

## Chapter Thirteen

### Waqf

#### 1. Origin and development of *Waqf*

The doctrine of *waqf* has been recognized and enforced in the Islamic legal system from the earliest times. Its origin is traced back to the direct prescriptions of the prophet (peace be on Him). Hazrat Umar (R) sought the advice from the prophet regarding his intention to make the most pious use of a piece of land (*waqf*) of his own situated at Khaibar, which was allotted to him. At this the prophet advised him, "Tie up the property (corpus) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance, devote its produce to your children, your kindred and the poor in the way of Allah."<sup>34</sup> In accordance with the advice of the prophet, Hazrat Umar dedicated (*waqf*) the property in question and it continued in existence for several centuries until the lands became waste.<sup>35</sup>

Besides the above *Hadith*, Quranic provisions are also available in favour of charity, which can be treated as the basis of *Waqf*. The provisions are-

- (a) "And in their (rich persons) wealth the beggars and outcasts (deprived) have due share."<sup>36</sup>
- (b) "By no means you shall attain righteousness unless you give (freely) of that which you love; and whatever you give of a truth Allah knows it well."<sup>37</sup>

Thus the above verses of the Holy Quran and the stated *Hadith* laid the foundation of *waqf* (charity) and so the institution of *waqf* is

<sup>34</sup> Ameer Ali cited this *Hadith* in *Muhammedan Law*, Vol. 1, P. 192.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Al-Quran*, 51:19

<sup>37</sup> *Al-Quran*, 3:92

interwoven with the entire religious life and social economy of the Muslims.<sup>1</sup>

Though the institution of *waqf* owed its origin to the first century of Al-Hizri i.e. after the demise of the prophet, but rigid legal shape took place in the second century A.H. Some western writers consider that this institution was prevalent even before the time of the last prophet. But this view is not acceptable. The fact is this that the institution of *waqf* has developed with Islam and there is no evidence that such a complex system of appropriating usufruct as a life interest to varying and successive classes of beneficiaries existed prior to Islam.<sup>2</sup>

#### 2. Definition of *Waqf*

The term '(*waqf*)' literally means 'detention'. But juristically it means "the dedication of consecration of property, either in express terms or by implication, for any charitable or religious object, or to secure any benefit to human beings".<sup>3</sup> It has also been defined by different Jurists and also by the *Waqf Act*.

According to Abu Hanifa, '*Waqf*' is the detention of a specific thing in the ownership of *waqif* or appropriator and the delivering or appropriating of its profits or usufruct in charity on the poor or other good objects.<sup>4</sup> But Abu Yusuf defines *waqf* that it is the detention of a thing in implied ownership of Almighty Allah, in such a manner that its profits may be implied for the benefits of human beings, and the detention when once made, is absolute, so that the thing dedicated can neither be sold, nor given nor inherited.<sup>5</sup> Imam Muhammad, another disciple of Abu Hanifa, agrees with Abu Yusuf on this point. But he adds a point that the right of the *Waqif* does not cease in the property until he has appointed a *Mutawalli* and delivered it into his hands. The view of Abu Yusuf has been accepted in India-Pakistan sub-continent and now a *waqf* is valid though a *Mutawalli* is not appointed. Section 2 of the *Mussalman Wakf Validating Act*, 1913 defines *waqf* as, "Wakf means the permanent dedication by a

<sup>1</sup> Ameer Ali, Vol. I, P. 193.

<sup>2</sup> Syed Khalid Rashid, *Muslim law*, P. 210.

<sup>3</sup> Ameer Ali, Vol. I, P. 194.

<sup>4</sup> *Op.cit.*, P. 195.

<sup>5</sup> *Ibid.*



person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable".

*Waqf*, therefore, is the permanent dedication of any property, movable or immovable, by *waqif* or appropriator for the benefit of human beings with the intention of attaining the pleasure of Almighty Allah.

### 3. Characteristics of *Waqf*

A *Waqf* should have the following characteristics as revealed from its definition:

#### (i) Religious motive

The purpose of *waqf*, according to Islamic law, must be pious, religious or charitable. Thus construction of Church or temple and their maintenance is void, because it is opposed to the tenets of Islamic principle. Without religious motive, a *waqf* is not valid. The *waqf*, therefore, must have religious motive.

#### (ii) Perpetuity

A *waqf* or dedication must be permanent. A *waqf* for a particular period, for example, for twenty years, is invalid. Besides, the purpose for which a *waqf* is created must be permanent in character, like the building and dedicating of a mosque; because a mosque is built for perpetuity and not for limited period of time.

#### (iii) Ownership of the *Waqf* property

As the *waqif* dedicates his property to Allah, so naturally its ownership is transferred from the *waqif* to Allah. The *Waqif* is, therefore, extinguished from the title of the *Waqf* property and its fruits are to be devoted to the benefit of mankind, i.e. its beneficiaries. The legal fiction that the *waqf* property, public or private, vests in Allah must be upheld.

#### (iv) Utilization of Usufructs

The income accruing from the *waqf* property is to be used for the purpose for which it was created.

### 4. Statutory laws relating to *waqf*

During British regime several laws on *waqf* were enacted for proper administration and management of *waqf* property. During Pakistan period some Acts were also passed. Some of the important Acts passed by Central and state or provincial legislature for the recognition, protection and administration and management of *waqf* property are as follows:

- (i) The Mussalman *Wakf* Validating Act, 1913. (Act of No. VI of 1913).
- (ii) The Mussalman *Wakf* Act, 1923 (Act No. XLII).
- (iii) The Mussalman *Wakf* Validating Act, 1930 (Act No. XXXII of 1930).
- (iv) The Bengal *Wakfs* Act, 1934 (Act No. XIII of 1934)
- (v) The U.P Muslim *Wakfs* Act, 1936 (Act No. XIII of 1936)
- (vi) The Punjab Muslim *Waqf* Act, 1952 (Act No. VI of 1952)
- (vii) The *Wakfs* Act, 1954 (Act No. XXIX of 1954)
- (viii) The *Waqf* Ordinance 1962 (Ordinance No. 101- 1962)

The above laws were enacted by Central or Provincial legislature and were in force either for whole of India or for a particular State or province. The *waqf* Ordinance, 1962 was promulgated in Pakistan to amend and consolidate the laws relating to *waqf*. This Ordinance is still in force in Bangladesh and is applicable for *waqf* created before or after this Ordinance. Large number of *waqf* estates in Bangladesh are administered by this Ordinance.

### 5. Kinds of *Waqf*

Under Islamic law, there are three kinds of *waqfs*-

- (i) Public (ii) Quasi-public (iii) Private

Justice Ameer Ali classified *waqf* into three-<sup>6</sup>

- (i) In favour of the rich and the poor alike. (public)
- (ii) In favour of the rich and then for the poor (*Quasi*-public)
- (iii) In favour of the poor alone (private)

<sup>6</sup> Ameer Ali, Muhammad Law, Vol. I, P. 193.



(i) **Public waqfs:** A public *waqf* is one under which property is dedicated to Allah for the use of human beings. The dedication is for the public at large without any restriction regarding its use. Bridges, roads, wells, ponds etc. are examples of public *waqfs*. These are used irrespective of religion, caste, nationality etc.

(ii) **Quasi-public waqfs:** Quasi-public *waqf* is one under which both private and public type of *waqfs* are blended.<sup>7</sup> It is partly public and partly for the benefit of a particular individual or class of individuals, may be the members of the settler's family. In order to determine the type of *waqfs*, regard is to be had to its main purposes and the primary intention of its creator. The *waqf* deed itself offers the best guidance in this regard.<sup>8</sup>

(iii) **Private waqfs:** A private *waqf* is one under which the income of the property is for the use of the descendants of the person who has dedicated the property and on their extinctions the property is to go Allah completely. Such a *waqf* is termed as *Waqf-alal-aulad* or family *Waqf*. Such type of *waqf* is not so much popular in Bangladesh.

#### 6. Subjects of Waqfs

Islamic law divides *waqf* property into the following:<sup>9</sup>

- (a) Immovable;
- (b) Movable which is accessory to immovable property.
- (c) Movable property which is not consumed in the process of the use and *waqf* of which is customary;
- (d) Articles which are not consumed in the process of its use, but *waqf* of which is not common.
- (e) Movable property which is consumed in the process of its use.

Thus any property may be the subject of a *waqf*. A valid *waqf* may be created of immovable property and movables such as shares of

<sup>7</sup> 16 DLR 1(DB)

<sup>8</sup> PLD 1964, Dhaka 575.

<sup>9</sup> Aziz Ahmad, Islamic Law in Theory and Practice, P. 390.

company, promissory notes and even money.<sup>10</sup> *Waqfs* of the following, movables are valid:<sup>11</sup>

- (i) Quran for reading in mosques;
- (ii) working cattle's and instruments of husbandry;
- (iii) War horses, camels and other animals;
- (iv) Swords;
- (v) Chest of money for loans to the poor;
- (vi) Share in companies; and
- (vii) Securities etc.

The property dedicated must possess two characteristics-(i) it must be tangible property and (ii) it must be capable of being used without being consumed. Under the *Waqf* Act, 1913, 'any property', may be dedicated, means and includes almost every species of property. So the above mentioned movables can validly be dedicated. The property dedicated must be in the ownership and possession of the *waqif* (dedicator).

#### 7. Objects of Waqf

The object of *waqf* must be any object recognised by Muslim law as religious pious or charitable. All works of religious, charity or public utility can be proper objects of a *waqf*. Religious purposes are known to every Muslim, which have been defined in the Quran and elaborated in the *Hadith*. It is now a settled issue that the object of *waqf* should not be in conflict with the clear religious policy of Islam. Thus religious purposes do not include such dedications as "solely to the worship of Allah (*Huqaullah*)"<sup>12</sup> But the service of man and good of humanity (*Haqul Ebad*) also constitute pre-eminently the service and worship of Allah. Thus everything dedicated to Allah is, in fact, for the good of mankind.

Charitable objects include giving to one's own family and descendants and such things in which rich and poor alike are interested. These are Mosque, *Imambara*, College, schools, Madrasa, hospital

<sup>10</sup> PLD 1958 Lah. 824.

<sup>11</sup> AA.Fyzee, Outlines of Muhammadan law, P. 291.

<sup>12</sup> Amcer Ali, Vol. I, P. 274.



reservoir, roads, bridges, graveyard etc. The valid objects of *waqf* are of two types-

(a) Based on *shariya* and

(b) Judicial decisions.

(a) Based on authoritative texts like Hedaya, Alamgiri etc.

- (1) Mosques and provisions for imams to conduct prayer therein;
- (2) Maintenance of educational institutions like colleges, schools, Madrasah and salaries of their staffs;
- (3) Construction of aqueducts, bridges and caravanserais;
- (4) Distribution of alms to the poor and the needy; and
- (5) Financing the Haj pilgrimage for the poor.

(b) Based on judicial decisions

- (1) Observance of the death anniversaries of the *waqif* and members of his family.<sup>13</sup>
- (2) Reading of Holy Quran in public and private places.<sup>14</sup>
- (3) Providing of maintenance to poor relations and dependants.<sup>15</sup>
- (4) Celebrating of the birth of Ali *Murtaza*;<sup>16</sup>
- (5) Maintenance of *Khankah*<sup>17</sup>
- (6) Lighting in a mosque;<sup>18</sup>
- (7) Repairing of *Imambara*;
- (8) Celebration of Muharrom;<sup>19</sup>
- (9) Construction of *ribat* in Mecca for the benefits of the pilgrims.<sup>20</sup>

<sup>13</sup> Satter Ismail V. Hamid Sait, AIR 1944, Md.. 504.

<sup>14</sup> Ibid.

<sup>15</sup> Mukaram V. Anjuman-un-Nissa, AIR 1924, All. 45.

<sup>16</sup> Biba gan V. Kalb Hussain (1909) 31 All. 136.

<sup>17</sup> PLD 1966 Lah. 978

<sup>18</sup> Gobinda Chandra V. Abdul Majid (1944), 1 Cal. 329; PLD 1968 Lah. 824.

<sup>19</sup> Syed Ali V. Syed Muhammad Ali (1928) Pat. 7.

<sup>20</sup> Muhammad Yusuf V. Muhammad Sadiq (1933) Lah. 501.

(10) Grants to *Idgah*.<sup>21</sup>

(11) Expenses of keeping *Tazia*

(12) Salary and pension of servants<sup>22</sup>

(13) Perpetual upkeep of the tomb of a saint

Different courts in their judgment approved most of the above objects, though however, it is submitted, some of them are not as per Islamic principles. In Indian sub-continent, there are large number of *Durgah*, *Majar* (grave), *Kankah* etc which are maintained against the clear provisions of Islam. *shirk* (Partnership), *Bidyat* (innovation) and anti-Islamic activities take place in the name of *Ibadat* (worship). Islam not only discourse all these institutions, but also prohibits them as it prohibits the construction and maintenance of a church or temple. However, jurists are of opinion that charitable objects include giving financial assistance to one's own family and descendants and such other things in which rich and poor may be equally interested, for instance, mosque, Madrasa, College, school, hospital, roads, bridge, graveyard etc.

### 8. Creation of *Waqf*

In Muslim Law there is no set formula for creating a *waqf*. The only requirement is a clear intention of creating a *waqf* for any lawful purpose and a declaration by the *waqif* to that effect and the appointment of a *Mutwali*.<sup>23</sup> A *waqf* may be made orally or in writing. It is enough that from the nature of the grant it can be inferred that a *wakf* of the property was created.<sup>24</sup> Where such intence cannot be drawn from the terms of the grant, the statements and the conduct of the grantee and his successors's expression of his intention and the method in which the property has been treated are worthy of consideration.<sup>25</sup> If the founder of institution suffers the members of a particular community or the public at large to use a premises without interruption for a religious or pious or charitable purpose for any sufficient length of time, then under the Shariah Law dedication will be presumed. Thus where the shrine is of a saint, *Pir*, and it has been treated as a place of pilgrimage by devotees

<sup>21</sup> Kulsumbi V. Muhammad Abdus atar (48) A.N. 92

<sup>22</sup> Abdul Wahah V. Sughra Begum AIR 1932 All. 248.

<sup>23</sup> PLD 1967 Lah. 1221 (D.B).

<sup>24</sup> AIR 1940 Oudh 18; AIR 1947 Oudh 17; AIR 1936 Oudh 465; AIR 1935 Lah. 251;

<sup>25</sup> AIR P.C. 109.



who are accustomed to perform or participate in religious ceremonies performed there, then it will be difficult to resist the inference that the place has been dedicated for such a purpose.<sup>26</sup>

Declaration of Wakf is sufficient. A bona fide declaration by a *wakif* is sufficient to create a valid wakf and it is not necessary that possession should be delivered to the *Mutawalli*. Declaration of *waqf* may be made by the *waqif* himself or by his agent.

'*Bonafide*' declaration. Declaration of *wakf* must be accompanied by an intention to give effect to it.<sup>27</sup> If it is found that the *waqif* had no intention to dedicate the property and that there was evidence that he had never acted upon the *waqf* deed or had dealt with the property as his own, then the Court would be justified to draw an inference that no dedication to *waqf* was ever intended by him and that the deed was merely designed to provide a shield against possible claims which the *waqif* anticipated might be made against him. Where there is neither a declaration of *wakf* nor delivery of possession, a mere intention to set apart property for charitable purposes is not sufficient to create a *wakf*, even if the income of the property is applied to the intended purpose. When once there is an effective dedication in *wakf* it cannot be revoked; and it is obvious that breaches of trust on the part of a trustee, however numerous, and extending over however long a period cannot put an end to the trust. Where the *waqif* has an intention to create a trust, and the deed contains a statement that *wakif* had divested himself of the possession or the property and taken over the management thereof in the capacity of a *Mutawalli*, it was held there was no ground on which that dedication could be disregarded, and the *waqf* was held to be valid although the *waqif* had contended that it was not.<sup>28</sup> An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the *waqf* was not meant to be acted upon. Evidence of intention is admissible if the *waqf* is not created by a document. If the *waqf* has been created by a document the evidence of intention is admissible only when the language of the document is ambiguous.<sup>29</sup>

<sup>26</sup> PLD 1971 S.C. 401.

<sup>27</sup> PLD 1949 P.C. 8.

<sup>28</sup> PLD 1949 P.C. 8.

<sup>29</sup> Shaukat Mahmood, Principles and Digest of Muslim Law, P.157.

### 9. Waqf of Musha (undivided property)

A *Musha* or an undivided share in property may form the subject of *waqf*, whether the property may form the subject of *waqf* or whether the property be capable of division or not. This opinion is approved by Imam Abu Yusuf and it is also the decision of different courts. But the exception is that a *waqf*, of a *Musha* for a mosque or graveyard is not valid, whether the property is capable of division or not. But Imam Muhammad is of opinion that a *waqf* of a *Musha* in property capable of partition is invalid, for, he holds that delivery of possession by the *waqif* to a *Mutawalli* is a condition necessary for the validity of a *Waqf*. However, the Calcutta and Allahbad High Courts held the opinion that a *waqf* of *Musha* for maintenance of a Mosque is valid.<sup>30</sup>

But the more correct view is that the *waqf* of *Musha* for purpose like a mosque or burial ground is not valid for the reason that the continence of participation in anything is repugnant to its becoming the exclusive right of Allah, because, this leads to chaos and confusion among the beneficiaries as well as those who share in the undivided property. Even a mother is not competent to execute *waqf* as guardian for or on behalf of the minor child and a *waqf* so executed is illegal and void,<sup>31</sup> because the property remains undivided.

### 10. Waqf and trust

There is good deal of similarity between a *wakf* and a trust, but there are also vital and substantial differences. It is not permissible to import, *in toto*, the Trusts Act, 1882, or the concept of the law of trust as it is understood in England, into the principles of *wakf* in Muslim Law.<sup>32</sup> A trust is always for the benefit of its author and it does not exhaust the trust property, while in a *waqf*, a charitable purpose is always presumed and the *cy-pres* doctrine is applied. The *waqf* property does not vest in the trustee. A *waqf* property cannot be given over to a trust. It is dedicated to Allah and its handing over to trust cannot be permitted because the trust is always for the benefit of particular beneficiaries. The difference between *waqf* and trust is given in the following table.<sup>33</sup>

<sup>30</sup> Mahomad Auyub Ali V. Amir Khan (1939) 43 Ac 268.

<sup>31</sup> Gyasuddin V. Allah Tala waqf Mahsana, AIR 1986, All. 39.

<sup>32</sup> PLD 1967 Dacca 1(F.B).

<sup>33</sup> Shaukat Mahmood, Principles and Digest of Muslim Law, P. 152.



## Trust

## Waqf

- |  |   |
|--|---|
| 1. No particular motive necessary.   | is 1. It is generally made with a pious, charitable or religious motive.  |
| 2. The founder may himself be beneficiary.   | 2. The wakif cannot reserve any benefit for himself except to some extent under Hanafi Law.   |
| 3. It may be for any lawful object.  | 3. The ultimate object must be some benefit of mankind.   |
| 4. The property vests in the trustee.  | 4. The property vests in Allah  |
| 5. A trustee has got a larger power than a <i>Mutawalli</i> .  | 5. <i>Mutawalli</i> is only a Manager or Superintendent.  |
| 6. It is not necessary that a Trust must be perpetual, irrevocable or inalienable.                                     | 6. A <i>waqf</i> is perpetual, irrevocable and inalienable.   |
| 7. It results for the benefit of the founder when it is incapable of execution and the property has not been exhausted | 7. The <i>cy-pres</i> doctrine is applied and the property may be applied to some other object.   |
| 8. It is regulated by Trust Act.   | 8. Rules regulating Trusts cannot be applied to <i>wakfs</i> . Muslim <i>waqfs</i> are governed by special provisions of Muslim Law applicable to it. |

11. Qualifications of a *Waqif* (dedicator)

'*Waqif*' means a person who creates a *waqf* by dedicating his property to Allah so that a section of human beings can accrue benefit out of that property.

A *Waqif* must possess certain qualifications which are as follows:

- (i) *Waqif* should be a Muslim;
- (ii) He must be a man of sound mind;
- (iii) He must have attained majority;
- (iv) He must not be insolvent;
- (v) His debts must not be more than his assets. He should not dedicate any property of his own with the intent to defraud his creditors, because Islam lay stress on repayment of loan first. So the *waqf* will be invalid;
- (vi) A *waqif* cannot dedicate his property in favour of an idol or temple;
- (vii) The *waqif* shall be the owner of the property which he intends to dedicate.

A *waqif* has the full right to lay down conditions in which the income of the *waqf* property is to be used. Among others he can lay down the following conditions: -

- (a) The income of the *waqf* property shall be distributed among his male descendants to the exclusion of the females and vice versa.
- (b) The income of the *waqf* property shall be distributed among his descendants who follow a particular school of thought. For instance, a *Mu'tzila* can lay down that any of his descendants who will relinquish the *Mu'tzila* creed shall not be entitled to the income of the *waqf* property.
- (c) The income of the property shall be given to 'Z' for example, during his lifetime and to 'A' after his death and so on. In short successive life-estates may be created.
- (d) The *waqif* may also lay the procedure for the appointment of a *Mutawalli* during or after his death.
- (e) The *waqif* may appoint himself as the first *Mutawalli* and may reserve to himself the right to dismiss or appoint a *Mutawalli*.
- (f) The *waqif* may reserve the right to alter the beneficiaries or alter their shares.

12. Essential elements of a valid *waqf*

The following requisites must be fulfilled for the validity of a *waqf*:

- (i) There must be a clear intention on the part of *wakif* to create the *wakf*.
- (ii) *Wakif* must declare his intention, either orally or in writing.
- (iii) *Wakif* must be the owner of the property to be dedicated as *Waqif*.
- (iv) The *wakf* must be perpetual, although, no express mention of perpetuity of *waqf* is essential. If *Wakfnama* says that the *wakf* is for, say, 50 years, it is invalid.
- (v) The objects of *wakf* should not be in conflict with the Islamic principles.
- (vi) The *wakif* must be of sound mind and major, and a Muslim. However, *wakf* by non-Muslims are recognised under certain conditions.
- (vii) *Wakf* must not be contingent or conditional.
- (viii) Delivery of possession of the property dedicated shall take place
- (ix) The right of the *waqif* over the *waqf* property shall be extinguished.



### 13. Legal consequences of *Waqf*

i. ***Waqf Irrevocable***- A *waqf* cannot be revoked after its dedication is final. Dedication in which the dedicator reserves the power of revocation except in the case of a mosque void *ab initio*. In the case of a mosque, the dedication is valid and the condition is invalid.<sup>34</sup>

ii. ***Waqf Property becomes Inalienable***.-When a property is dedicated and becomes *waqf* it cannot be disposed of by gift or sale or mortgaged by *waqif*, his heirs or *Mutawalli* though lease for a limited period is permissible.

iii. ***Waqif's title extinguished***.- The right of the *waqif* in the property is extinguished and he cannot resume its ownership.

iv. ***Not subject to inheritance***.- As the *waqif's* title is extinguished in the *waqf* property, it is not subject to inheritance.<sup>35</sup>

v. ***Exemption from attachment and sale in execution of decree***.- *Waqf* property cannot be attached or sold in execution of any decree against *waqif* or *Mutawalli* or beneficiaries.<sup>36</sup>

vi. ***Waqf property liable to adverse possession***- If the Muslim community is apathetic in the matter and allows an encroachment to remain on *waqf* property for more than twelve years, then the person in possession acquires title by adverse possession.<sup>37</sup>

vii. ***Alienation with permission of Court***.- A *Mutawalli* can in case of necessity alienate the *waqf* property with the permission of the *Qadi*.<sup>38</sup>

### 14. Appointment of *Mutawalli*

Generally a *Mutawalli* is appointed either by the *waqif* or by the Court for proper management and administration of the *waqf* property. All rights of *waqf* property, under Islamic law, pass out of the *waqif* and vest in the Almighty Allah. *Mutawalli* is merely a manager or superintendent of the *waqf* property.

<sup>34</sup> Baillie, 565; Hedaya, 232.

<sup>35</sup> Hedaya, 232.

<sup>36</sup> Shah Muhammad Kaim Ata V. Mohammad Shamsuddin 100 I.C 241.

<sup>37</sup> Masjid Shahid Ganj V. Shiromani Gurdwara Parbandhak Committee AIR 1938 Lah. 369

<sup>38</sup> Muhammad Qasim V. Muhamad Mehedi, AIR 1937 Oudh. 207.

#### (a) Who is a *Mutawalli*

'*Mutawalli*' originates from the term '*wali*', which means the manager of *waqf* property. *Mutawalli* is essential for the maintenance, administration, management and supervision of the *waqf* property. There may be more than one *Mutawalli* for the same *waqf*. Their rights, duties and mode of performance depend on the nature of appointment so that they can act jointly or severally.

#### (b) Qualifications of a *Mutawalli*

A *Mutawalli* must possess some qualifications which are as follows:

(a) A *Mutawalli* must be major and a sane person. Majority, under Muslim law, is attained with the attainment of puberty and understanding and a person is presumed to have attained both on the completion of his or her fifteenth year.<sup>39</sup>

(b) A woman or a blind person may be appointed as a *Mutawalli*.

(c) He must not be an applicant for the post of *Mutawalli* and he must be free from a known sin.<sup>40</sup>

Usually a female is not appointed a *Mutawalli* if a suitable male is available and she cannot perform the religious duties like *Khatib* (one who delivers surmons), or an *Imam* in a mosque (whose function is to lead congregational prayer). So where the duties of *Mutawalli* are secular or religious, the Court may prefer to appoint a male *Mutawalli* due to habits of seclusion of Muslim females.<sup>41</sup>

#### (c) Procedure of appointment of *Mutawalli*

A *Mutawalli* is appointed in any of the following procedure:

(a) By the *waqif*

(b) By his executor, if any.

(c) By the beneficiaries, if the number is limited

(d) By the last *Mutawalli* in *h-bed*.

(e) By the court.

<sup>39</sup> Hanskuasbai V. Imam Ali Shah AIR (1921) Nag. 53.

<sup>40</sup> Neil Ballie, Digest of Mohammadan Law, P. 601

<sup>41</sup> Syyad Muhammad Ghause V. Sayabiran salin, AIR (1935), Mad. 68.



**(a) Appointment of Mutawalli by waqif**

The *waqif* may appoint a *Mutawalli* and he may lay down a procedure for the appointment of a *Mutawalli*. He may also invest the *Mutawalli* with power to nominate his or her successor after death or abandon of office.<sup>42</sup> If the *waqif* has reserved the right for himself to appoint a *Mutawalli* in the *waqf* deed, he is entitled to do so.<sup>43</sup>

**(b) Appointment of Mutawalli by executor**

If a *Mutawalli* dies and the *waqif* is not alive, then it is the right of the executor of the *waqif* to appoint a successor to the deceased *Mutawalli*.

**(c) Appointment of mutawali by beneficiaries**

If there is no duly appointed *Mutawalli* and if the number of beneficiaries is limited, then the beneficiaries may appoint a *Mutawalli* without the order of the court. But this view is opposed by the jurists.

**(d) Appointment of successor by a Mutawalli**

In the absence of any provision in the deed of *waqf* regarding succession to the office of *Mutawalli* and if neither the founder nor his successor is alive, then *Mutawalli* may appoint a successor for the time being on the death-bed illness.<sup>44</sup>

**(e) Appointment of Mutawalli by the court**

If the *waqif* has failed to appoint a *Mutawalli*, or a *Mutawalli* dies or dismissed and the *waqif* or his executor is not living or is incapable of performing his duties, then the Court may appoint a *Mutawalli*.

While appointing a *Mutawalli* the court must respect the wishes of the *waqif* or appropriator. If he has left any direction or laid down any procedure for appointment of a *Mutawalli*, it must be followed.<sup>45</sup>

**15. Rights and duties of a Mutawalli**

A *Mutawalli* is a superintendent of *waqf* property. He has, therefore, some rights and duties, which are as follows:

<sup>42</sup> AIR 1930 All. 169.

<sup>43</sup> AIR 1953 Mad. 958.

<sup>44</sup> AIR 1946 Lah. 200.

<sup>45</sup> Mohiuddin Chowdhury, V. Amin-ud-Din Chowdhury, AIR 1945 Cal. 441.

(i) A *Mutawalli* has the right and duty to take possession of the *waqf* property and manage it to the best of his ability for the interest of the beneficiaries.

(ii) He must take all legal steps to protect the *waqf* property.

(iii) A *Mutawalli* can lease out agricultural land for three years only and residential house for a period of one year.

(iv) A *Mutawalli* can mortgage, sell or exchange *waqf* property or any part there of with the permission of the court.

(v) He cannot increase the allowances of officers and servants attached to the *waqf* where the allowance is fixed by the *waqif*. But the court may, in a proper case, increase such allowance.<sup>46</sup>

(vi) A *Mutawalli* is bound to keep clear and distinct accounts of his expenses.

(vii) He may lawfully erect shops, houses etc which will yield profit to the *Waqf*

**16. Remuneration of a Mutawalli**

(i) A *Waqif* may provide for the remuneration of the *Mutawalli* at the time of the dedication. This amount may be either fixed or it may be a residue left over after all necessary payments have been made out of the income of the *Waqf*.<sup>47</sup>

(ii) If *waqif* has not made any provision for the remuneration of the *Mutawalli*, in that case, the court (District judge) may fix a sum not exceeding one-tenth of the income of *waqf* property for his services.<sup>48</sup>

(iii) If the remuneration for the *Mutawalli* fixed by the *waqif* is too small, the Court may increase that allowance, but it must not exceed that limit of one tenth of the income of the *Waqf*.<sup>49</sup>

<sup>46</sup> Ameer Ali, Vol. I, P. 469.

<sup>47</sup> Sayid Ismail V. Hamidi Begum (1921) 6 Pat. 125; AIR 1950 All. 154.

<sup>48</sup> Muhiuddin V. Sayiduddin (1833) 20 Cal. 810, 821; Mumtaz Qadir V. Advocate-General (1946) 21 Luck. 244.

<sup>49</sup> Ameer Ali, Vol. I, P. 469.



### 17. Removal of a *Mutawalli*

A *Mutawalli* is, as stated, the manager of the *waqf* property. But he can be removed from the post under certain cases which are as follows:

(i) The Court has the power in the interest of the *waqf* to remove or dismiss a *Mutawalli*, even if the founder or *waqif* may have expressly directed that he should not be removed in any case, if-

- (a) He is not fit for the office, or
- (b) He is dishonest, or
- (c) He is negligent in the discharge of his duties.

(ii) A *Waqif* has the right to reserve the office of *Mutawalli* for himself. But if he is a person of infamous character and unworthy of confidence, the court may dismiss or suspend him from his office though he might have laid down the condition at the time of creation of *waqf* that the court shall not have the right to removal. Such a condition is considered to be void and not binding on the court.

### 18. Doctrine of *Cy-pres*

Where a clear charitable intention is expressed in the instrument of *wakf*, it will not be permitted to fail, because the objects, if specified, happen to fail, the income of the *wakf* properties would in such a case be applied to the benefit of the poor, or to objects as near as possible to the objects which failed. In the absence of clear evidence to the contrary a general pious intention should be presumed when a Muslim creates a *wakf* or trust for a charitable or religious objects. This decision calls for a wider and more general application of the doctrine of *cy-pres* than had hitherto been contemplated by the Courts, because onus has been shifted to the party which contends that the *wakf* is invalid, to prove that the *wakif* had no general pious intention when he created the *wakf*. The doctrine of *cy-pres* would apply in the a case of *wakf-al-awlād* on the extinction of the line of the *waqif* only when the object is concurrently charitable, and in that case the income of the whole of the property would be applied to charitable purpose.<sup>50</sup> But where there is no reference to charity in the deed, and the *waqf* appears to be only for the benefit of

<sup>50</sup> PLD 1957 Lah. 264.

the family of the *waqif*, the doctrine would be invalid.<sup>51</sup> A *wakf* which is invalid for uncertainty cannot be validated by the application of the doctrine of *cy-pres*. The trustees of a charity cannot make a *cy-pres* application of its funds to purposes other than those marked out by the instrument of trust or the scheme of a court regulating the charity. The court can, however, apply the doctrine in making the scheme for a Muslim charity.

### 19. Powers and functions of the *waqf* administrator under the *waqf* Ordinance.<sup>52</sup>

All *Waqf* estates and properties in Bangladesh are now managed and administered by the *Waqfs* Ordinance, 1962 (Ordinance No. 1 of 1962) which was promulgated to consolidate and amend all existing laws relating to the administration and management of *waqf* properties in Pakistan. This Ordinance is in force in Bangladesh and all litigations relating to *waqf* are now disposed of under this Ordinance. The Ordinance makes the provision for appointment of the administrator of *waqfs* for Bangladesh under section 7.

The administrator have the following powers and functions for proper management of the *waqf* property.<sup>53</sup>

- (a) He investigates and determines the nature of and extent of *waqfs* and *waqf* properties and calls from time to time, for accounts, returns and information from *Mutawallis*.
- (b) He ensures that the *waqf* properties income arising therefrom are applied for the purposes for which such *waqfs* were created.
- (c) He gives direction for the proper administration of *waqfs*.
- (d) He manages himself or through the employed officers and servant and does necessary acts for the proper control, administration and management of *waqf* property.

<sup>51</sup> PLD 1959 Pesh. 152.

<sup>52</sup> The original title of this Ordinance (East Pakistan Ord. No: 1 of 1962) was East Pakistan Waqf Ordinance, 1962. Under P.O.48 of 1972, the words "East Pakistan" have been replaced by "Bangladesh" (Adaptation of Existing Bangladesh Laws, 1972) and now it is Waqfs Ordinance 1962.

<sup>53</sup> Section 27 of the Ordinance; Yar Ali Khan Chowdhury V. Administrator of Waqfs. 20 DLR 535.



(e) He fixes the remuneration of *Mutawalli*, where there is no provision for such remuneration in the *waqf* deed.

(f) He invests any money received as compensation for the acquisition of *waqf* properties either by himself or directs the *Mutawalli* to do proper investigation.

(g) He does all such acts as may be necessary for proper maintenance and administration of *waqf* property.

Besides the above, the administrator may remove a *Mutawalli* for breach of trust, mismanagement, or misappropriation of fund or if he has convicted more than once under section 61 of this Ordinance, or if he is found unsuitable, incompetent, negligent or otherwise undesirable or does any act causing loss to the *waqf* property.<sup>54</sup>

The administrator may transfer any part of *waqf* property for the improvement and benefit of the *waqf*, subject to previous sanction of the Government.<sup>55</sup> He may also take over and assume the administration, control, management and maintenance of any *waqf* property including any shrine, *dargah*, *imbarara* or other religious institution associated with such *waqf* property.<sup>56</sup> In case of vacancy due to minority of the successors or unsound mindness, or insolvency by the Court which stand in the way to hold the office of *Mutawalli*, the administrator may temporarily appoint a person to act as a *Mutawalli*.<sup>57</sup>

<sup>54</sup> Section 32 of the Waqf Ordinance, 1962; 35 DLR 277.

<sup>55</sup> Section 33 of the Ordinance.

<sup>56</sup> Section 34 of the Ordinance.

<sup>57</sup> Section 43 of the Ordinance; Amir Sutan Ali Hyder V. Md. K. Alam, 29 DLR (Sc) 295.

## Chapter Fourteen

### *Wasiyat* or will

#### 1. Origin and development of the concept *wasiyat* or will

In pre-Islamic Arabiya *wasiyat* (Arabic term) or bequest was prevalent and under that system a testator or a person making bequest was free to make it in favour of any person and he could bequeath of his entire property leaving his children, parents and kindred deprived. He was also at liberty to give preference to one heir to the exclusion of the others.<sup>1</sup> But Islam brought a change in the law of bequest by specific rules laid down in the Quran and the Hadith. Islam restricted the unbridled power of the testator who is now not allowed to bequeath more than one-third of his property.

The Quran approved the power of making a testamentary disposition and regulates the formalities and conditions to which it is subjected. The Quran states, "When death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage".<sup>2</sup> The Prophet (Peace be on him) also restricted the right of the testator to bequeath more than one-third. The Hadith is as follows:

The Hadith has been narrated and reported by Sa'd Ibn Abi Wakkas who said:-

"In the year of the conquest of Mecca, being taken so extremely ill that my life was despaired of, the Prophet (peace be on him) came to pay me a visit of consolation. I told him that by the blessing of Allah, having a great estate but no heirs except one daughter, I wished to know if I might dispose of it all by *wasiyat*. He replied: 'No'. And when I severally interrogated him, 'If I might leave two-thirds or one-half, he also replied in the negative but when I asked if I might leave a third, he answered, 'Yes', you may leave a third of your property by bequest, but a third part to be disposed of by *wasiyat* is a great portion, and it is better you should leave your heirs rich than in a state of poverty which might oblige them to beg of others."<sup>3</sup>

<sup>1</sup> Abdur Rahim, Muhammadan Jurisprudence, P. 15  
Al-Quran, 2:180.

<sup>2</sup> Ameer Ali cited this hadith in Muhammedan Law from Mishkatul Masabih, PP. 569-70.