

WAQF- MUSLIM LAW

- The literal meaning of the word waqf is 'detention'. In the legal context, waqf means detention of a property so that its produce or income may always be available for religious or charitable purposes. When a waqf is created, the property is detained or, is 'tied up' forever and thereafter becomes non-transferable.
- **Section 2(1) in The Mussalman Wakf Validating Act, 1913**
"Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.
- In waqf property is vested in implied ownership of God. The property becomes non-transferable. Once waqf is created it cannot be revoked. A conditional or contingent waqf is void.
- "As defined by **Abu Yusuf**, waqf has three main elements. They are-
 1. Ownership of God
 2. The extinction of the founder's right
 3. The benefit of mankind
- Waqf can be constituted of both movable and immovable property. Every Muslim who is of sound mind and age of majority can constitute waqf.
- The creator of waqf must be owner of the property dedicated.
- In waqf property is settled permanently so that its usufruct is always available for an indefinite period. Waqf cannot be for a limited period.
- When a property is declared 'wakf' the original user is divested of it and the property rests in Almighty God.
- Any **major person** with **sound mind** can be a Waqif (founder of waqf)
- Following cannot be a subject matter of waqf
 - (1) A dower-debt;
 - (2) Right to recover money from debtor under simple money decree;
 - (3) Right of a usufructuary mortgagee

- A waqf can be created through a deed in writing or orally. A written deed of endowment is called a Wakfnama.

Essentials/Characteristics of a Wakf

- 1. Property vests in god** – Once the dedication of the property is made to the wakf, the ownership of the wakf is transferred to god. [**Md. Ismalia vs. Thakur Sabif Ali, 1962 SC 1722**] .
- 2. Wakf must be Permanent** – A Muslim wakf must be created for an unlimited period. In short, perpetuity is an essential feature of a wakf.
- 3. Wakf must be Irrevocable** – The irrevocability is another characteristic feature of a wakf. Once constituted validly, a wakf cannot be revoked. If in a wakfnama a condition is stipulated that the wakif reserves to him the right of revoking the wakf or the wakf will stand revoked on the happening of any event, **then such a wakf is void.** [**Asoobai vs. Noorbai, (1906) 8 Bom LR 18**]
- 4. Wakf properties are Inalienable** – Once a property is dedicated to the god, they can't be alienated. However this rule is not absolute and in some circumstances, it is permissible that a mutawalli may alienate the wakf properties, a mutawalli may sell or grant a lease of the wakf properties with the prior permission of the court. When a wakfnama allows selling wakf properties in some circumstances, then the mutawalli has the power to alienate wakf properties in those circumstances.
- 5. The founder of waqf must be a competent person**
- 6. The subject matter must be a transferable property**
- 7. The object must be religious, pious and charitable**
- 8. The formalities required must be duly completed.**

Modes of Creation of Wakf

- Muslim law does not prescribe any specific way of creating a Wakf. If the essential elements as described above are fulfilled, a Wakf is created. Though it can be said that a Wakf is usually created in the following ways-
 1. **By an act of living person (inter vivos)** - when a person declares the dedication of his property for Wakf. This can also be done while the person is on death bed (marj-ul-maut), in which case, he cannot dedicate more than 1/3 of his property for Wakf.
 2. **By will**- when a person leaves a will in which he dedicates his property after his death. Earlier it was thought that Shia cannot create Wakf by will but now it has been approved.
 3. **By Usage**- When a property has been in use for the charitable or religious purpose for time immemorial, it is deemed to belong to Wakf. No declaration is necessary and Wakf is inferred.

Types of Waqfs

1. Public- wells, bridges, roads etc.
2. Private- Waqfs for benefit of private person also called wakf-ul-aaulad (ex. imambara)
3. Semi-public- Waqfs for benefit of a class of person.

Categories of waqf from the perspective of its purpose:

- **Waqf ahli:** the proceeds of waqf are designated for the waqf founder's children and their offspring. However, these beneficiaries cannot sell or dispose of the property subject-matter of waqf.
- **Waqf khayri:** the proceeds of waqf are earmarked to charity and philanthropy. Examples of beneficiaries include the poor and the needy. Waqf khayri is typically used to finance mosques, shelters, schools, and universities. This is meant to help financially-challenged individuals and communities.

- **Waqf al-sabil:** a waqf whose beneficiaries are the general public. It is very similar to waqf khayri, though waqf al-sabil is usually used to establish and construct the public utility (mosques, power plants, water supplies, graveyards, schools, etc).
- **Waqf al-awaridh:** the yield of waqf is held in reserve so that it can be used at times of emergency or unexpected events that negatively influence the livelihood and well-being of a community of people. For example, waqf may be assigned to the satisfaction of specific needs such as medication for sick people who are unable to pay medication expenses and education of poor children. Waqf al-awaridh may also be used to finance maintenance of the utilities of a village or neighborhood.

Categories of waqf from the perspective of its output nature:

- **Waqf-istithmari:** the waqf assets are intended for investment. Such assets are managed to produce income that will be used in constructing and reconstructing waqf properties.
- **Waqf-mubashar:** the waqf assets are used to generate services to the benefit of some charity recipients or other beneficiaries. Examples of such assets include schools, utilities, etc

Subject Matter of Waqf

- Subjects of wakfs could be land properties like gardens, fields etc. Religious institutions can also be subject to waqf like Dargah, Graveyard, Imambara (private place for certain ceremonies), Khangah (a place for religious instructions and devotional exercise), mosque, Takia (a resting place).
 - Later other movable properties were also made subject matter of waqfs like load-bearing animals, agricultural instruments, Koran for reading in a masjid, movable properties, horses, swords.
 - Basically, anything non-perishable by use can be a subject of waqf.
-

Mutawalli

- Mutawalli is a person who manages the waqf, he has no rights to transfer waqf property to anyone, and he is just the administrator.
- Any person who is a major, of sound mind can be appointed as Muatawlli
- He is only a superintendent whose job is to see that the usufructs of the property are being utilized for valid purpose as desired by the wakif. He has to see that the intended beneficiaries are indeed getting the benefits. Thus, he only has limited control over the usufructs.
- In *Ahmad Arif vs Wealth Tax Commissioner*, SC held that a mutawalli has no power to sell, mortgage, or lease wakf property without prior permission of the Court or unless that power is explicitly provided to the mutawalli in wakfnama.

Who can be a mutawalli

- A person who is a major, of sound mind, and who is capable of performing the functions of the wakf as desired by the wakif can be appointed as a mutawalli. A male or female of any religion can be appointed. If religious duties are a part of the wakf, then a female or a non-muslim cannot be appointed.
- In *Shahar Bano vs Aga Mohammad*, Privy Council held that there is no legal restriction on a woman becoming a mutawalli if the duties of the wakf do not involve religious activities.

Who can appoint a Mutawalli

- According to the general rule, the founder of the waqf appoints at the time of the creation of the waqf. But, in case a waqf is created without the appointment of a mutawalli then the following persons are eligible to appoint the Mutawaali:
 1. The executor of the founder;
 2. The mutawalli on his death-bed;
 3. The Court

Powers and Duties of Mutawalli

Being the manager of the wakf, 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 wakf. He is authorized to take all reasonable actions in good faith to ensure that the end beneficiaries are able to enjoy all the benefits from the wakf. As he is not the owner of the property, therefore he is barred from selling the property.
- He can take authorization from the court to sell or borrow money by showing the existence of appropriate grounds or the existence of urgency.
- He can file a suit to protect the interests of the wakf.
- 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.
- He is entitled to remuneration as provided by the wakif. If the remuneration is too small, he can apply to the court for getting it enhanced.

Removal of Mutawalli

- 1. By the Court**– Once a mutawalli is appointed, he cannot be removed by the wakif. But the mutawalli can be removed by the Court only on following grounds.
 - a) If He denies the waqf character of the property and sets up an adverse title to it in himself.
 - b) He although having sufficient funds neglects to repair the waqf premises and allows them to fall into despair;
 - c) He causes damage or loss to the waqf property or commits a breach of trust knowingly and intentionally.
 - d) The mutawalli is rendered insolvent.
- 2. By the Wakf Board**– According to **section 64** of the Wakf Act, 1995, the Wakf Board has the authority to remove the mutawalli from his office under the conditions mentioned therein.
- 3. By the Wakif** – There are different views related to this concept. According to Abu Yusuf, even if the wakif has not reserved a right to remove the mutawalli in

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

Difference between waqf and trust

- Both in waqf as well as in trusts, the property is detained and its usufruct is utilized for religious or charitable purposes.
- But, a waqf under Muslim personal law may be distinguished from a trust at least on the following matters:
 1. A waqf may be constituted only for those purposes which are recognized as religious, pious or charitable in Islam whereas, a trust may be constituted for any lawful object.
 2. Except under Hanafi law, the founder of a waqf cannot reserve any benefit for himself, but the founder of a trust may himself be a beneficiary.
 3. The powers of a mutawalli (manager of the waqf (manager of the waqf-property)) are very limited as compared to the powers of a trustee.
 4. A waqf is generally perpetual and irrevocable, whereas, a trust need not be perpetual and may also be revoked under certain conditions.
- Because of the above-mentioned differences between waqf and trust, the Indian Trust, Act, 1882, is not applicable to Muslim waqf in so far as the nature and operation of waqfs are concerned. But, for purposes of instituting any suit in the cases of irregularities and mismanagement of waqf property, a waqf has been regarded as a 'trust' within the meaning of **Section 92 of the Civil Procedure Code, 1908.**
- However, it must be noted that the Indian Trusts Act is applicable also to Muslims. Therefore, if a Muslim wants to settle his properties in a trust he may do so under this Act instead of creating waqf under Muslim person law.