$~27, 28 & 37

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 17.09.2018

% ***Pronounced on: 27.11.2018***

\+ **FAO(OS) 278/2017 & CM Nos.38675/2017, 45939-40/2017, 7340/2018, 19001/2018, 25788-89/2018, 29888-89/2018**

ABDUL MAJEED & ANR ..... Appellants

versus

HAMMAD AHMED & ORS ..... Respondents

\+ **FAO(OS) 280/2017 & CM APPL. 38914/2017, 18987/2018**

ABDUL MAJEED & ANR ..... Appellants

versus

HAMMAD AHMED & ORS ..... Respondents

\+ **CONT.CAS(C) 706/2018 & CM APPL. 38048/2018**

ABDUL MAJEED & ANR. ..... Appellants

versus

HAMMAD AHMED & ANR. ..... Respondents

Present : Mr. C.S. Vaidyanathan, Sr. Advocate and Mr. Parag P. Tripathi, Sr. Advocate, with Mr. Simran Mehta, Mr. Saket Sikri, Ms. Aakansha Kaul, Mr. Gaurav Sarin, Mr. Pawan Upadhyay and Mr. Rishabh Kapur, Advocates for the petitioners in all matters.

Mr. Kailash Vasdev, Sr. Adv. with Mr. L.S. Rawat, Ms.Limayinla Jamir, Ms. Mohita Srivastava and Mr. Bobby Lau, Advs. for R-1 in item nos. 27 & 28.

Mr. Dayan Krishnan, Sr. Adv. with Mr. Satinder Singh Bawa, Mr. Sumer Sandhu and Ms. Nayan Tara Gupta, Advs. for R-2 in item nos. 27 and 28.

Mr. Shreyans Singhvi and Ms. Ekta Mehta, Advs. for R-3 in all matters.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K.CHAWLA

S. RAVINDRA BHAT, J.

1. The present interlocutory appeals are from a common order of a learned Single Judge, made in two suits. The first suit [CS(OS) 162/2017- hereafter "the first suit"] - filed by Asad Mueed (who and his brother Abdul Majeed are called the "Asad Mueed" group), is primarily against Hammad Ahmed and his son Hamid Ahmed (hereafter "Hammad" and "the Hammad group") seeking reliefs in effect, for the said Hammad group ought to be removed from the position of trustees of Hamdard Laboratories (hereafter "HLI" or "the trust"). The second suit - CS(OS) 211/2017 (hereinafter "the second suit") was filed by Hammad against the Aswad Mueed group The second suit seeks a declaration that Abdul Majeed was no longer *Mutawalli* of Hamdard Laboratories (India) (hereinafter "HLI") on the ground that he was in breach of obligations under the Trust Deed dated 28.08.1948 as amended from time to time. Permanent injunction was also sought to restrain Abdul Majeed from continuing as *Mutawalli* of the Trust.

2. The facts are that one Janab Abdul Mueed, father of Asad Mueed and Abdul Majeed, was the eldest son of the trust's *Wakif Mutwalli*, i.e. Haji Hakim Abdul Hamid (hereafter *"Wakif Mutuwalli"*). The said Wakif Mutuwalli was the son of the trust's founder, Hakim Hafiz Abdul Majid. Abdul Mueed, his son (and brother of Hammad) was the first Chief Mutawalli of HLI; he assumed the office of Chief Mutawalli upon the death of the *Wakif Mutuwalli* and held it till his demise in March, 2015. The first suit (OS 164/2017) alleged that in 2006, Hammad who was in-charge of the

Marketing and Sales Department of HLI was ousted due to his involvement in various acts of defalcation of organizational monies. Various civil and criminal proceedings were initiated against him. It was alleged that in 1998, Hammad Ahmed, as head of Marketing & Sales of HLI appointed Eden Enterprises Pvt. Ltd., a non-existent entity as distributor of HLI products. That entity came into existence after the appointment of Eden Enterprises Pvt. Ltd. as distributor; it had a share capital of ₹3,000/- and its promoter was one Shammi Tandon, a subordinate. Within a span of few months, HLI products worth crores were given to the said enterprise by the second defendant being head of Marketing & Sales without payment of sale price. The said enterprise did not pay the price of the goods as a result wrongful loss of ₹1.76 crores was caused to HLI. Criminal Complaint Case No.7/1/2012 is pending against the second defendant and others in this regard, besides CS(OS) 59/2011 for recovery of the siphoned goods / proceeds.

3. Other allegations of irregularities by Hammad i.e alleged order for supply of 10000 tree guards (in 2000) without inviting bids, private price fixation, without negotiations on 19.04.2000 and payment made in a single tranche on 31.03.2000 to the tune of ₹1.74 crores are cited as illegalities; consequential loss on account of payment to an advertising agency hired by Hammad, which had no advertising rights for the locations mentioned on the 16 invoices; pendency of criminal Complaint No.5480/2010 before the concerned Court for misappropriation, criminal breach of trust, cheating and falsification of accounts and been summoning of Hammad Ahmed to face trial; CS(OS) 855/2011 pending against him, and others for recovery of the siphoned monies as well as FIR No. 89/14 also pending investigation

with Economic Offences Wing of Delhi Police against the second and third defendants were cited.

4. Asad Mueed alleged that after the death of his father (the Wakif Mutawalli) in March, 2015, the Hammad group mounted pressure upon him and his brother for withdrawal / compromise of the pending cases. On refusal to do so, they started creating obstructions in the prosecution of the cases and the working of HLI. On 03.11.2016, they purported to terminate the services of Mr. S. Rajagopalan, AGM (Finance), authorised representative of HLI and a prime witness in criminal cases. They also terminated the services of Mr. Javed Akhter, Sr. Manager (Legal) who was overseeing the cases on behalf of the management of HLI. They had no authority to terminate their services and their action was motivated and malicious. Asad Mueed, in the first suit, also alleged that on 02.01.2017 the account maintained with HLI was blocked as a result of which payments to statutory bodies and employees' salaries were not made. The payments to the advocates representing HLI before various Courts were not released. To avoid embarrassment and distress, Asad Mueed, deposited ESI dues of ₹ 96,204/- from his own pocket on behalf of HLI. These acts of Hammad and Hamid it was alleged, were prejudicial to the interests of the organisation. Crucial operations of the organisation came to a stand-still. Hammad and Hamid acted *mala fide*; their removal as trustees of HLI was required.

5. The Hammad group contested the first suit, alleging that after the death of Chief Mutawalli (Abdul Mueed) on 19.03.2015, Hammad as the senior *mutawalli* of HLI in line of succession of the Wakif Mutawalli as per the Trust Deed and being the only living successor (of the Wakif Mutawalli) took over as the Chief Mutawalli of HLI on 20.03.2015 by

office order dated 20.03.2015. Asad Mueed and his brother who are also the *mutawallis* opposed the Hammad's assuming the office as Chief Mutawalli, and caused the issue of an illegal office order dated 23.03.2015 appointing Asad Mueed as Mutawalli. The Asad Mueed group deliberately and for ulterior purpose adopted positions contrary to the stipulations in the Trust Deed. On 23.03.2015, they wrote a letter to the Bank of India not to allow the second defendant to operate the business account of HLI singly as was the practice for decades. They asked the bank to allow them to operate the bank account. The Asad Mueed group instigated and threatened the employees of HLI not to acknowledge Hammad as Chief Mutawalli. They levelled baseless and false allegations against him and his family. Abdul Majeed who claimed to be CEO of the organisation was removed by Hammad due to his open defiance and conduct detrimental to the organisation by office order dated 25.03.2015; Abdul Majeed, however, declared himself to be in continuation as CEO by an unauthorized order dated 26.03.2015.

6. In the second suit, CS (OS) 211/2017, Hammad sought a declaration that Abdul Majeed was no longer Mutawalli of HLI being in breach of obligations under the Trust Deed dated 28.08.1948 as amended from time to time. Decree for permanent injunction is also sought to restrain Abdul Majeed to continue as *mutawalli* of HLI.

7. After considering the pleadings in the two suits and analysing the arguments of the parties, the learned single judge restrained Asad Mueed from claiming himself to be Chief Mutawalli and directed him to hand over the pass word and other vital information regarding the functions of that post, in relation to HLI's management to Hammad. The findings of the single judge, made in the course of the interim order granted, are as follows:

"23. It is not in dispute that Wakf/Trust Deed dated 28.08.1948 was executed; Hakim Hazi Abdul Hameed became the sole Wakif Mutawalli of HLI. In 1964 - 65, the Wakif Mutawalli appointed his both sons Abdul Mueed (the plaintiff's father) and Hammad Ahmed (the second defendant) as Mutawallis. The Wakif Mutawalli in terms of the Trust Deed appointed his elder son Abdul Mueed as Chief Mutawalli of HLI during his life time. In 1973, the Wakif Mutawalli carried out modification in the Wakf Deed and introduced clause 42-A which reads as under :

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

24. It is also not in dispute that in 1995 the Wakif Mutawalli appointed his two grandsons one each from the family of his sons namely Abdul Majeed and Hammad Ahmed as Mutawallis in HLI. In 1999, the Wakif Mutawalli died leaving behind four mutawallis and in terms of the Trust Deed, Abdul Mueed the eldest son of the Wakif Mutawalli became the Chief Mutawalli. Abdul Mueed has since expired on 19.03.2015. The second defendant, undisputedly is the senior-most amongst the male descendants of the Wakif Mutawalli. Clause (3) of the Wakf Deed reads :

> *"The First Chief Mutawalli will be appointed by Wakif Mutawalli, thereafter the senior most male descendant in line of succession (of Wakif Mutawalli) and then holding an office of Mutawalli will be the Chief Mutawalli. After the Wakif- Mutawalli, the division of rights and duties among the Mutawallis shall be made by the Chief Mutawalli for efficient working of the Wakf and the Majlis-e-Ayan shall have no right to disturb this division*

or render it difficult for the Chief Mutawalli or any of the Mutawallis to perform his or their duties to manage the Wakf satisfactorily and with proper freedom of action. The Chief Mutawalli will be the Sadar (President) of the Majlis-e-Ayan and the descendant second in seniority to the Chief Mutawalli will be its Nazir (Secretary)."

25. The first Chief Mutawalli was to be appointed by the Wakif Mutawalli. Thereafter the senior-most male descendant in the line of succession (of Wakif Mutawalli) and then holding the office of Mutawalli was to be the Chief Mutawalli.

26. This Court had occasion to analyse various clauses of the Trust Deed in CS(OS) Nos.116/1972 to 119/1972 decided on 23.12.2011 to hold that the plaintiffs therein were not 'Wakfs' under the Wakf Act…

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

29. I find no substance in the arguments that the succession to the office of Chief Mutawalli must devolve by the rule of lineal primogeniture. The citation Faqruddin v Tajuddin (supra) in clear terms rules out the principle of primogeniture to be *applicable to Muslims. Moreover, when the parties are governed by the express clauses in the Trust Deed, succession is to take place as per the intention of the founder of the Trust. The Trust Deed, as observed above, creates a line of succession which is distinct and deliberate departure from the ordinary Muslim Law of succession.*

30. The citation 'The Secretary of State for India in Council v Syed Ahmed Badsha Sahib Bahadur (supra) is not applicable to the facts and circumstances of the case. In the said proceedings construction of the relevant provisions of the Will executed in Tamil by Arulanandasami who died on 20.04.1954 leaving behind him his two sons Y.A.Arogyasami and A.Arputham was at issue. The former succeeded to the management of the A schedule properties and on his death in 1961 a dispute arose as to whether his minor son Yagappa was entitled to manage the properties or his brother Arputham should do so. Contents of the Will freely translated were :

> *My elder son and after 'him' the senior-most male member amongst the heirs in 'his' line, from generation to generation, shall manage the A schedule properties without subjecting them to any alienation and perform the charities properly.*
>
> *(emphasis given)*

31. In the Will, the testator had clearly and unequivocally desired that his elder son and 'after him' the senior-most male member amongst the heirs in 'his' line was to manage A schedule properties. Apparently, the testator wanted his elder son and after 'him' the senior-most male member amongst the heirs of 'his' son to be the beneficiary. In the instant case, clause 3 of the Deed, on the face of it, clearly prescribes that after the death of Chief Mutawalli, senior-most male member descendant in the line of succession (of Wakif Mutawalli) is to become the Chief Mutawalli. The Trust Deed does not mention if the senior-most male descendant in the line of succession of the previous 'Chief Mutawalli' is to become the Chief Mutawalli. The words "of Wakif Mutawalli" are of utmost importance and cannot be rendered redundant. Moreover, it is only a prima facie view and *parties will be at liberty to produce credible evidence to substantiate their respective plea during trial.*

32. Learned Senior Counsel for the plaintiff emphasized that due to disabilities enumerated in clause 6 of the Deed, the second defendant is not capable to be appointed as Chief Mutawalli. This contention cannot be taken care of at this stage. Various civil and criminal proceedings are pending between both the parties. Till date, the second defendant has not been held guilty for siphoning of the money belonging to the Trust and no decree for its recovery has been passed. The second defendant has also placed on record the list of various cases pending between the parties, in the written statement; some cases have been dismissed as withdrawn; some are pending between the parties. Mere pendency of the criminal proceedings without any verdict of the Court so far cannot debar the second defendant to be appointed as 'Chief Mutawalli'. It is relevant to note that the criminal cases are pending since long and the second defendant continued to be 'Mutawalli' even during the life time of previous Chief Mutawalli. The plaintiff at no stage filed any suit for his removal as 'Mutawalli'.

8. Based on the above interim *findings* and observations, the learned single judge directed as follows, disposing of the temporary injunction application filed in the second suit, by Hammad:

"47. In view of observations above, the defendants No.l& 2 are directed to hand over, the. password of the domain name www.hamdard.com, www.hamdafd.in and www.hamdardindia.com and its e-mail server password to the plaintiff. They shall also disclose and handover the ERP (Enterprise Resource; Planning) Admin Control Password.

48. The lA stands disposed of."

9. It is argued on behalf of the Asad Mueed group by learned senior counsel, Mr. C.S. Vaidyanathan and Mr. Parag P. Tripathi, that the impugned order has effectively rendered the two suits infructuous, by granting final relief to Hammad, at the interim stage, by giving him

decisive, permanent and absolute control over the affairs of HLI; effectively barring the other trustees from management. The finding of the Single Judge that Hammad is entitled to be HLI's *Chief Mutawalli* is impugned as a patently erroneous observation in para 28 of the impugned order, i.e. that *"It is not in dispute that presently the second defendant is the senior most male descendant in the line of succession of Wakif Mutawalli."* The appellants however, urge that this observation is incorrect because the issue is in dispute, as to who is the senior most male descendant, in the line of succession of the *Wakif Mutawalli*, at present.

10. It is argued that the appellants' case is that the line of succession of *Wakif Mutawalli* is governed by the principle of lineal primogeniture; and while dealing with this contention, the impugned order rendered contradictory findings in para 29, by first holding that the judgment of the Supreme Court in *Faqruddin v. Tajuddin* [2008] 8 SCC 12 rules out the applicability of the principle of lineal primogeniture to Muslims; and then observing in the later part of the same para that the Trust Deed creates a line of succession distinct from the Muslim law of succession. Learned senior counsel argued that if the latter part of para 29 of the impugned order is to be accepted, then the judgment of the Supreme Court in *Faqruddin* (supra) *ex facie* does not apply to the facts of the present case, by the strength of reasoning in the impugned order itself.

11. It is argued by the appellants that the issue of succession to the office of Chief Muatawalli stands squarely covered, in their favour by a catena of judgments cited before the single judge by them, including *The Secretary of State for India v. Syed Ahmed Badsha Sahib Bahadur* 1921 The LW Mad. 188 [DBJ], *A. Arputham v. Minor A.V. Yagappa,* by *Mother & Guardian Elizabeth Mary* [1964] I.L.R. 2 Mad.865 (DB)] affirmed by the Supreme

Court in 1971(3) SCC 808; whereby the Court held that succession to the office of trustee of a public charity, when hereditary in nature, is almost invariably governed by the principle of lineal primogeniture; in contrast to the ambulatory succession i.e. succession from amongst a college of successors going up and down the genealogical tree. Learned senior counsel argued that a complex issue, which has a seminal bearing on the final relief in the matter, was decided by the single judge at this nascent stage in the suit erroneously without trial which has resulted in serious miscarriage of justice.

12. Counsel emphasized that Hammad Ahmed is accused, multiple instances of siphoning of HLI monies, for which he was summoned by the Court of the Learned Metropolitan Magistrate for offences under Section 403, 406, 408,463, 467, 468, 471, 477-A of the IPG, upon strong evidence of a *prima facie* case against him. Furthermore, in a separate case, relating to siphoning of HLI monies, the Economic Offences Wing of the Delhi Police has registered a FIR against Hammad Ahmed under Sections 406,408,420,468,471 and 34 of the Indian Penal Code. It is urged- also, that two civil suits are also pending against Hammad, in this court, for recovery of the siphoned HLI monies, totaling ₹ 3.5 crores approximately.

13. It was also argued that the termination of S. Rajagopalan and Javed Akhter was patently *mala fid*e and designed licitly derail the criminal prosecutions and recoveries pending against Hammad. Learned counsel argued that grant of interim relief is an equitable, discretionary remedy. In the given facts of this case, entrusting single handed control over the affairs of a valuable public charity, to a tainted trustee, without any checks and balances, to the complete exclusion of the other trustees; on the ground that

criminal trials against the said trustee are still pending and have not attained finality, scarcely qualifies the test of equitable relief.

14. It is argued that by issuing affirmative mandatory directions in favour of Hammad, at the interim stage, the single judge has altered the *status quo* prevailing for the last several years and this has the imminent likelihood of exposing the charitable corpus to plunder by Hammad, given his dubious track record. The counsel warn that the consequences of the impugned order would be irremediable and will result in multiplicity of litigation. Learned counsel relied on *Dorab Cawasji Warden* v. *Coomi Sorab Warden* (1990) 2 SCC 117 and emphasised that according to observations of the Supreme Court, interim mandatory orders can be to *preserve or restore status quo,* not to alter it into a fresh situation. The following observations were particularly relied on:

> *"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:*
>
> *(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.*
>
> *(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.*

> *(3) The balance of convenience is in favour of the one seeking such relief.*
>
> *17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."*

15. Counsel also relied on *Samir Narain Bhojwani v Aurora Properties and Investments* 2018 SCC Online 1048 in support of the same proposition. It was also argued that there is ample material on record to show that HLI has suffered low profits and turnover, during the tenure of Hammad, as Head of Marketing and Sales. It is further submitted that Hammad's continuance of as a *mutawalli* (simpliciter) is hit by clauses 6(2], 6[4) and 6(6) of the Trust Deed; consequently, he could not have been allowed to act as Chief *Mutawalli*. It is lastly emphasized that while HLI's net profits under Hammad's marketing leadership were a mere ₹35.71 Crores, the same have now swelled to ₹ 236.88 Crores, in the year 2015-2016, under the management and control of Asad Mueed. Asad Mueed took charge of HLI as CEO, in the year 2012, the annual profits increased from ₹ 106.59 Crores to ₹ 236.88 Crores which is 122% increase in absolute terms, in under five years and the turnover of HLI ballooned from ₹ 276.61 Crores to ₹ 564.98 Crores [an increase of a 104%]. Likewise, net profitability increased from 22.66% during Hammad's tenure of leadership, to 43.50% during Asad Mueed's leadership.

16. Learned counsel for the Hammad group submitted that the impugned order does not call for any interference. It was submitted that *prima facie* ,

the trust deed clearly indicated that the eldest *in the line of the Wakif Mutawalli* was to take over as Chief *Mutawalli.* It was contended that for management of the wakf there ought to be at least one and at the most five *mutawallis* including the Wakf *mutawallis* and the Chief Mutawallis. The Senior most among the male descendants of the Wakif *Mutawalli* who shall be holding an office of the *mutawalli* will be the Chief *Mutawalli*. After the Wakif *Mutawalli* ceased to be *mutawallis*, every Chief *mutawalli* shall have the same rights and duties of administration of the Wakf and power of making regulations therefor as are provided in the Deed for the *Wakif Mutawallis* and allocate rights and duties among other *mutawallis*. With the exception of Wakif *Mutawallis*, the remuneration of the Chief *Mutawallis* and *Mutawallis* for services rendered to the *Wakf* shall be such as may be decided upon by the Wakif Mutawalli and after he ceases to be *Mutawallis*, by the Chief *Mutawalli*. These remunerations are decided upon after considering the nature of service rendered by each one of them and the extent of the activities of the *wakf*. It was submitted that on death of the *Mutawalli, appointed* as successors to the *Wakif Mutawalli* subject to the provision of clause 5, the male descendants of the *Wakif Mutawalli*, then living, shall in order of seniority, be appointed as *Mutawallis* of the Wakf. Like this, the succession to *Mutawalliship* continues in the male line from generation to generation. In the absence of a male successor in the direct line of succession who shall be a fit person to assume charge as a *Mutawalli* of the Wakf, then, anyone from the male descendants of the female issue being rightful claimant to succession is be appointed as *Mutawalli*. If there is no male descendant of the female issue fit enough to become a *Mutawalli* then any female issue of descendants who shall be fit to become *Mutawalli* can be so appointed. In the absence of all these, the *Majlis-e-Ayan* is empowered to appoint by an extra-ordinary Resolution, someone from outside the family who has the ability to act as a *Mutawalli* and to administer the Wakf properly.

17. It is argued that though a person might be entitled to appointment as *Mutawalli,* under Clause 4, the *Majlis-e-Ayan* is empowered to make a Special Resolution, to refuse to appoint such personas a *Mutawalli* or in the event of such person having already been appointed as a Mutawalli, to remove or suspend him from office, if he is (1) a minor or insane or by reason of lack of education, experience or old age and weak health is unable satisfactorily to perform his duties as *Mutawalli*; (2) He is dishonest, addicted to alcohol, gambling or has been convicted of some crime involving moral turpitude;(3) He is so heavily involved in debts that there is serious apprehension about his honesty;(4) He has either spent or is spending the income of the Wakf property in violation of the terms of the Wakf;(5) He does not maintain regular and proper accounts of the Wakf property and does not comply with such resolutions of the *Majlis-e-Ayan* and that body calls for their compliance; or(6) He during whose term of *Mutawalliship* the business and property of the Wakf has either suffered such losses or are most likely to suffer such losses as may be directly attributable to lack of ability of his part;(7) He does not exercise his right of appointment as a *Mutawalli* at the time of the accrual of the right, though eligible. However, be, on making a return request and on a vacancy arising in *Mutawalliship*, may be appointed as a *Mutawalli* towards such vacancy.

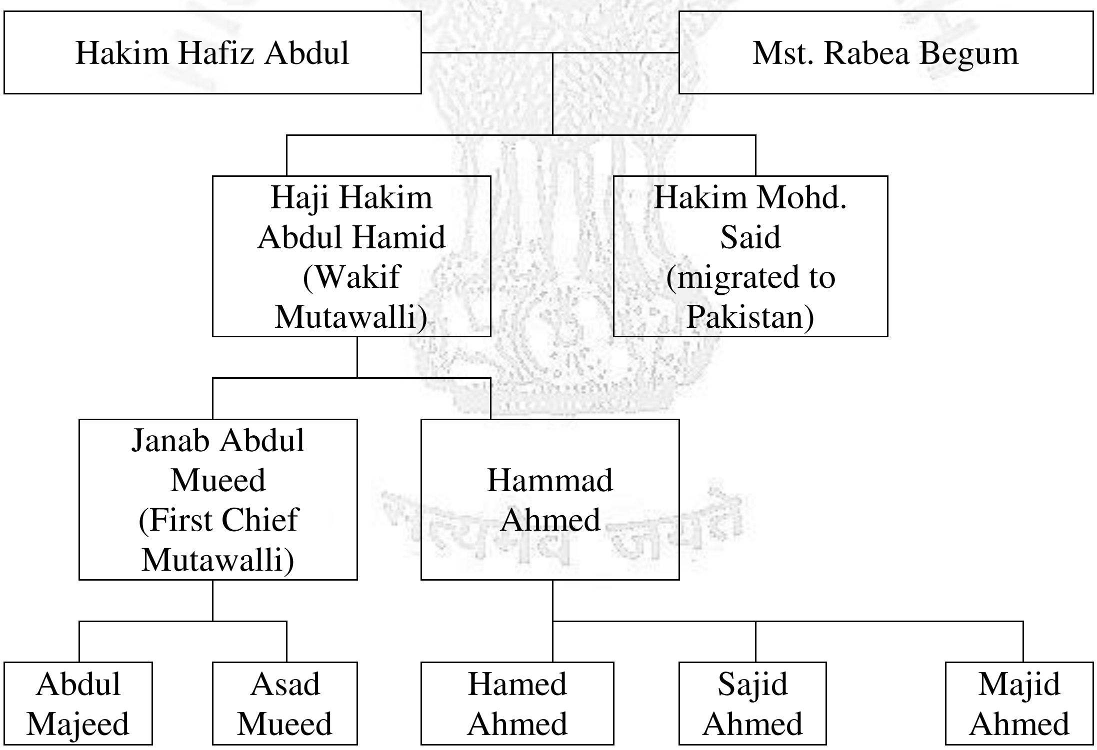
18. It is stated that Hammad and his elder brother, Late Abdul Mueed were appointed as *Mutawallis* of Hamdard in 1964 by their father Late Janab Haji Hakim Abdul Hameed. On 02.02.1973, the Wakif *Mutawalli* amended the Deed appointing the Hammad and his elder brother the Late Abdul Mueed were recognized as successors in interest by inserting Clause

42A. In 1974, the Late Abdul Mueed, elder brother of the plaintiff being the Senior most male descendant in the line of succession of the Wakif Mutawalli, was made the Chief Mutawalli of the Dawakhana by the Wakif Mutawalli. It is stated that on 20 May, 1995, the Wakif Mutawalli Hakim Haji Abdul Hameed appointed Abdul Majeed s/o the Late Abdul Mueed and Hamid Ahmad son of the plaintiff as *Mutawallis* of the Dawakhana. On 22.7.1999, Haji Hakim Abdul Hamid passed away. He was survived by his sons - Abdul Mueed and Hammad. In accordance with the conditions of *Mutawalliship*, his eldest son Abdul Mueed remained the Chief Mutawalli of the Dawakhana as the senior most descendant of the Wakif *Mutawalli* and also was the eldest *Mutawalli*. In 1999, Abdul Mueed, the Chief Mutawalli, in terms of clauses 4 and 5 of the trust Deed, appointed his second son as the fifth Mutawalli on 17th April 2000.

19. It was submitted that the single judge's reasoning accepting the Hammad group's contention is sound and reasonable. In this regard, the argument with respect to the senior most male descendent of the last Chief Mutawalli, is refuted. Counsel urged that the plain terms of the *Wakf* enabled the *Wakif Mutawalli* to first nominate the Chief Mutawalli and upon the demise of the latter, succession was to devolve, *"thereafter the senior most male descendant in line of succession (of Wakif Mutawalli) and then holding an office of Mutawalli"* This meant, clearly that the office of Chief Mutuwalli, had, upon the demise of any incumbent to that office, is the "senior most male descendent" of the <u>*Wakif Mutuwalli*</u>. The second qualification is that the concerned individual should be a *mutuwalli.* Hammad clearly fit that description: he was the senior most male descendent of the Wakif Mutuwalli; also he was an incumbent *mutuwalli.*

20. Counsel re-iterated that the findings of the learned single judge, with respect to the inapplicability of the rule of lineal male primogeniture to Hanafi Muslims meant that the directions in regard to devolution of office of *Chief Mutawalliship* in the trust deed were conclusive. Consequently, there was nothing unreasonable or *facially* arbitrary in the view that the senior most male descendent of the Wakif Mutawalli's line (Hammad in fact being his son) succeeding to that position.

21. For the sake of convenience, the relationship between the parties, to the Wakif Mutawalli and the Chief Mutuwalli, is shown, through the following family tree:



22. The relevant conditions in the Trust Deed are extracted below:

> *"3.The first Chief Mutawalli will be appointed by Wakif Mutuwalli thereafter the senior most male descendant in line of succession (of Wakif Mutawalli) and then holding an office of*

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

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

4. On the death of the Mutawalli or Mutawallis appointed as successors to the Wakif Mutawalli subject to the provision of clause 5, the male descendants of the Wakif Mutawalli, then living, shall, in order of seniority, be appointed as Mutawallis -of the Wakf. Like this, the succession to Mutawalliship shall continue in the male line from generation to generation. If there is no male successor in the direct line of succession who shall be a fit person to assume charge as a Mutawalli of this Wakf, then anyone from the male 'descendants of the female issue being rightful claimant to succession shall be appointed as Mutawalli. And, if there is no male descendant of the female issue mentioned above, who is fit enough to become a Mutawalli then any female issue of descendants who. shall be fit to become Mutawalli shall be so appointed. If, God forbid, neither a male nor a female' is left from the male and female descendants above referred to, who is fit to be appointed as a Mutawalli, then the Majlis-e-Ayan shall have the right to appoint by an extra-ordinary Resolution, someone from outside the family who has the ability to act as a Mutawalli and to administer the Wakf properly.

5. MAJLIS-E-AYAN shall have no right to alter, the order of succession in regard to Mutawalliship detailed in Clause Four above, unless and until the person entitled to act as a Mutawalli is suffering from such defect or disability as has been mentioned in clause 6 hereunder."

23. In 1973, the Wakif Mutawalli carried out modification in the Wakf Deed and introduced clause 42-A which reads as under :

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

24. One relevant document on the record, placed by the Hammad group, in OS 162/2017 is the order of the *Wakif Mutawalli*, dated 4 July, 1995, constituting the Board of the Trust (HLI). It reads as follows:

"CONSTITUTION OF BOARD OF MUTAWALLIS
Presently/ Wakif Mutawalli, Chief Mutawalli and Mutawalli are consulting and discussing the affairs of the Hamdard Dawakhana (Wakf) both formally and informally. Now two more Mutawallis, viz., Mr. Abdul Majed & Mr. Hamid Ahmed, eldest sons of Mr. Abdul Mueed & Mr. Hammad Ahmed respectively, are appointed as Mutawallis of the Wakf. They will be working from the day they assume their offices.

It is felt that the Board of Mutawallis should be constituted in the life of Wakif

Mutawalli, which can be converted later into "Majlis-E-Ayan" after Wakif Mutawalliceases to hold his office.

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

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

1. Hakeem Abdul Hameed (Wakif Mutawalli): Chairman
2. Mr. Abdul Mueed: Vice Chairman

3. Mr. Hamraad Ahmed: Senior Mutawalli
4. Mr. Abdul Majeed: Mutawalli

5. Mr. Hamid Ahmed - can attend the meetings as an observer till he assumes office of Mutawalli.

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

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

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

The Board of Mutawallis will supervise, monitor and review the functions of Hamdard Dawakhana (Wakf). The Board of Mutawallis will finalise and approve the budgets, working plans, projects and major policies which are not of routine in nature.

The Board of Mutawallis will also review the reports, budgets and plans of the Aid Receiving institutions from Hamdard Dawakhana (Wakf).

This Board will start functioning from today."

25. The undisputed position is that the *Wakif Mutawalli,* Hakim Abdul Hamid, died on 22nd July, 1999. The Hammad group concedes that late Abdul Mueed became the Chief Mutawalli and controlled the day to day affairs of the group. By then, Abdul Majeed, the senior most member of the Abdul Mueed line, had already been appointed as a Mutawalli. Janab Abdul Mueed expired on 19.03.2015; according to Hammad (described as second defendant in OS 162/2017) *"after his death defendant no. 2 being the Senior Mutawalli of HLI in line, of succession of the Wakif Mutawalli as per the DEED being the only living successor of the Wakif Mutawalli took over as the Chief Mutawalli of HLI on 20.03.2015vide office order dt.*

20.03.2015." This is the precise point where the position gets muddied or blurred in a manner of speaking: both the Asad Mueed group and the Hammad factions assert that *per* Clause 3 of the Trust Deed, the eldest male descendent belongs to their respective group. The series of documents produced and relied upon by the rival groups, equally assert that the senior male descendent is from their group; the lone *Majlis-e-Ayan* minutes (of meeting) of 02-11-2016 does not shed any more light; in fact, it is part of a series of increasing acrimonious exchange of correspondence between the Assad Mueed/Abdul Majeed and the Hammad factions, with third parties and service providers (banks, employees, etc).

26. In *A. Arputham* (supra), a Division Bench had to consider whether trusteeship (created through testamentary devolution) was to be through male lineal primogeniture, or an "ambulatory" male primogeniture, where collegial primogeniture prevailed- somewhat as in this case. The bequest, creating the trust, in that case, was as follows:

> *"My elder son and after him the senior most male member amongst the hairs in his line, from generation to generation, shall manage the A schedule properties without subjecting them to any alienation and perform the charities properly."*

The court then construed the document, and held as follows:

> *"8. The contention raised on behalf of the appellant is that the trusteeship should devolve on the senior most male member for the time being among the descendants of Arulanandasami Nadar. There can be little doubt that the document prescribed a special line of succession for the management of the trust properties. The female members are excluded from management. So too, the junior members of the family. The substantial question to be decided in the case is whether the testator intended that the trusteeship should devolve by the ordinary rule of lineal primogeniture, as contended for on behalf of the respondent, or, whether he intended that the trusteeship should vest in the senior*

*most male member among Arulanandasami's descendants, as contended for by the appellant. The acceptance of the latter contention would mean that the testator intended a college to be created, as it were, from which the senior most should be selected-such college consisting of the male descendants of the testator's family. It is argued that that must have been the intention of the testator, as he had stated in the Will that the eldest male member in the family of Arulanandasami for the time being should manage the trust. But, a careful reading of the clause would show that that could not have been his intention at all. The word "***" does connote the idea of successive generations. Again, the clause: (*****) (that is, the eldest male heir at that time), indicates that the male heir should be to the deceased trustee and not to Arulanandasami. This is therefore a plain case of succession by primogeniture, where if the last owner dies leaving sons, his eldest son will be entitled to succeed. Lineal primogeniture is a rule of inheritance under certain systems of jurisprudence; it is not unknown to the customary Hindu Law. What, therefore, the testator intended is a hereditary succession where the rule of primogeniture is to be applied. Now, hereditary succession is succession by the heir to a deceased under the law; it is the law that fixes up the successor or the heir and not the terms of the document. For example, originally the office or right might have been created by a document. It might prescribe the first trustee and provide for succession as if it were the property of the latter. Or it might itself prescribe a mode of selection of a trustee beyond the lifetime of the first trustee. In the first case trusteeship will be hereditary. In Kalipada Chakrabarti v. Smt. Palani Bala Devi (1953) 1 M.L.J. 597 (S.C.). Mukherjea J., while defining a hereditary office, observed that*

> *"this means that the office goes from one person to another solely by the reason of the latter being a heir to the former."*

9. The document in the present case clearly indicates that there should be a single trustee. The words "" can only mean "when the succession opens or vacancy arises." In that context, the words will mean the heir of the last holder and not of the testator or his son.

10. The contention urged on behalf of the appellant is that the document prescribes a special or peculiar rule of succession whereby the rule of primogeniture would apply only to a limited extent; the office will devolve on the senior most among the existing descendants of Arulanandasami at the time when the office becomes vacant. To put it in other words, every person succeeding will obtain the trusteeship by virtue of the document and not by reason of his heirship to the previous holder. If this contention were to be accepted, it would mean that the trusteeship would not be successive but ambulatory, in the sense of going up and down the genealogical tree of the family. There is no warrant for this view in the document."

27. In *Faqruddin* (supra), the issue was whether a second son was recognized and therefore entitled to hold a spiritual office (with attendant temporal duties), i.e as *Sajjadanashin.* There were no rules, except that the congregation, (of the devout) on a certain date, recognizes the individual entitled to the office, which is then signified by the tying of a turban. A dispute arose (also somewhat complicated by the fact that one of the heirs of the late *Sajjadanashin* was a convicted felon. There existed a requirement in terms of local law, with respect to recognition of the office. The dispute which ultimately was decided by the Supreme Court, was upon the basis that the heirs of the senior member could not rely on Muslim personal law, which simply was that there is no rule of lineal primogeniture according to Quranic tradition. The Supreme Court held as follows:

"The law of inheritance amongst the Mohammedans is governed by their personal laws. If the properties are wakf properties, the offices of Sajjadanashin and Mutawalli are to be filled up in accordance with the law or the custom. If the properties are heritable, those who are the `Quranic Heirs' would be entitled to hold the said posts. Indisputably, the law of primogeniture has no application amongst the Mohammedans vis-a-vis their law of inheritance.

27. `Wakf' would mean taking out something out of one's ownership and passing it on to God's ownership dedicating its usufruct - without regard to indigence or affluence, perpetually and with the intention of obtaining Divine pleasure - for persons and individuals, or for institutions or mosques and graveyards, or for other charitable purposes.

28. It is beyond any doubt or dispute that a Mutawalli is the temporal head. He is the manager of the property. Office of Sajjadanashin, however, is a spiritual office. It has to be held by a wise person. He must be fit for holding the office.

29. The Rules, indisputably, are statutory in nature. His Highness of Maharaj used to exercise both executive and legislative policy. The Rules having been validated have a statutory force."

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

29. In the present case, the principal rule is in the opening part of Para 3 of the Deed: "*The first Chief Mutawalli will be appointed by Wakif Mutuwalli <u>thereafter the senior most male descendant in line of succession</u>*

*(of Wakif Mutawalli)"*the second – also an equally important condition is that such *senior most male descendent* should at the relevant time, i.e *"then holding an office of Mutawalli will be the Chief Mutawalli"*. Another important: perhaps significantly overlooked rule is also contained in the same provision, which is the sub-para (to Para 3):

> *"The Chief Mutawalli will be the Sadir (President) of the Majlis-e-Ayan and the descendant second in seniority to the Chief Mutawalli will be its Nazir/Secretary)."*

30. A complete reading of the provision (relating to succession) therefore, leads one to conclude that after the death of the *first* Chief Mutawalli, the senior most male in his line- and one who is also a *Mutawalli*, is entitled to succeed to the office. The last condition is important, because one might be the senior most male member; yet existing membership as a *Mutawalli* ensures that the *wakf* is spared the risk of experimentation and vagaries of administration by one alien to its governance. The last *internal* clue, which has assumed some importance in this case, is that during the tenure of a Chief Mutawalli (or any Chief Mutawalli) he is the President of the *Majlis-e-Ayan* and *"the descendant second in seniority to the Chief Mutawalli will be its Nazir/Secretary)"*. This condition is to be read along with the other two preconditions, because it occurs as part of the principle governing succession. The designation of a Nazir or Secretary, has to be of the "descendant second in seniority to the Chief Mutawalli". In other words, the successor to the office is also revealed during the lifetime of the holder, Chief Mutawalli, in the *persona* of the Nazir, *who is second in seniority to the Chief Mutawalli.*

31. Neither party has placed on record minutes of meetings, of HLI, prior to the death of the *Wakif Mutawalli,* or even undisputed minutes of

meetings of the time when the undoubted last Chief Mutawalli was in office. Yet, for the purpose of this case, what is relevant is that during the lifetime of the *Wakif Mutawalli,* on 4 July, 1995, he (the *Wakif Mutawalli,* Hakeem Abdul Hameed, had issued an order relating to HLI's governance, which also nominated *Mutawallis.* The relevant extract of that order is as follows:

> *"With this order, I hereby constitute the Board of Mutawallis for the Hamdard*
> *Dawakhana (Wakf) as under:*
> *1. Hakeem Abdul Hameed (Wakif Mutawalli): Chairman*
> *2. Mr. Abdul Mueed: Vice Chairman*
> *3. Mr. Hamaad Ahmed: Senior Mutawalli*
> *4. Mr. Abdul Majeed: Mutawalli*
> *5. Mr. Hamid Ahmed - can attend the meetings as an observer till he assumes office of Mutawalli.*
> *Mr. Abdul Majeed will be the Secretary of the Board of Mutawallis and he will issue the agenda and will record the minutes."*

32. In the opinion of this court, the designation of Abdul Majeed as Secretary or Nazir, i.e second in seniority of the Chief Mutawalli (whose position was known and accepted during the life time of the *Wakif Mutawalli*) *prima facie* is a strong circumstance that the plain "lineal male primogeniture" rule of succession applied to the office of Chief Mutawalli, rather than an uncertain collegial "ambulatory" lineal succession which is more likely to lead to disputes. The indication in the Deed and the conduct of the parties are strong circumstances to prefer this interpretation. This court, therefore, is of the opinion that the view of the single judge on this aspect was based on an incorrect interpretation of the relevant terms of the Deed.

33. There is authority for the proposition that *pendente lite,* an interlocutory decision should not be upset, absent unusual circumstances

(Ref. *Wander limited v. Antox India (Pvt.) Limited* 1990 (Supp) SCC 727). That principle (of general non-interference) is to be respected; however, if there is mis-appreciation of facts or serious omission in the consideration of materials – as in this case, the Division bench can exercise its appellate power and set aside the interlocutory determination (Ref. *Wockhart Ltd. v Torrent Pharmaceuticals Ltd.& Ors.* [2018 SCC Online 1778 (SC)]. In the present case, the omission by the single judge, in considering the entire provisions and also overlooking relevant documents constitutes justification for setting aside the impugned order.

34. This court is further of the opinion that there is also merit in the appellant's complaint that the impugned order is vulnerable because it is an *interim mandatory injunction,* ordered in a routine manner. The extraordinary and unusual manner of this *pendente lite* relief was highlighted in *Dorab Cawasji Warden v Coomi Sohrab Warden & others* 1990 (2) SCC 117 by the Supreme Court, in the following terms:

> *"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:*
>
> *(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.*

> *(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.*
>
> *(3) The balance of convenience is in favour of the one seeking such relief.*
>
> *17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."*

35. Recently, in *Samir Narain Bhojwani v Aurora Properties and Investments* 2018 SCC Online 1048 (SC), the rule in *Warden* was affirmed; speaking about it, the Supreme Court held as follows:

> *"**7.** The principle expounded in this decision has been consistently followed by this Court. It is well established that an interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction. (See Metro Marins v. Bonus Watch Co. (P) Ltd.[3], Kishore Kumar Khaitan v. Praveen Kumar Singh[4] and Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja (Dead) through LRS.[5])."*

36. The impugned order does not show any compelling reason or logic, why the single judge felt that the mandatory order, which was issued in Hammad's suit, was essential. It is also not as though the Hammad group of plaintiffs had been in control of the ERP and related systems, which the Abdul Majeed/Assad Mueed group had somehow taken hold of, unilaterally. The impugned order, therefore *did not preserve the status quo*

existing immediately prior to the institution of the suit, but created a new status quo. In the absence of any decisive finding that the Abdul Majeed/Asad Mueed group were rank outsiders, who had no manner of stake in HLI, such order could not have been made in interlocutory proceedings.

37. For the above reasons, this court is of the opinion that the impugned order cannot be sustained; it is hereby set aside. The passwords of the concerned programme/ERP and other systems shall handed over/made known to Abdul Majeed, who shall continue to control them and deal with them as before. However, in the overall interests of the HLI and other entities controlled by the Trust and its associated organizations, this court is of opinion that some measure of control in the form of a neutral overseeing administrative arrangement, or setting limits as to the powers of the parties, in regard to their functioning, is necessary. The single judge is therefore requested to hear the parties and make appropriate orders in this regard, preferably at earliest convenience. Further, the single judge may also consider appropriate orders in the form of undertaking regarding accounts.

38. The appeals therefore succeed, but subject to the above terms. The parties are directed to appear before the single judge, for further hearing, on 10.12.2018. The appeals are allowed in the above terms.

Order *dasti*.

S. RAVINDRA BHAT
(JUDGE)

A.K.CHAWLA
(JUDGE)

NOVEMBER 27, 2018