

## **Trust (Waqf) under Muslim Law:**

The word 'waqf', in its literal sense, refers to 'detention', 'stoppage' or 'tying up'. According to the legal definition, it means a dedication of some property for a pious purpose in perpetuity. The property so alienated should be available for religious or charitable purposes. Such a property is tied up forever and becomes non-transferable.

According to Muslim law, waqf originates from the principles established by the Prophet. It involves dedicating property to the ownership of God. Almighty, and the devotion of the profits for the benefit of human beings.

It has been observed in the case of *M Kazim vs. A Asghar Ali*, AIR 1932 11 Patna 238, that waqf in its legal sense means the creation of some specific property for the fulfilment of some pious purpose or religious purpose.

According to Abu Hanifa, "*Waqf is the detention of a specific thing that is in the ownership of the Wakif or appropriator and the devotion of its profits or usufructs to charity, the poor, or other good objects to accommodate a loan*".

Further, as defined by Abu Yusuf, waqf has three main elements:

- Ownership of God,
- Extinction of the founder's right and
- Benefit of mankind

Section 2 of the Mussalman Waqf Validating Act, 1913, defines waqf as "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by Muslim Law as religious, pious, or charitable."

The Waqf Act, 1954, Section 3(1) defines waqf as *the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognized by Muslim law as religious, pious, or charitable*".

A waqf can be either in writing or can be made by an oral presentation. In the case of an oral agreement, the presence of words emphasising the intention of the parties is a prerequisite.

## **Objectives of Waqf**

The objective of a waqf should be religious, charitable, or pious. The basic yardstick is what is deemed to be religious, charitable, or pious. There can be mixed purposes of a waqf; some may be lawful, and some of them may be unlawful. If a waqf is created for a lawful purpose, it would be a valid waqf, and an unlawful purpose would lead to an invalid waqf. The honourable Allahabad High Court in the case of *Mazhar Husain Khan vs. Abdul Hadi Khan (1911)* held that the unlawful part of the waqf must return back to wakif.

If a waqf is created for a particular purpose, that purpose should be served. But if that purpose somehow, because of some genuine reasons, cannot be fulfilled, then the second best purpose should be completed.

### **Parties to Waqf:**

There are majorly three parties to a waqf:

- The founder of a waqf is known as 'wakif'.
- The beneficiary for whom the waqf is created is known as the 'Mawquf 'alayh'. A beneficiary must be legally capable of owning a property.
- The person appointed for the administration of the waqf is known as 'Mutawalli'.

### **Essentials of Waqf:**

The essential conditions of a valid waqf, according to the Hanafi Law (Sunni Law), are:

#### Competence of wakif

- Wakif must be a Muslim
- He must be of a sound mind, meaning he should be able to understand the repercussions of his act.
- He should be a major (18 years or above) as per the Indian Majority Act, 1875.

#### Formalities

There are no formalities as such for the creation of a waqf. It can be created orally or by a deed. However, the intention to give property in waqf should be proved. The Privy Council in the case of *Beli Ram & Brothers and others vs. Chaudari Mohammad Afzal and others* (1948) observed that the validity of the waqf completely depends upon the intention with which the wakif creates that waqf. The court held that if there is a situation where the wakif does not put the waqf-nama into action, then it can be clearly presumed by the court that the dedication of the property was not the intention of the wakif and there was some other malafide intention of the wakif to retain the said property.

#### Waqf must be unconditional

The waqf created must not be contingent. The giving away of the property must be immediate and complete and should not be based on any condition. Contingent waqfs are invalid. The Allahabad High Court, in the case of *Khalil Uddin vs. Sir Ram and Ors.* (1933), held that there is only one situation where a condition is allowed and that does not make a waqf invalid, that is, payment of debts before giving away the property to waqf.

#### Waqf must be irrevocable

Hidaya provides that once the property is given for the purpose of waqf, it becomes inalienable, that is, it cannot be further sold, leased, or mortgaged. The property thereafter vests with God or Allah.

#### Permanent dedication of the property

The most important essential of a valid waqf is that it should be a permanent dedication of the property. It has the following prerequisites:

- There must be a dedication,
- The dedication must be permanent and
- The dedication must be of any property.

The wakif himself has the right to donate such property and give it for any purpose recognized under the Muslim Law. If the waqf is made for a limited period, it cannot be considered as a valid waqf.

in the case of *Mst. Peeran vs. Hafiz Mohd. Ishaq (1966)*, the honourable Allahabad High Court, while dealing with a leased property and whether that leased property can be converted into a waqf, held that a leased property cannot be given for a waqf, if given, would be invalid because it would not be a dedication of permanent character.

Wakif must be the owner of the property

Wakif must be the owner of the property; thereby, the property must belong to the dedicator completely. A leased or any mortgaged property cannot be given for the purpose of waqf. However, an anticipated property can be allowed for the purpose of waqf, provided the sale of the property is eventually completed.

### **Doctrine of Cypress:**

The word cypress means 'as nearly as possible.' The doctrine of cypress is a principle of the English law of trusts. Under this doctrine, a trust is executed, or carried out as nearly as possible, according to the objects laid down in it.

Where a settlor has specified any lawful object that has already been completed or the object cannot be executed further, the trust is not allowed to fail. In such cases, the doctrine of cypress is applied, and the income of the property is utilised for such objects that are as nearly as possible to the object already given.

The doctrine of cypress is also applicable to waqfs. Where it is not possible to continue any waqf because of

- lapse of time,
- changed circumstances,
- some legal difficulty or
- where the specified object has already been completed

The waqf may be allowed to continue further by applying the doctrine of cypress.

The Supreme Court in the case of *Ratilal Panachand Gandhi vs. State of Bombay (1954)* held that when a particular purpose for which waqf is created and due to any reason that particular purpose cannot be given effect, then the courts can step in and allow the trust to be executed in cypress, that is, in a way as nearly as possible to that which the author of the trust intended.

### **Mutawali:**

The person who is appointed for administration of “waqf” is known as Mutawali.

Any person who has attained the age of majority, is of a sound mind, and is capable of performing the functions to be discharged under a particular waqf can be appointed as a Mutawalli of the waqf. A foreigner cannot be appointed as a trustee of property in India.

Allahabad High Court in the case of *Ijaz Ahmed vs. Khatoon Begum (1917)* held that where the office of Mutawalli is hereditary, then in that case, even a minor can be appointed as a Mutawalli.

A woman can also be appointed as a Mutawalli. The Privy Council in the case of *Shahar Banoo vs. Aga Mohomed Jaffer Bindaneem (1906)* held that there is no prohibition against a woman being appointed as a Mutawalli, but the appointment depends completely upon the nature of waqf. For example, if the purpose of waqf is religious activities, then a woman cannot be appointed.

Furthermore, Madras High Court in the case of *Munnawaru Begum Sahibu vs. Mir Mahapalli Sahib and two others (1918)* and Calcutta High Court in the case of *Kassim Hassan vs. Hazra Begum (1920)* held that women are allowed to be appointed as Mutawalli. If a woman is appointed and there are certain spiritual or religious functions that a woman cannot perform, then in that case, a deputy should be appointed to fulfil such religious functions. The same was upheld by the Supreme Court in the case of *Mohd. Zainulabudeen (Since Deceased) by LRs. vs. Sayed Ahmed Mohindeen and Ors. (1989)* that a woman can be appointed a Mutawalli anywhere and a deputy can be appointed to fulfil or perform the spiritual functions of the waqf.

## Powers and duties of Mutawalli

Being the manager of the waqf, he is in charge of the usufruct of the property. He has the following rights:

- He has the authority to use the usufructs to the best interest of the waqf. He is authorised to take all reasonable actions in good faith to ensure that the end beneficiaries are able to enjoy all the benefits from the waqf. As he is not the owner of the property, therefore he is barred from selling the property. However, he could be bestowed upon such rights by the wakif by the explicit mention of them in waqf nama.
- He can alienate the waqf property by giving genuine reasons and taking prior sanction from the court. If he alienates the property without the permission of the court, it would not be *void ab initio*; rather, it would be voidable at the instance of any of the parties. If the court retrospectively confirms the alienation, then it would become valid.
- He can take authorisation from the court to sell or borrow money by showing the existence of appropriate grounds or the existence of urgency.
- He can file a civil suit to protect the interests of the waqf. Before the Waqf Act, 1934, a Mutawalli could file a suit at any time. But, after the 1934 Act, waqf board files suits.
- He also has the power to lease the property for the agricultural purpose for less than three years and for the non-agricultural purpose for less than one year. He can get the term extended with due permission from the court. If the waqf nama provides for a longer period of lease, then that would be valid. Otherwise, in the rest of the situations, the permission of the court is a must. Furthermore, if Mutawalli makes an invalid lease, it can be confirmed afterwards by the court and made valid.
- He has complete power with regard to the legal and economic aspects of waqf.

## Removal of Mutawali

By the court

The court's power to remove Mutawalli is absolute. A suit has to be filed in the district court, and the procedure laid down under the Code of Civil Procedure, 1908 would be applicable to such a suit. Mutawalli can be removed by the Court only on the following grounds:

- He denies the waqf character of the property and sets up an adverse title to it in himself.
- He, although having sufficient funds, neglects to repair the waqf premises and allows them to fall into despair.
- He causes damage or loss to the waqf property or commits a breach of trust knowingly and intentionally.
- He is rendered insolvent.

By the waqf board

According to Section 64 of the Waqf Act, 1995, the Waqf Board has the authority to remove the Mutawalli from his office under the following conditions:

- Of unsound mind
- Convicted of the offence of criminal breach of trust
- Convicted under Section 61 of the Act more than once
- Undischarged insolvent
- Drug addict
- Act against waqf in legal proceedings
- Neglect the duties of waqf
- Misappropriates property of the waqf

By the Wakif

There are different views with regard to the removal of Mutawalli by the wakif. According to Abu Yusuf, even if the wakif has not reserved a right to remove the Mutawalli in the waqf

deed, he can nevertheless remove the Mutawalli. However, Imam Mohammed differs on this and believes that unless there is a reservation, wakif cannot do so.

However, the general rule applicable is that if the wakif is alive, Mutawalli can be removed at any time, but if the wakif is dead, then Mutawalli cannot be removed until and unless the waqf nama clearly provides for the same.

### **Kinds of Waqf:**

There are broadly two kinds of waqf:

#### **Public waqf**

It is created for the public, religious, or charitable purposes. The end benefit goes directly to the people at large, and the descendants and children of the wakif cannot take its benefit.

#### **Private waqf**

This type of waqf is created for the settler's own family and his descendants and is also known as 'waqf-alal-Aulad'. It is a kind of family settlement in the form of a waqf. In the words of the Prophet, "*the most excellent sadaqua that a man can bestow upon his family is waqf-alal -aulad*". Till the heirs are alive, the property remains with them. On extinction of the family, the residue goes to the poor; that is, the ultimate benefit goes to charity.

Ijma gave existence to waqf-alal-aulad. Under Muslim law, there is a duty to maintain one's wife, children, parents, and those relatives who are unable to take care of themselves. As per the Prophet, "*when a Muslim bestows on his family, it becomes alms; though he is not giving to charity or poor people, it is a pious obligation*".

In the case of *Abul Fata Mahomed Ishak and others vs. Rasamaya Dhur Chowdhuri and others (1891)*, two Muslim brothers executed a deed that purported to be a waqf of immovable property for their children and descendants from generation to generation. If there was a complete extinction of defendants, then the property would go for the benefit of orphans, poor, widows, et cetera. The honourable Privy Council held that the extinction of all the defendants seems illusionary and too remote and uncertain, as the family may not be extinct for 'n' number

of years, and within that time, the property may completely vanish. It was held that such a creation of waqf is nothing but hood winking of the law. Hence, such a waqf cannot be accepted.

After this judgement of the Privy Council, there was an uproar among Muslims. The judgement was not in consonance with the ancient Muslim law. To reverse the above judgement, the Mussalman Waqf Validating Act, 1913, was passed. The act is discussed in detail further in the article.

Kinds of waqf from the view of their purpose

#### Waqf Ahli

This waqf is basically created to cater to the needs of the waqf's founder's children and their descendants. But the nominees do not have a right to sell or dispose of the property, which is the subject matter of waqf.

#### Waqf Khayri

This kind of waqf is established for charitable and philanthropic purposes. The beneficiaries in such a kind of waqf may include people belonging to the upper economic sections of society. It is used as an investment for building mosques, shelter homes, schools, madrasas, colleges, and universities. All of this is built to help and uplift the economically challenged individuals.

#### Waqf al-Sabil

The beneficiaries of such a waqf are the general public. Although similar to waqf Khyari, this type of waqf is generally used for the establishment and construction of public utilities (mosques, power plants, water supplies, graveyards, schools, etc).

#### Waqf al-Awaridh

In such a kind of waqf, the yield is held in reserve so that it can be used in case of emergency or any unexpected events that affect the livelihood and well-being of a particular community in a negative manner. For example, waqf may be assigned to cater to the specific needs of society, like providing medication to sick people who cannot afford expensive medicines.

Waqf al-awaridh may also be used to finance the maintenance of the utility services of a particular village or a neighbourhood.

Kinds of waqfs from the view of its output nature

Waqf-Istithmar

Such a kind of waqf is created for using the assets for investment purposes. The said assets are managed in such a way that the income is applied for constructing and reconstructing waqf properties.

Waqf-Mubashar

The assets of such a waqf are used to generate services that would be of some benefit to some charity recipients or other beneficiaries. Examples of such assets include schools, utilities, etc.

**Waqf During death or illness (marz-ul-maut)**

Similar to gifts made while the donor is on the deathbed, a waqf created under these circumstances can apply to up to one-third of the property without the consent of the heirs.

**Revocation of Waqf:**

Under Muslim law, a waqf is a permanent dedication of property for pious, religious, or charitable purposes. Once a waqf is validly created, it becomes absolute, irrevocable, and perpetual. The property is considered to be vested in God, meaning it cannot be taken back, sold, or inherited by the founder. Though the founder cannot revoke the waqf to reclaim the property, there are limited circumstances where changes can be made:

- **Change of Objects/Beneficiaries:** If a waqf deed explicitly grants the founder the power to alter the beneficiaries or change the mode of administration, the founder is legally allowed to modify these specific terms.
- **Exchange or Sale (Istibdal):** A waqf property cannot typically be sold. However, in modern legal frameworks (such as under the Waqf Act in India), a mutawalli or manager can exchange

or sell waqf property if it has become entirely useless or requires relocation, but this strictly requires prior permission from the court or the relevant State Waqf Board.

### **The Mussalman Waqf Validating Act, 1913**

This Act was enacted on 7 March 1913 to remove doubts regarding the validity of family waqfs (Waqf-alal-Aulad) created by Muslims in India. The Act legally recognized the right of Muslims to dedicate property for the benefit of their families, children, and descendants, provided that the ultimate benefit was reserved for charitable or religious purposes recognized under Muslim law.

#### Background

Before 1913, the decision of the Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhury had cast doubt on the validity of family waqfs by holding that a waqf substantially benefiting the settlor's family was not a valid charitable dedication. The 1913 Act was enacted to overcome this position and validate such arrangements under Muslim law.

#### Objectives of the Act

1. To declare the rights of Muslims to create waqfs in favour of their families and descendants.
2. To validate family waqfs that ultimately benefited the poor or other religious, pious, or charitable purposes.
3. To remove uncertainty created by judicial decisions regarding the legality of such waqfs.

#### Important Provisions

##### Section 2 – Definition of Waqf

"Waqf" means the permanent dedication of property by a Muslim for any purpose recognized by Muslim law as religious, pious, or charitable.

##### Section 3 – Power to Create Certain Waqfs

A Muslim may create a waqf:

- For the maintenance and support of his family, children, and descendants.

- A Hanafi Muslim may also reserve benefits for his own maintenance during his lifetime or for payment of debts.

However, the ultimate benefit must be reserved expressly or impliedly for the poor or for another religious, pious, or charitable purpose of a permanent character.

#### Section 4 – Remoteness of Benefit

A waqf is not invalid merely because the charitable benefit is postponed until after the extinction of the settlor's family line.

#### Section 5 – Saving of Customs

The Act does not affect any local or sectarian customs prevailing among Muslims.

#### Significance

- Recognized Waqf-alal-Aulad (family waqf) as valid under Indian law.
- Protected Muslim personal law concerning property dedication.
- Ensured that family maintenance and charitable purposes could coexist in a waqf arrangement.
- Became a foundational legislation for later waqf laws, including the Mussalman Waqf Act, 1923, Waqf Act, 1954, and Waqf Act, 1995.

#### Critical Evaluation

While the Act successfully validated family waqfs, critics argued that it allowed property to remain tied up within families for generations, potentially restricting its productive use. Supporters, however, viewed it as an essential protection of Muslim religious and charitable traditions and an affirmation of Muslim personal law.

#### Conclusion

The Mussalman Waqf Validating Act, 1913 was a landmark legislation that restored the legality of family waqfs in India. It balanced private family benefits with the requirement that the property ultimately serve charitable or religious purposes, thereby harmonizing Muslim personal law with statutory recognition.

