the Notification dated 20th October, 2010 should be directed to consider the representations that may be made by the Petitioners as also other persons who may be connected with the Muslims wakfs and also to consider the lists prepared by the Committee constituted by the State Government under the Chairmanship of the Charity Commissioner is concerned, it is clear from the provisions of Section 4 of the Act that for proper working of the scheme of the Wakf Act, conducting of proper and thorough survey is absolutely necessary. The Joint Parliamentary Committee in its report has also noted that the survey plays a very important role in implementation of the provisions of the Act and therefore, the survey should be conducted carefully and in a transparent manner. In our opinion, therefore, the survey officers who are conducting the survey under Section 4 are under a duty to take into consideration all relevant material including any

material that may be placed before them by the Petitioners, who are trustees of various Muslim charities as also other similarly situated persons who are connected with the Muslim charities. So far as the report of the Committee referred to above is concerned, that Committee was constituted by the State Government and that Committee had prepared a list. In our opinion, as the material collected by the Committee would be relevant for the purpose of preparing the survey report by the Survey Officer, in case a copy of the report of the Committee is placed before the Survey Officer by the Petitioners, the survey officers cannot refuse to take that material into consideration. In our opinion, a direction in that regard has to be issued to the Survey Officer.

22. It was also urged before us relying on the provisions of sub-section 6 of Section 4 that the survey ordered by the Notification dated 20th October, 2010 is invalid. In our opinion,

however, that submission is not well founded. Sub-section 6 of Section 4 operates in relation to second or subsequent survey. It contemplates the first survey to be valid. In the present case, however, it has been found that the first survey itself was not valid and it was defective. In our opinion, therefore, exception cannot be taken to the resurvey ordered by the Notification dated 20th October, 2010 on the basis of the provisions of Sub-section 6 of Section 4 of the Act.

23. Now, the last question that requires to be considered is whether having found that the Notification incorporating the Wakf Board to be invalid, we can direct the Charity Commissioner and the authorities under the Bombay Public Trust Act to exercise their powers in relation to such Muslims Trust as may be registered as Public Trust under the Bombay Public Trust Act. In that regard, reliance was placed on the provisions of Section 43 of the Wakf Act. It reads as under:

43. Wakfs registered before the commencement of this Act deemed to be registered. -

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

24. Perusal of the provisions of Section 43 shows that if a particular Trust or wakf is registered under any law for time being in force, then that registration is deemed to be registration made under the provisions of the Act. This section deals only with the necessity of registration of wakfs under the Act. It does not lay down that after coming into force of the Wakf Act, Muslim Trusts which are registered under the Bombay Public Trust Act and under any other State Law will cease to be governed by that

Act, merely because the Wakf Act has come into force. It is possible to say that after a Wakf Board is incorporated under the Wakf Act and it becomes effective and starts controlling the affairs of the Muslim Trusts, which are registered under the Wakf Act, then the provisions of the Bombay Public Trust Act may cease to operate in relation to such public trusts/wakfs. But till that eventuality occurs, in our opinion, it would be in the public interest that the affairs of such public trusts are governed by the provisions of the Bombay Public Trust Act. If it is held that merely on commencement of the Act in a State, without the machinery provided by the Wakf Act becoming operative, the provisions of the Bombay Public Trust Act cease to operate in relation to the Muslims Public Trusts, which are registered under the Bombay Public Trust Act, it will result in creating a vacuum, inasmuch as, in the absence of any machinery being effective under the Wakf Act, the affairs of the Trust will not be controlled

by the provisions of the Wakf Act and the provisions of the Public Trust Act will also not apply. Therefore, in our opinion, it would be appropriate to direct that till the Wakf Board is established, incorporated and constituted under the provisions of the Wakf Act and it becomes operative, the provisions of the Bombay Public Trust Act shall apply to the Muslims Public Trusts which are registered under the Bombay Public Trust Act.

25. In the result, therefore, the petitions succeed and are allowed.

(i) The Notification dated 4-1-2002 is set aside;

(ii) The lists of wakfs prepared and published by the Wakf Board dated 13-12-2002 are set aside.

(iii) The Survey Officers appointed by

Notification dated 20th October, 2010 are directed to take into consideration representations, if any, made by the Petitioners and other similarly situated persons connected with the Muslims wakfs, including the list prepared by the Committee constituted by the State Government under the Chairmanship of the Charity Commissioner, while preparing and submitting their survey reports to the State Government. The survey officer may also take into consideration any list of the wakfs, if prepared under the Act repealed by the 1995 Act.

(iv) Until a new Board or Boards are incorporated under the Act and they are constituted in accordance with the provisions of the Act and the Board or Boards start functioning in accordance with the provisions of the Wakf Act, the provisions of the Bombay Public Trust Act

will apply to the such Muslims Public Trusts, which are registered under the Bombay Public Trust Act. Rule is made absolute accordingly. No order as to costs.

26. We have set aside the Notification dated 4-1-2002. None of the actions taken or orders passed by the Wakf Board constituted by the Notification dated 4-1-2002 is challenged in any of the petitions that have been decided by this order. Therefore, we are not pronouncing on the validity or otherwise of the actions taken and orders passed by the Wakf Board so far. The validity of those actions and orders will be decided by the Forum before which the validity of those actions or orders is challenged.

. It is also made clear that the State of Maharashtra is at liberty to take steps to make such interim arrangements, as it may be advised, to manage and to supervise the Wakf property and other related aspects under the Wakf Act. The

decision and/or action already taken including the pending dispute or litigation shall be governed by the Wakf Act.

27. So far as Writ Petition (L) No.357 of 2011 is concerned, it is clarified that by this judgment we have not considered the relief claimed by prayer clause c(iii) in respect of wakfs list dated 30-12-2004. Therefore, the Petitioners shall be at liberty either to file fresh petition claiming that relief or claim that relief in other pending matters.

28. At the request of the learned Counsel appearing for the Wakf Board, it is directed that operation of this judgment shall remain stayed for a period of 10 weeks from today. However, during this period all the interim orders that are operating as on today shall continue to operate.

(Anoop V. Mohta, J.)

(D.K.Deshmukh J.)