



## **BOOK REVIEWS**

THE LAW OF WAKFS – AN ANALYTICAL AND CRITICAL STUDY (1999). By S.A. Kader. Eastern Law House, Calcutta. Pp. 486. Price Rs. 350.

WAKF IS a unique and peculiar institution under Muslim Law. Its origin and definition is traced from these words of the prophet: “Tie up the substance and give away the fruit”. Wakf is defined in the various Wakf enactments, including the Wakf Act, 1995, as the permanent dedication by a Muslim of property for pious, religious or charitable purpose. A Wakf is created by perpetual dedication of any property by a Muslim, which becomes vested in God Almighty and profits from the property are to be applied for the benefit of its creatures. Perpetuity is the hallmark of Wakf.

The legislation in the field of Wakf started with the Mussalman Wakf Validating Act, which was passed in 1913 to remove the effect of Privy Council decision that held the Wakfs invalid for offending the rule against perpetuity. The Act of the same name in 1930 made the application of 1913 Act retrospective. The Mussalman Wakf Act, 1923 can be called as the precursor of Wakf legislation for being a general enactment dealing with creation, maintenance and administration of Wakf property. Provincial Acts were subsequently enacted for Bengal, Delhi, Bihar and UP in 1934, 1943, 1947 and 1960 respectively. The Wakf Act, 1954 was passed by the Parliament to be applicable in the whole of India except in the state of J & K and to be enforced in different states by gazette notifications of the central government. The Wakf Act, 1995 has repealed and replaced the 1954 Act. The literature on the subject was available in Qureshi, *Wakfs in India*; Rashid, *Wakf Administration in India*; Hussain & Rashid, *Wakf Laws and Administration in India*. These books became obsolete with the passing of the 1995 Act.

The book under review is the pioneer work concerning the new Act. It is a section-wise commentary on the 1995 Act referring to legislative changes brought about by the Act. After giving the text of each section (total number of which is 113) of the Act, the corresponding old law under the 1954 Act is also described. The book discusses the scope of each provision in the Act along with pertinent comments on the same by pointing out the defects and lacunae and suggesting amendments wherever necessary. The author has clarified every term with reference to case law. Judicial pronouncements relating to Wakfs, Wakf properties and management thereof are elaborately and incisively discussed. The book justifies its name for being really an analytical and critical study of the enactment.



In the brief introduction of 13 pages, the author has tried to trace the seeds of 'Wakf' in the Quranic verses though the term is nowhere used in the holy book. The author has succinctly pointed out:<sup>1</sup>

The doctrine of Wakf is inextricably intertwined with the religion of Islam... with the advent of Muslim rule the concept of Wakf got introduced in this country. It is estimated that there are more than a lakh Wakfs in India and the present value of the properties in Wakf will be worth over thousand crores.

Regulation of religious endowments by legislation is briefly discussed by referring to Regulations of 1810 and 1817 of the Bengal and Madras Codes, Religious Endowments Act, 1863, Charitable Endowments Act, 1890, Charitable and Religious Trusts Act, 1920. Then there is brief historical survey of Wakf Acts, which has also been done quite aptly in the foreword by Justice M.M. Ismail former Chief Justice of Madras High Court.

The Wakf Act, 1995 has brought about uniformity in the Wakf administration throughout the country except in the state of J & K. The central government is empowered to constitute the Central Wakf Council out of specified categories of Muslims under the chairmanship of Union Minister in charge of Wakfs. The functions of the council are purely of advisory nature. State Boards are to consist of seven to thirteen members. Majority of them will be elected from amongst Muslim MPs, MLAs, members of Bar Councils and *mutawallis* of Wakfs. Nominated members shall be from eminent Muslim organisations, recognized scholars of Muslim theology and a representative of the state government. Wakf tribunals are sought to be created to consider questions and disputes pertaining to Wakfs.

The author has examined the constitutional validity of the Act<sup>2</sup>. By pithily referring to a number of Supreme Court and high court judgements it is concluded that the Act and its provisions are not hit by articles 25 and 26 of the Constitution and are well within the legislative competence of the Parliament.

Section 3 of the Act pertaining to definitions of various terms is quite appropriately given an elaborate treatment by the author. 'Wakf', its meaning, ingredients and kinds are discussed in detail. Functions of the Wakf Board and right and duties of *mutawallis* have also been exhaustively dealt with. The author has taken a pragmatic view in regard to women's right to offer prayer in public mosques. Referring that there is no such prohibition in Quran and entry of women in mosques is allowed in some Islamic countries and also in some mosques in Tamil Nadu, the author

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1. S. A. Kader, *The Law of Wakfs – An Analytical and Critical Study* 6 (1999).

2. *Id.* at 18-24.



opines: "There is no harm in allowing women to participate in congregational prayers in a public mosque in separate enclosures"<sup>3</sup>.

Discussing the term of office of Board Chairman reference is made to the judgement of *Hazi Ahmad Khan v. Punjab Wakf Board*<sup>4</sup>. In this ruling the Punjab and Haryana High Court has laid down that there being no provision in the statute barring the removal of the chairman of the board by a vote of no confidence, the members who had the power to elect have also the power to remove by majority. The author differs with this view of the high court saying that the Wakf Board is a creature of the statute which provides for election by members but does not provide for his removal by a motion of no confidence. The author, citing a Bombay High Court judgement which lays down that right to recall is not a common law right, concludes that such a right cannot be acceded to the members<sup>5</sup>.

Justice Kader has examined the provisions of the Wakf Act very minutely. Read his comment<sup>6</sup> about section 20(1) (b):

This is badly drafted. It reads that the State Government may remove the chairperson or any member if (1) he refuses to act or (2) he is incapable of acting or (3) he acts in a manner, which the State Government, after hearing any explanation that he may offer, considers to be prejudicial to the interests of the Wakf. The words "in a manner which the State Government after hearing any explanation that they may offer, considers to be prejudicial to the interests of the Wakf" govern all the three categories mentioned above. The result is that the State Government may remove a chairperson or any member if he refuses to act or is incapable of acting in a manner which is prejudicial to the interests of the Wakfs, a result which is the height of absurdity. The intention of the Legislature to confer power on the State Government to remove the chairperson or any member if he refuses to act or is incapable of acting in a manner beneficial or not prejudicial to the interests of the Wakfs. But by clubbing together all the three contingencies the draftsmen have created a mess. The words "refuses to act or is incapable of acting or" in clause (b) have to be deleted and a separate clause has to be inserted.

Similarly the author has pointed out a clear drafting error and raised a very valid objection to the inclusion of last portion of section 26<sup>7</sup> and

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3. *Id.* at 105.

4. AIR 1980 P & H 306.

5. *Supra* note 1 at 137.

6. *Supra* note 1 at 142.

7. *Supra* note 1 at 143.



proviso to sub-section (1) of section 51<sup>8</sup>. The author pleads for deletion of section 66 as not only desirable, but imperative as well<sup>9</sup> for being in conflict with another provision.

The yearning of the author that proper application of income from the Wakf properties can transform the social, educational and economic condition of the Muslims is reflected time and again in the book. For example, while discussing the scope of section 48 audit of accounts of Wakfs, it correctly observes:<sup>10</sup>

The importance of auditing of the accounts of the Wakf cannot be over emphasised. It is not unusual for mutawallis to look upon the properties in Wakf under their management as their patrimony and play ducks and drakes. The misappropriation and misapplications of the income from the Wakf properties being common features, strict vigilance has to be maintained on the income and the expenditure. The needless pomp and splendour witnessed in the celebration of urs, santhankudu, khanduri festivals in Durgahs and Takias overshadow the spiritual aspects. I am not pleading for asceticism but only for spending more for the poor and the needy in the way of God.

The value of the book has been enhanced with the inclusion of appendices. The inclusion of Wakf rules framed in exercise of powers conferred by the Act by the various state governments has added to the utility of the book for practicing lawyers and others. Wakf Rules of Delhi, Karnataka, Kerala, Madhya Pradesh, Tamil Nadu, Uttar Pradesh and West Bengal framed during the years 1995-97 are available in this part. To make the book a consolidated and comprehensive one, the Mussalman Wakf Validating Acts of 1913 and 1930 and the Mussalman Wakf Act, 1923 are also included. Comparative charts comparing each section of the Wakf Act, 1995 with that of the Wakf Act, 1954 and *vice versa* are useful for the transitional purposes. Foreword by former Chief Justice M.M. Ismail who praises the book as 'the product of the brave attempt of the author', has added to the prestige of the book.

The book deserves appreciation for its rich material, flawless printing and use of quality paper. The practitioners and scholars in the field of Wakf law and others who are interested in and concerned with the subject will find the work useful and beneficial.

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8. *Supra* note 1 at 197.

9. *Supra* note 1 at 237.

10. *Supra* note 1 at 186-87.

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