

CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Board of Mutwallis

(Banerjee J.)

19.06.1967

JUDGMENT

Banerjee J.

1. This is a reference under section 66(1) of the Indian Income-tax Act, 1922. The assessment years, which are involved, are 1948-49 to 1958-59. The relevant accounting years for assessment years 1948-49 to 1956-57 are the calendar years 1947 to 1955; the relevant accounting years for assessment years 1957-58 and 1958-59 are the financial years respectively ending with March 31, 1957, and March 31, 1958. The question of law referred to this court is :

"Whether, on the facts and in the circumstances of the case and on a proper construction of the wakfnamah dated the 25th July, 1900, the income of the wakf was exempt from taxation under the provisions of section 4(3)(i) of the Indian Income-tax Act, 1922 ? The reference has been made in the circumstances hereinafter stated in brief. One Ibrahim Sulaiman Salehjee, now deceased, executed a deed of wakf on July 25, 1900, and thereby created a charitable trust. Hereunder, are set out material portions from the said deed of wakf :

1. "... And whereas I am desirous of making wakf of the said land hereditaments hereinafter particularly described upon objects hereinafter mentioned with the motive of obtaining Suwab or religious merit as understood and laid down by the Mohamedan Law of the Haneefa Sect.

2. Now this indenture witnesseth that I do hereby make wakf valid and binding according to Mohamedan Law governing the Soonnee Sect to which I belong of all lands and properties hereinafter mentioned and divest myself of the ownership of the same and vest the same in the ownership of God the fruits and profits of the same to be spent on the objects mentioned in this deed....

3. The object or objects to which the income of wakf estate is to be applied is left to the discretion of the mutwallis appointed under this wakfnamah provided that the general rule to be observed is that the object or objects should be such as are calculated to bring to me Suwab or religious merit according to the Mohamedan notions and according to the provisions of Faikah and Shara governing the Soonnees such object being hereby generally indicated in the following description of items, viz. :

(1) The feeding of the poor in Calcutta in the month of Ramjan in every year.

(2) The digging of wells in such place or places as the mutwallis may deem expedient.

(3) For providing or contributing to the expenses of any Soonnee Mosque or Mosques.

(4) For providing or paying such sums as the said mutwallis shall think fit for the support and marriage expenses of any of the children of any of the relations of the said Ibrahim Sulaiman Salehjee who may be for the time being in poor and indigent circumstances.

(5) For gifts and donations to Mohamedan Schools, (6) For the expenses of a Mosafirkhana in Calcutta, and (7) For aid to School opened by Ibrahim Sulaiman Salehjee of No. 1, Amratolla Lane, in Calcutta.

(8) If any children of descendants become poor then it shall not be considered a disability in them (with ?) reference to their fitness to participate in the benefits of this wakf that they are my children and their descendants on the other hand will be considered equally fit with other poor people to share in the provisions made for the poor by this deed.

(9) In regard to the governance of the wakf estate I direct that there shall be always five mutwallis to manage the wakf estate and carry out the directions made down in the deed in regard to the contributions of the profits and income arising from the wakf estate..." We need notice here that the copy of the deed of wakf, made annexure to the statement of case, is admittedly not a correct copy and was not used by the Appellate Tribunal. This is also apparent from the quotations from the deed made by the Tribunal. How this came to be, passes our comprehension. Be that as it may, a correct copy of the deed, as was used before the Tribunal, was given to us and the above quotations are from that copy. Let that copy be kept on the record.

Apparently the mutwallis did not work well. Ultimately, there was a suit filed in the Original Side of this court for removal of the mutwallis from office, for accounts against them, for appointment of a fit and proper person as mutwalli and for framing of a scheme for administration of the wakf. The suit was filed in the year 1929 (Suit No. 1496 of 1929 - Mahmood Ismail Salehji v. Ahmed Ebrahim Salehji), and had a long spell of existence in this court, so much so, that in the

year 1954, Sarkar J. (thereafter Sarkar C.J. of the Supreme Court) observed in one of his orders in the suit "this suit has been in this court for years and has given rise to many proceedings. It is difficult to see who has benefited by the long and active life granted to it. In the last phase it acquired the movement of a shuttle-cock in a keenly contested game of badminton". Be that as it may, the wakf estate is now governed by a scheme framed by this court and the receiver appointed by this court is in possession or was so during all material times. How things fared under the receiver we do not know but we find that the income of the wakf estate is now subjected to large demands for public revenue. In the income-tax returns filed for the assessment years, hereinbefore mentioned, the mutwallis offered a portion of the income of wakf estate, in some of the assessment years, for taxation under the Income-tax Act. The Income-tax Officer, however, made his own calculations and taxed a major portion of such income at the lower rate applicable under the first proviso to section 41(1) of the Indian Income-tax Act, 1922. The exemption granted by the Income-tax Officer related only to such portion of the income as had been actually applied to religious and charitable purposes, which only, according to the Income-tax Officer, went towards the objects mentioned in the wakfnamah. Although the mutwallis had themselves offered a portion of the wakf income for taxation, they subsequently grew wiser and took up the position that no part of the wakf income was taxable. In appeals, against the assessment orders, before the Appellate Assistant Commissioner, it was therefore contended, on their behalf, that no portion of the wakf income should be taxed, inasmuch as the whole of it had been applied for public religious and charitable purposes. The Appellate Assistant Commissioner did not uphold the contentions raised on behalf of the assessee and, while confirming the orders passed by the Income-tax Officer, he modified them to the extent that the income of the wakf estate was directed to be taxed under the first part of the proviso under section 41(1) of the Income-tax Act at the maximum rate. Appeals were taken by the assessee before the Appellate Tribunal and the contentions raised before the Assistant Commissioner were repeated before the Tribunal. The contentions appealed to the Tribunal and the appeals, which were heard together, were allowed with the following observation :

"Now in this case before us, among the various objects of the wakf, which have been quoted above, objects Nos. (4) and (8) make provisions for charities to the relations of the donor. For the sake of convenience we reproduce them here also.... No doubt, apparently it looks that it is a direction of the wakf income for the benefit of the poor relations of the donor, but looking at the scheme of the wakf as a whole, we think that the primary object of the wakf is public charity. The wakf's main object is charity to the poor whoever he be. This object is of a public nature even under the general law. The wakf, however, while keeping in view charity to the poor as the main object, has guarded against his own poor relations being handicapped by reason of a discrimination between a poor non-related and poor related at the hands of the mutwalli and by

these objects, Nos. 4 and 8 have put his poor relations at par with the other poor persons. But even so, the mutwallis powers have not been fettered, he may still refuse charity to the wakifs relations, if in his opinion, such a claimant to the charity was not poor...In the case before us, all that we mean to say is that the object of charity as laid down under the deed is valid even under the general law, and if incidentally that object instead of being channelised in one direction only, namely, towards the non-relations of the wakif, is also channelised to become all-pervasive so as to include even the relations of the wakif, that portion of the charity, which has thereby gone to the poor relations of the wakif, does not cease to be a charity of a general nature. In that view of the matter it must, therefore, be held that even such charities are exempt under section 4(3)(i), even if the same has been made to the poor relations of wakif." Mr. Gouri Mitter, learned counsel for the Commissioner of Income-tax, submitted that a charitable purpose would include relief to the poor, education, medical relief and advancement of any other object of general public utility. He did not dispute that clause (1), in paragraph 3 of the wakf deed, provided for relief to the poor and clauses (2), (3) and (5) to (7), in the said paragraph, provided for other objects of general public utility and as such all those were genuine charitable purposes. He did not also dispute that clause (8), in paragraph 3 of the deed, providing for participation of the wakifs children and descendants in the provisions made for the poor, that is to say, the provisions to be found in clause (1) of paragraph (3), if they were "equally fit with other poor people" did not make the charity partake of the character of a private charity. He, however, submitted that clause (4), in paragraph 3 of the deed, providing for support and for payment of marriage expenses of his children and relations, if poor and indigent was a fly in the ointment and enabled the mutwalli to direct the entire income to that predominantly private purpose, to the exclusion of other purposes. According to him, that detracted from the value of the wakf as a public charitable endowment. He sought to distinguish the decision of the Supreme Court in Trustees of the Charity Fund v. Commissioner of Income-tax referred to in the judgment of the Tribunal, because he thought that that was the first hurdle he should cross. The Supreme Court had to consider the trust deed of Sir Sassoon David, Bart. and others. Clause 13 of the deed of trust provided that the trust fund shall be held by the trustees upon trust to apply for the following purposes :

"(a) the relief and benefit of the poor and indigent members of the Jewish or any other community of Bombay or other parts of India or of the world either by making payments to them in cash or providing them with food and clothes and/or lodging or residential quarters or in giving education including scholarship to or setting them up in life or in such other manner as to the said trustees may seem proper or.....

(b) the institution, maintenance and support of hospitals and schools, colleges or other educational institutions or.....

(c) the relief of any distress caused by the elements of nature such as famine, pestilence, fire, tempest, flood, earthquake or any other such calamity or.....

(d) the care and protection of animals useful to mankind or.....

(e) the advancement of religion or.....

(f) other purposes beneficial to the community not falling under any of the foregoing purposes... :

Provided always that in applying the income as aforesaid the trustees shall give preference to the poor and indigent relations or members of the family of the said Sir Sassoon David, Bart., including therein distant and collateral relations; provided further that in the application of the income of the said charitable trust fund the said trustees for the time being shall observe the following proportions, viz., that not less than half the income of the said funds shall at all times be applied for the benefit of the members of the Jewish community of Bombay only (including the relations of Sir Sassoon David, Bart., as aforesaid) and Jewish objects and particularly in giving donations to the members of the Jewish community of Bombay on the anniversary of the death of the said Sri Sassoon David, Bart., and his wife Lady Hannah David which falls on the twenty-second day of June and the remaining income for the benefit of all persons and objects including Jewish persons and objects and in such proportions as the said trustees may think proper....."

The question before the Supreme Court was whether the income from this trust fund was exempt from taxation as income of charitable trust, under section 4(3)(i) of the Income-tax Act. In answering the question in the affirmative and in favour of the assessee, the Supreme Court observed :

"We are not unmindful of the fact that it is open to the trustees to spend the net income entirely for the purpose referred to in sub-clause (a) to the exclusion of the other clauses. But the very fact that the relations or members of the family do not come in directly under any of those latter sub-clauses cannot be ignored, for they certainly have some bearing on the question as to who or what were the primary objects of the trust as a whole. In the next place, the purpose of sub-clause (a) is the relief and benefit of the poor and indigent members of Jewish or any other community of Bombay or other parts of India or the world. It is conceded by the learned counsel that this sub-clause clearly expresses a general charitable intention involving an element of public utility. It follows, therefore, that sub-clause (a) constitutes a valid public charitable trust having as its beneficiaries the several classes of persons referred to therein. This is the first position. We then pass on to

the provisos. The first proviso opens with the words in applying the income as aforesaid. This takes us back to sub-clause (a). The meaning of the proviso obviously is that in applying the income for the purpose of sub-clause (a), the trustees shall give preference to the poor and indigent relations or members of the family of Sir Sassoon David, Bart. The proviso does not operate independently but comes into play only in applying the income as aforesaid. The provisions for giving preference involves the idea of selection of some persons out of a bigger class envisaged in sub-clause (a). The poor and indigent relations or members of the family can claim to participate in the benefits under the trust only if they come within one of the several classes enumerated in sub-clause (a)... In other words, sub-clause (a) prescribes the primary class of beneficiaries out of which the actual beneficiaries are to be selected by the application of the provision of the provisos, that is to say, by giving preference to the relations or members of the family of the said Sir Sassoon David, Bart."

The Supreme Court approvingly referred to the case *In re Koettgens Will Trusts* in which "a testatrix bequeathed her residuary estate upon trust for the promotion and furtherance of commercial education. The persons eligible as beneficiaries under the fund were stated to be persons of either sex who are British-born subjects and who are desirous of educating themselves or obtaining tuition for a higher commercial career but whose means are insufficient or will not allow of their obtaining such education or tuition at their own expense... The testatrix further directed that in selecting the beneficiaries it is my wish that the.... trustees shall give preference to any employees of John Batt & Co. (London) Ltd. or any members of the families of such employees; failing a sufficient number of beneficiaries under such description, then the persons eligible shall be any person of British birth as the trustees may select provided that the total income to be available for benefiting the preferred beneficiaries shall not in any one year be more than 75% of the total available income for that year. "It was held, on a construction of the will, that the gift to the primary class from which the trustees could select the beneficiaries contained the necessary element of benefit to the public..." In that context Upjohn J. observed :

"If, when selecting from that primary class the trustees are directed to give a preference to the employees of the company and members of their families, that cannot affect the validity of the primary trust it being quite uncertain whether such persons will exhaust in any year 75 per cent. of the trust fund. On the true construction of this will, that is not (as to 75 per cent.) primarily a trust for persons connected with John Batt & Co. and the class of persons to benefit is not confined to them, and in my judgment the trust contained in clauses (7) and (8) of the will of the testatrix is a valid charitable trust."

The Supreme Court approved of the observation as based on sound principles. The Supreme

Court further observed :

"As we have already stated the relations or members of the family are clearly not the primary object contemplated by sub-clauses (b) to (f). The first part of sub-clause (a), omitting the provisos is not said to be too wide or vague and unenforceable. The provision for giving preference to the poor and indigent relations or the members of the family of Sir Sassoon David, Bart., cannot affect the public charitable trust constituted under sub-clause (a). In our opinion, the income from the trust properties comes within the scope of section 4(3)(i) and is, therefore, entitled to exemption."

Mr. Mitter submitted that the benefits under clause (4) of paragraph 3 of the wake deed, which we have to consider, were not meant for the primary class of the poor, out of which selection of poverty-stricken relatives could be made. Such benefits were reserved for relatives only and other poor persons had no chance of participating in those benefits. Since the whole of the income of the wakf could be diverted by the mutwallis to the channel provided by clause (4), he submitted, the trust was not wholly for public charity. This is how he sought to distinguish the case of the Trustees of the Charity Fund. Mr. Mitter next invited our attention to the case of the Commissioner of Wealth-tax v. J.P. Pardiwala Charity Trust, in which the Bombay High Court had to consider the trust deed of one J.P. Pardiwala for the purpose of exemption of the trust from assessment under Wealth-tax Act, in which section 5(1)(i) is substantially to the same effect as section 4(3)(i) of the Indian Income-tax Act. In that case, under a deed of settlement certain properties were transferred to a trust. Clause (5) of the deed empowered the trustees to expend money on certain religious ceremonies for the repose of the soul of the members of the settlors family. Clause (6) of the deed authorised the trustees to pay money towards the maintenance and support of lineal descendants of the children of settlors father, the settlors relatives "and or other indigent persons". The Wealth-tax Officer held that the properties settled on trust were not entitled to exemption from wealth-tax, as the object of the trust was not charitable. In interpreting the deed, Tambes J. (V.S. Desai J. agreeing with him) observed :

"The argument of Mr. Joshi is that clause 6 speaks of persons falling under two categories to whom the trustees could in their discretion make payment towards their support and maintenance. The first class or category consist of the lineal descendants of the children of Pestonji Pardiwala (father of the settlor) and/or any or more of the relatives, wife, children and family of Jehangir Pestonji Pardiwala, his brother and sisters... the persons falling under the second category or class consist of indigent person of whatsoever creed or nationality who in the opinion of the trustees or required support. As already stated, the argument of Mr. Joshi is that it is left to the discretion of the trustees to make payment or contribution towards the support and maintenance of the first category irrespective of their

financial condition. It is only if the trustees desire to make payments or contributions towards the support of persons other than the relations, then their power is restricted to make payments or contribution to indigent persons only. In view of the phraseology used in clause (6), it is not possible for us to accept the argument of Mr. Joshi. In our opinion, the clause speaks of one category only, and the category is of indigent persons. They may be relatives of the settlor or his deceased father, or they may be persons of whatsoever creed or nationality. The power given to the trustees under clause 6 is to make in their discretions payment according to the need of the persons requiring it. In making the choice the trustees have been directed to give preference to the relations of Jehangir Pestonji Pardiwala and his wife. The relations of Jehangir Pestonji Pardiwala and his wife would get aid not merely because they are the relations, but also because they are indigent persons. The difficulty in our way in accepting the contention of Mr. Joshi, firstly, is that the clauses relating to the said relations and indigent persons are joined by clause and/or other. The deed thus directs the trustees to make payment or contribution in support and aid to the said relations and/or other indigent persons. The use of word other leaves no doubt that the reference to the relations is reference to the indigent relations only.... In the second instance, Mr. Joshi's contention would render the concluding clause commencing from who in the opinion of the trustee... Pardiwala and his wife entirely meaningless... The dominant object is to grant relief to the indigent persons by making payment of contribution towards their support and aid. The circumstance that a direction has been given that in considering that case of such indigent persons preference be given to the relations, does not affect the validity of the trust or does not in any manner derogate from the trust being one for public purpose of a charitable nature."

Mr. Mitter submitted that the language of the deed that we have to construe is different from the deed that the Bombay High Court had to construe, and clause (4), according to him, had no reference to the indigent public but was confined only to indigent relatives of the wakf. He rounded up this branch of argument with the submission that the expression "charitable purpose" must be construed strictly. As a result of the decisions spread over a long period, the expression can only be applied to a public charity. There is no such thing as private charitable trust and if the income of a trust could be or was capable of being diverted to private charity the same must not be construed as a trust the income of which was exempt from assessment under section 4(3)(i) of the Indian Income-tax Act. Since clause (4), according to him, was wide enough to defeat the public charitable purpose of the wakf, the income from the trust should not be exempted from assessment under the Indian Income-tax Act. Dr. Debi Pal, learned counsel for the assessee, submitted that the paramount object of the wakf was relief to the poor and the dominant purpose was public charity. The provision for marriage and support of indigent relatives of the wakif, as

in clause (4) of paragraph 3 of the deed, was not such as to change that dominant and paramount character of the trust. He relied, in support of this argument, on a decision of this court in Commissioner of Income-tax v. Keshari Singh Nahar. In that case, in certain premises forming part of the properties held under a trust for religious and charitable purposes, there were a Jain temple in which the public were allowed to worship, a permanent exhibition and a library containing collections of works of Jain art and culture which members of the public were allowed to use and enjoy and a hall which was to be used for holding public meetings. It was provided by the trust that the settlors sons, grandsons and other descendants should have the right to use the premises on the occasions of marriages, social engagements and festivities. In construing the deed, for the purpose of exemption of the trust income under section 4(3)(i) of the Indian Income-tax Act, Sinha J. (as he then was), S.K. Dutta agreeing with him, observed :

"It is true that in section 4(3)(i) of the Income-tax Act, the word wholly is used, but it is sufficient if the primary object of the trust or other legal obligations which have been created is one of general public utility... The trust deed has been discussed above. Although it does not, in so many words, mention members of the public, yet the nature of the trust itself and the finding of the Tribunal, make it ample clear that the general purpose was one of public utility....

Coming to the Hall, it has been found that it is used for holding public meetings. Taking an overall view of the picture, there can be little doubt that the primary object of the trust is to benefit the members of the public. There is, however, a small reservation, namely that when any of the sons, grandsons and other descendants of the settlor would like to use the hall and outhouse, etc., on the occasions of marriages, social engagements and festivities, they should be allowed to do so. In other words, for a limited purpose, preference of user is given to the descendants of the settlor to use the hall, etc., for certain specified purposes. I do not think that this cuts down the general intention to such an extent that we can say that the general intention of benefiting the public has been lost. If the primary object is the test, then there can be little doubt that this is a public and charitable trust, within the meaning of section 4(3)(i) of the Income-tax Act."

We do not feel that Dr. Pal is far wrong in his contention. Upon reading the deed of wakf as a whole, we are of the opinion that the purpose was predominantly charitable, in the sense that the purpose was for benefit of the public. The motive of the wakif, in creating the wakf estate, was to obtain "Suwab or religious merit as understood and laid down by the Mohamedan Law of the Haneefa Sect." The motive was certainly the laudable motive of benefiting the mankind in general and thereby obtaining religious merit according to Mohamedan faith. By paragraph (3) of the deed, the mutawallis are at liberty to apply the income of the wakf for the purposes

mentioned therein. The poor relatives and descendants of the wakif do not appear as preferential recipients of any of the several benefits mentioned in clauses (1) to (3) and (5) to (7) and, therefore, so far as those purposes are concerned, they certainly involve an element of public utility. It is true, as Mr. Mitter argues, that it is open to the mutwallis to spend the net income entirely for the purpose referred in clause (4) of paragraph 3, to the exclusion of the purposes mentioned in other clauses. But the fact that the relations or descendants of the wakif do not come directly under any of the other clauses cannot be ignored, for these certainly have some bearing on the question as to who and what were the primary objects of the wakf as a whole. Then again, in clauses (1), (4) and (8) also the predominant object is to benefit the poor, with emphasis on the poor relatives of the wakif in clause (4). The several charitable clauses in the deed open with the words that the general rule to be observed would be that the objects of charity should be such as would bring religious merit according to Mohammedan notions to the wakif and, thereafter, a general indication of such objects was given to the mutwallis. Those objects are predominantly for the benefit of the poor and for the good of the public. Marriage expenses and expenses for support of relatives and descendants appear to have been provided for in the deed not so much because they were relatives or descendants but because they were also poor and in indigent circumstances and ranked as objects of charity for the same type of misfortune as other poor people suffered from. If we read clauses (1) and (8) together, we find that the participation of the relatives in the benefits of the wakf, even if the same be limited to the benefits mentioned in clause 1 only, was dependent upon the qualification that they were considered "equally fit with other people to share in the provisions." Thus, the predominant object of the wakf was to benefit the poor, including the poor relatives, and to benefit other bodies of public utility like mosques, schools, musaffirkhanas, water-supply, etc. This predominate object was not destroyed by the provision made for support or payment of marriage expenses of poor relatives as one of the objects. Taking the overall picture, we are of the opinion, the primary object of the wakf was to benefit the poor and other members of the public. The provision made in clause (4) does not cut down the primary intention to such an extent that the intention itself is lost. Mr. Mitter next submitted that, if we look to the chart prepared by the Tribunal, it would appear that larger expenses for objects under clauses (4) and (8) and smaller expenses under clauses (1), (2), (3) and (5), (6) and (7) were incurred by the mutwallis. This argument proceeds under a misapprehension. Clause (8), it is not disputed, is charitable in nature. How much was spent under clause (4) and how much under clause (8) does not appear from the chart. It is true that expenses under clauses (4) and (8) together were heavier than expenses under clauses (1), (2), (3) and (5), (6) and (7), but, nevertheless, it does not appear that the expenses under clause (4) out balanced the expenses for charity under other clauses. We cannot, therefore, make much of this argument. Mr. Mitter lastly contended that the expenses under clause (4) should not be excluded from taxation, particularly for those years which are covered by the amended section 4(3)(i)

(amended in 1953 with effect from April 1, 1952). He relied on the Supreme Court decision in H.E.H. Nizams Religious Endouments Trust v. Commissioner of Income-tax, in support of the contention. We ignore this argument because the question as framed does not accommodate this argument. In the view that we take we answer the question referred to this court in the affirmative. The Commissioner of Income-tax must pay the costs of this reference to the assessee.

K.L. Roy J. - I agree.

Question answered in the affirmative.