

Taking Back a Waqf Property and Replacing it With Another Property

Darulifta Ahlesunnat (Dawateislami)

Question

What do the noble scholars and jurists of Islamic law say about the following: An individual has dedicated two Kanals of his land as an endowment (waqf) for a Muslim cemetery. After the endowment, some deceased Muslims have also buried therein. After some time, the endower intended to take back some part of the land from one side where no one had been buried yet, and he will dedicate an equal amount of land from another property in exchange. At the time of dedicating the waqf, he did not stipulate the condition of exchanging an empty part of the land for another piece of land. The question is whether he may take back the unused waqf land in exchange for an equal amount of land, or whether this is impermissible. Please provide guidance.

Answer

In the inquired situation, the Muftā Bihī opinion (according to which the verdict is issued) is that it is impermissible for said person to take back a portion of the waqf (endowed) land and exchange it for another land.

The detail is that: According to the opinion of Imām Abū Yusuf رحمه الله تعالى عليه, a land which is dedicated for waqf becomes waqf merely by the declaration of the endower. As a result, the land exits the ownership of the endower and enters solely into the ownership of Allāh Almighty. Thereafter, the endower can neither take back any portion from it (even the unused area), nor sell it. This is the Muftā Bihī opinion according to the jurists رحمه الله عليهم. Furthermore, the waqf land can only be changed when the endower stipulated this condition at the time of dedicating the waqf, or (if he did not stipulate the condition) when that land completely ceases to serve its intended purpose. In such a case, the land can be exchanged with certain conditions. But, if the land is still usable for the designated purpose, it is impermissible to exchange the land, even if the other land provides greater benefit. Therefore, in the inquired situation, the waqf was complete as soon as the endower dedicated it and it exited his ownership. Moreover, the condition of exchanging the land was not stipulated and the waqf land serves its intended purpose. Hence, it is impermissible to take back any portion of the land.

‘Allāmah Ibn Nujaym Misrī Ḥanafī رحمه الله تعالى عليه (d. 970 AH/ 1562 CE) writes:

(قوله ومن بنى سقاية أو خاناً أو رباطاً أو مقبرة لم يزل ملكه عنه حتى يحكم به حاكم) يعني عند أبي حنيفة -- وعند أبي يوسف يزل ملكه بالقول كما هو أصله إذا التسليم عنده ليس بشرط والوقف لازم. وفي فتاوى قاضي خان وتأخذ في ذلك بقول أبي يوسف (Al-Baḥr al-Rā'iq, Vol. 05, p. 274, Publ. Dar al-Kitāb al-Islāmī)

The endower does not retain ownership of the waqf asset after endowment. Thus, it is stated in Radd al-Muhtār ‘Alā al-Durr al-Mukhtār:

(فإذا تم ولزم لا يملك) أي: لا يكون مملوكاً لصاحبه (ولا يملك) أي: لا يقبل التملك لغيره بالبيع ونحوه

(Radd al-Muhtār ‘Alā al-Durr al-Mukhtār, Vol. 06, p. 540, Publ. Quetta)

It is not permissible to exchange the waqf property after the endowment. Thus, it is stated in al-Fatāwā al-‘Ālamgīrī:

لا يجوز تغيير الوقف عن هيئته

(Al-Fatāwā al-Hindiyah, Vol. 02, p. 490, Publ. Quetta)

Regarding cases where no condition for replacing the waqf was stipulated at the time of endowment, Imām Kamāl-Uddin Ibn Hummām رحمه الله تعالى عليه (d. 861 AH/ 1456 CE) writes:

والحاصل أن الاستبدال إما عن شرطه الاستبدال -- أولاً عن شرطه، فإن كان لخروج الوقف عن انتفاع الموقوف عليهم به فينبغي أن لا يختلف فيه -- وإن كان لا لذلك بل اتفق أنه أمكن أن يؤخذ بضمن الوقف ما هو خير منه مع كونه منتفع به فينبغي أن لا يجوز؛ لأن الواجب إبقاء الوقف على ما كان عليه -- ولأنه لا موجب لتجويزه لأن الموجب في الأول الشرط وفي الثاني الضرورة، ولا ضرورة في هذا إذ لا تجب الزيادة فيه بل تبقى كما كان

(Fath al-Qadīr, Vol. 06, p. 228, Publ. Dār al-Fikr, Lebanon)

After citing the text from the author of Fath al-Qadīr, ‘Allāmah Shāmī رحمه الله تعالى عليه comments:

أقول: ما قاله هذا المحقق هو الحق الصواب

(Radd al-Muhtār ‘Alā al-Durr al-Mukhtār, Vol. 04, p. 388, Publ. Dār al-Fikr, Beirut)

وَاللَّهُ أَعْلَمُ عَزَّ وَجَلَّ وَرَسُولُهُ أَعْلَمُ صَلَّى اللَّهُ تَعَالَى عَلَيْهِ وَآلِهِ وَسَلَّمَ

(Allah Almighty knows best and His Messenger صَلَّى اللَّهُ تَعَالَى عَلَيْهِ وَآلِهِ وَسَلَّمَ knows best.)

Answered By: Mufti Muhammad Qasim Attari

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