GUJARAT HIGH COURT

Hazrat Pirmohamed Shah Saheb Roja Committee

Vs.

Commissioner of Income-Tax

Income-tax Ref. No. 22 of 1963

(J.M. Shelat, C.J. and P.N. Bhagwati, J.)

25.09.1964

JUDGMENT

P.N. Bhagwati, J.

1. This is a reference which comes before us on a requisition under section 66 (2) of the Income-tax Act, 1922. There are two questions referred to us but they both relate to the same point, namely, whether the income of the assessee derived from properties held by it is exempt from tax under section 4 (3) (i). There is also a reference to section 4 (3) (ii) in the second question, but that is obviously due to some mistake because, as pointed out by the Tribunal, the claim for exemption under section 4 (3) (ii) was expressly given up by counsel who appeared on behalf of the assessee before the Tribunal and the only claim pressed was for exemption under section 4 (3) (i). We will, therefore, delete the words "and/or 4 (3) (ii)" in the second question and confine the scope of the inquiry before us to the determination of the question whether the income of the assessee is exempt from tax under section 4 (3) (i) which was the only question debated before the Tribunal. In order to answer this question it is necessary to state a few facts.

2. Hazrat Pirmohamed Shah Saheb was a renowned Muslim Saint who lived in Gujarat in the early half of the eighteenth century. He preached what is called by the Tribunal "a sectarian doctrine" and gathered around him a large following during his lifetime. From out of his followers who were considerable in number, he initiated 100 as his disciples and those initiated came to be known as Murids. He, however, did not permit Murids to initiate others as Murids with the result that after his death there could be no further Murids by initiation. But the descendants of Murids, became Murids and the class of Murids was, therefore, constituted of the descendants of the original Murids initiated by the Saint. The Murids came mostly, if not entirely from Sunni Bohra community, Sunni being one of the two main sects of the Muslim community, namely, Sunni and Shia. On the death of Hazrat Pirmohamed Shah Saheb which occurred sometime in 1742 A. D. his disciples i.e., Murids and other devotees subscribed moneys and

collected donations for the purpose of building a Roza or Dargah i.e., a Mousoleum to commemorate his memory. Out of those moneys, a Roza was built and there was also built alongside the Roza a mosque for the purpose of offering Ratias and prayers. In accordance with Islamic doctrine, all Muslims, whether Murids or non-Murids, had unrestricted access to the Roza and the mosque. Now the maintenance of the Roza and the mosque required moneys and so also did the observance of festive occasions such as Urs, death anniversaries etc., at these institutions. Several gifts of properties were, therefore, made by Murids for these purposes and certain properties were also purchased by persons in management out of offerings made at these institutions. All these properties were treated as properties of the Roza and the income from these properties after payment of municipal taxes, insurance premia and other outgoings in respect of the properties was utilised for maintenance of the Roza and the mosque and observance of festive occasions such as Urs, death anniversaries etc. It appears from the statement of receipts and expenditure for the years 1942-43 to 1956-57 produced before the Tribunal which is Annexure 'L' to the Statement of Case that during those years a part of the surplus income of the properties after meeting this expenditure on the maintenance of the Roza and the mosque and the observance of festive occasions such as Urs, death anniversaries etc., was also utilised for running Madrassas and Library and payment of expenses on items such as Langar and Bhandar for giving food to pilgrims attending the Roza and the mosque on festive occasions. This statement also shows that after meeting the aforesaid expenditure, there was a surplus of receipts over expenditure every year, but this surplus was at no time utilised for the personal benefit of the Murids. The Murids, however, had two kinds of rights in the properties of the Roza. Some of the Murids who had contributed to the cost of construction of certain rooms were entitled to reside in those rooms when they came to the Roza presumably from places outside Ahmedabad and they were also liable to carry out alterations or repairs to those rooms at their own cost. Then there were certain date trees in the premises of the Roza and the Murids were entitled to the dates from those trees. The properties of the Roza were considerable in number and they were situate in different places like Ahmedabad, Kadi and Viramgam. Barring the Roza, the mosque and the rooms meant for the occupation of the Murids entitled to reside therein, the rest of the properties were let out and produced income by way of rent which forms the subject-matter of assessment in the present reference.

3. The earliest records available are the records of the first survey operations carried out between 1870 and 1880 and they show that at that time the Roza and the mosque were recognised as Wakf and were entered as such in the Revenue records. The properties which were purchased for the Roza from time to time were also described as sold to the Wakf of the Roza in the documents conveying the properties. Now there is no positive evidence on record to show definitely how the properties of the Roza were managed prior to 1888 but the minutes of the meeting of the Murids held on 15th October 1888 indicate that until then the management of the Roza properties was being looked after by the general body of Murids through certain appointed agents. At this meeting resolutions were passed by the general body of Murids laying down certain rules in connection with the management and administration of the Roza properties. In these resolutions

as also in the Minutes the properties were described as belonging to the Roza and by the resolutions a committee was appointed to manage and administer the Roza properties. The Committee was to look after the properties of the Roza, maintain the Roza and the mosque and defray the expenses incurred on Urs and other functions in the Roza. The Committee to which we shall for the sake of convenience refer as the Roza Committee thereafter carried on the management and administration of the Roza properties. This state of affairs continued untill the time when the Mussalman Wakf Act, 1923 came into force. On the coming into force of that Act, the Roza Committee was called upon to furnish a statement containing the description and particulars of the Roza properties as also a statement of accounts on the footing that the Roza properties were properties held by way of Wakf to which the provisions of the Act applied. The Roza Committee, however, took up the stand that the Wakf on which the Roza properties were held was not a Wakf within the scope and ambit of the Act and the Roza committee was therefore, not liable to file any statement of particulars or statement of accounts under the provisions of the Act. This led to a series of litigations between the Roza Committee on the one hand and the Anjuman-I-Islam District Wakf Committee and other leading Sunni Muslim citizens on the other. It is not necessary to make any detailed reference to these litigations for the purpose of the present reference but it is sufficient to state that in these litigations of the aforesaid two parties the latter contended that the Wakf was a Wakf for the benefit of all Muslims while the former contended that the Wakf was a Wakf-alAulad meant only for the benefit of the Murids and their descendants who would also be Murids. While the last of these litigations was pending, the Bombay Public Trusts Act, 1950, came into force on 21st January 1952. Since the Act required applications to be made for registration of all public trusts on pain of penalty, the Roza Committee made an application to the Charity Commissioner on 30th May 1952 for registration of the Wakf. The application was made under protest since the contention of the Roza Committee was as it had always been, that the Wakf was not a Wakf for the benefit of the public but was a Wakf merely for the benefit of the Murids and was, therefore, not liable to be registered as a public Trust. The application was, however, withdrawn on 2nd November, 1953. The Assistant Charity Commissioner thereupon started a suo motu inquiry under the Act but before this inquiry was concluded, the Roza Committee made another application for registration of the Wakf to the Charity Commissioner on 28th April 1955. In this application the Roza Committee conceded that the Wakf was for the benefit of the public and was, therefore, liable to be registered as a Public Trust. The opposition of the Roza Committee being thus withdrawn, the Assistant Charity Commissioner made an order dated 29th April 1955 registering the Wakf as a Public Trust. No appeal or revision application was preferred against this order of the Assistant Charity Commissioner until the beginning of January 1958 when the Roza Committee, having regard to what happened in the income-tax proceedings initiated against it, to which we shall presently refer, made an application to the Charity Commissioner to revise this order. The Charity Commissioner, however, by an order dated 6th January 1958 held that the order passed by the Assistant Charity Commissioner had become final and conclusive since no appeal had been preferred against it and that in am event the Wakf was clearly public trust and was rightly registered as such.

4. In the meantime, on 28th March 1953, the Income-tax Officer issued notices to the Roza Committee, which is the assessee before us, under section 34 (1) (a) for the assessment years 1944-45 to 1948-49, the corresponding account year being Samyat Years 1999 to 2003. The notices were issued on the ground that by reason of the failure of the assessee to make a return of its income under section 22, the in come of the assessee for those assessment years had escaped assessment. The income of the asessee consisted of income derived from the Roza properties and there was also some income derived from voluntary contributions. The assessee contended that the income derived from the Roza properties was exempt from tax under section 4(3) (i) and the income from voluntary contributions was exempt under section 4 (3) (ii). The claim for exemption under both the heads was negatived by the Income-tax Officer and on appeal being taken to the Appellate Assistant Commissioner, he also took the same view except in regard to income from voluntary contributions which he regarded as exempt from assessment. The assessee thereupon preferred an appeal to the Tribunal. The Tribunal, after setting out the aforesaid facts, held that on those facts there was no doubt that the properties of which income was brought to tax by the revenue authorities were Wakf properties. The Tribunal observed that no Wakf was at any time created by any written document like a Wakf-nama nor was it established that any Wakf was created orally, but the foundation for the allegation that the Roza properties constituted Wakf properties was to be found in the description given to them in the records of the first survey and the conveyance deeds of the properties, conduct of the persons in charge of those properties from time to time and the manner in which the income derived from those properties had been utilised. The Tribunal thus held the Wakf to be established by long user. The Tribunal then proceeded to consider whether the Roza Committee could be said to hold the properties under trust or legal obligation. On this question the Tribunal held that since the properties were Wakf properties, the Roza Committee held the properties under a legal obligation "even though they may not have held it under a trust". The Tribunal then examined the question whether the purposes of the Wakf were public or private in the sense that the benefit of the Wakf was available to the Muslim Community as such or was confined only to the Murids. On this question the Tribunal would have had to examine the facts for the purpose of determining who were the beneficiaries under the Wakf, whether the Muslim community as a whole or only the Murids, but counsel who appeared on behalf of the assessee conceded before the Tribunal that the benefit of the Wakf was confined exclusively to the Murids. He contended that though the benefit of the Wakf was strictly confined to the Murids, the class of Murids constituted an appreciable section of the Sunni Bohra community and the Wakf was, therefore, a Wakf for the benefit of a section of the community so as to fall within the exempting provision contained in section 4 (3) (i). The Tribunal, however, relying on the test laid down by the House of Lords in *Oppenheim v. Tobacco Securities Trust Co. Ltd*[1]*.,* took the view that the class of Murids could not be regarded as a section of the community but constituted merely a fluctuating body of private individuals. On this view the Tribunal held that since the element of public benefit was absent, the Roza properties could not be said to be held under a legal obligation wholly for charitable or religious purposes. This conclusion was obviously based on the hypothesis that for religious

purposes, as for charitable purposes, the element of public benefit was essential a hypothesis which, as the last paragraph of the section will show, was patently erroneous. The Tribunal ended by observing that the Roza properties were held under a trust assuming that there is a trust as distinguished from a legal obligation for private religious purposes of the Murids and since the income of this private religious trust did not enure for the benefit of the public, it was not exempt under section 4 (3) (i) by reason of the last paragraph of the section. The Tribunal in the result held that the claim of the assessee for exemption under section 4 (3) (i) was not well founded and confirmed the assessment of the income to tax. This decision of the Tribunal is now challenged before us on the present reference.

5. Now it is well settled that the admissibility of a claim to exemption from income-tax must be determined by the language of the provision made in the Act. The provision under which the claim for exemption was made in the present case was section 4 (3) (i). That section as it stood at the material time during the assessment years 1944-45 to 1948-49 was in the following terms :

[1](1951) AC 297

> "4. (3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:
> (i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto.
> x x x x
> In this sub-section 'charitable purpose includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility, but nothing contained in clause (i), clause (ia) or clause (ii) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public."

The section, it will be noticed, consisted of two parts; the first exempting income derived from properties held under trust or other legal obligation wholly for charitable purposes on the basis of the statutory definition that "charitable purpose" includes relief of the poor education, medical relief and the advancement of any other object of public utility and the second, exempting income derived from property held under trust or legal obligation wholly for a religious purpose with this qualification that that part of the income of a private religious trust which does not enure for the benefit of the public would not be entitled to exemption. The claim for exemption before us was formulated under both the heads and it will, therefore, be necessary for us to consider the section in both its parts. We will first examine the question whether the income sought to be assessed could be said to be derived by the assessee from properties held under trust on other legal obligation wholly for charitable purposes, keeping in view the statutory definition of "charitable purpose" contained in the last paragraph of the section. It is now a trite saying after the decisions of the Privy Council in *Tribune Press, Lahore v. Commissioner of Income Tax, Punjab*[2], and *All India Spinners Association v. Commissioner of Income-tax*[3], that the Indian

statute must be construed on its actual words and is not to be governed by English decisions on the subject. Bearing this note of warning sounded by the Privy Council in mind, we will in deciding this question, base ourselves only on the construction of the words of the section before us but in order to arrive at a true interpretation of those words, it will be useful to compare the English law, though at the same time we must take care to see that we do not fall into the error of blindly accepting its principles in disregard of the language of our section. In England, as observed by Lord Russell of Killpwen In re, Grove Grady, (1929) 1 Ch. 557 at 582 "matters have been stretched in favour of charities almost to bursting point". But the Courts have firmly drawn the line at least in one direction. Barring the class of cases familiarly known as "poor relations" cases, it is now a universal rule that the law recognizes no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community. See Tudor on Charities, Fifth Edition, page 11. Authority for this proposition is to be found in numerous cases. In re, Foveaux, (1895) 2 Ch 501, Chitty, J., said, at page 504 :

> "To be a charity there must be some public purpose - something tending to the benefit of the community."

[2](1939) 7 ITR 415

[3](1944) 12 ITR 482

In Pemsel's Case, (1891) AC 531, Lord Macnaghten before he gave his classic definition of "charitable purposes" said at page 580 :

> "The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable."

In *Verge v. Somerville*[4]*,* Lord Wrenbury, delivering the judgment of the Priw Council, said at page 499 :

> "To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public - whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot". The proposition is true of all charitable gifts and is not confined to the fourth class in Lord Macnaghten's well know statement in Pemsel's Case, 1891 AC 531 where the learned law Lord defined "chartiable purposes" by saying:
> "Charity in its legal sense comprises four principal divisions; trust for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads".

The element of public benefit must exist whatever be the class in Lord Macnaghten's statement to which the charitable purpose may belong. The only exception is to be found in the case of trusts for the relief of poverty where the element of public benefit is dispensed with as a result of the historical development of the law of charity. There is ancient authority for supporting a gift for the relief of poor relations and recently the Court of Appeal in England held valid a gift to relieve the poverty of employees of a particular employer. *Gibson v. South American Stores (Gath and Chaves) Ltd*[5]*.,* These however constitute an anomalous line of cases which serve more to emphasize the rule rather than to militate against it.

6. When we turn to the words of Section 4 (3) (i) we find that the overriding test of general public benefit is insisted upon also in India and the reason is that a gift or bequest for a charitable purpose enjoys certain privileges under the law of Transfer, the law of wills and the law of Income-tax, and the intendment of the Legislature, therefore, clearly is that such privileges should be available only when the purpose is one which tends to the benefit of the public. As a matter of fact this requirement is more stringent in India than in England for it makes the test of general public benefit applicable to all the four classes of charitable purposes mentioned in the last paragraph of the section, namely, "relief of the poor, education, medical relief and the advancement of any other object of general public utility" and does not recognize any exception in favour of gifts for relief of poverty as in England. The words "any other object of general public utility" used by the legislature to describe the last class, with particular emphasis on the word "other", clearly

[4](1924) AC 496

[5](1950) Ch 177

show as a matter of plain grammatical construction and also on the principle of noscitur a sociis that the first three classes should also be purposes of general public utility, i.e., they must also be invested with a public character. In regard to the first class of charitable purposes, namely, relief of the poor, the Calcutta High Court, held in In re, Mercantile Bank of India (Agency) Ltd., 1942-10 ITR 512 (Cal), that relief of the poor must not be relief of a body of private individuals but must have a public character. The Madras High Court in *Commissioner of Income-tax, Madras v. Jamal Mohamad Sahib*[6]*,* and the Bombay High Court in *Trustees of Gordhandas, etc., Trust v. Commissioner of Income-tax, (Central) Bombay*[7]*,* also took the same view and held that trusts for the relief of poverty of poor relatives of the settlor were not for a charitable purpose since no element of public benefit was involved. Similarly it was held by the Bombay High Court in *D. V. Arur v. Commissioner of Income-tax, Bombay*[8] "that education" in the order to be charitable, must relate to the public and on that view the Bombay High Court found a trust for the education of the members of a family or the descendants of a certain named individual to, be non-charitable. The element of public benefit must, therefore, be present before a purpose falling within any of the four classes set out in the last paragraph of section 4 (3) (i) can be regarded as charitable. The purpose in order to be charitable must be directed to the benefit of the community or a section of the community and not to the benefit of particular

private individuals or a fluctuating body of private individuals.

7. The question which, therefore, requires to be considered is, has the wakf in the present case the public character which the Income-tax law requires of the charities it recognizes and favors? We may make it clear at this stage that when we use the word "wakf" we do not wish to anticipate the point whether there was in the present case a Wakf or a trust, for that is one of the points raised before us, but we are using the word on the assumption that what in fact existed in the present case was a Wakf as found by the Tribunal. It is clear from what is stated above that the purposes of the Wakf could be said to be charitable only if they were directed to the benefit of the community or a section of the community and not to the benefit of a particular private individual or a fluctuating body of private individuals. Mr. Kaji on behalf of the assessee sought to bring the case within this formula by relying on the following facts. He urged that on the record it was clear that out of the moneys collected from the Murids and other devotees, the Roza and the mosque were built and all Muslims, whether Murids or non-Murids, had unrestricted access to the Roza and the mosque. Festive occasions as Urs, death anniversaries etc., were also celebrated at these institutions. Properties had been gifted by Murids for the purpose of maintenance of the Roza and the mosque and the celebration of festive occasions such as Urs, death anniversaries etc. The Wakf also conducted Madrasas and library and the order of the Charity Commissioner which is part of the statement of Case shows that the Madrasas were open not only to all Muslims but also to non-Muslims. Reiving on these facts Mr. Kaji contended that the Wakf properties were clearly, held for the benefit of the Muslim community as a whole and not for the limited benefit of the Murids. Now all these facts were before the Tribunal and on these facts the assessee might have invited the Tribunal to find that the purposes of the Wakf were directed to the benefit of the Muslims as a whole and were, therefore, of a public character. But the

[6]1941-9 ITR 375 : AIR 1941 Mad 535 [8]1945-13 ITR 465 : AIR 1946 Bom 44

[7](1952) 21 ITR 231 : AIR 1952 Bom 346

Tribunal was saved the trouble of examining these facts along with the other facts on record for it was conceded by counsel appearing on behalf of the assesses that the benefit of the Wakf was strictly confined to the Murids. In view of this concession which was made before the Tribunal and on which the Tribunal acted, we cannot permit Mr. Kaji to contend before us that the purposes of the Wakf were directed to the benefit of the Muslims as a whole and the benefit of those purposes was not limited only to the Murids.

8. Mr. Kaji, however, contended that the assessee was still within the exemption because Murids constituted a section of the community and the purposes of the Wakf were, therefore, invested with a public character. That raises the question; what is a section of the community? Now this expression has always eluded definition and having regard to the impossibility of laying down a precise definition of what is meant by a "section of the community", Lord Green M. R. *In re, Compton, Powell v. Compton*[9], while discussing this question disclaimed any intention to make an attempt to define it, Nevertheless, he did proceed to explain what in his opinion would constitute a "section of the community." In order to appreciate the test laid down by him for ascertaining when a class of persons can be said to constitute a section of the community as distinguished from an aggregate of individuals not constituting such section, it is necessary to

notice the facts of the case which came before him. The testatrix there created a trust for the education of the lawful descendants of three named persons to fit such descendants to be servants of God serving the nation, not as students for research of any kind. The descendants of two of such persons were to "have the preference as scholarships for the time thought best by the trustees not over the age of twenty-six years". There were 28 descendants living at the time of the proceedings. The trust was held, and, if we may say so, obviously rightly held, to be a "family trust" and not one for the benefit of a section of the community. It was not a valid charitable trust, for the beneficiaries were defined by reference to a personal relationship and so it lacked the quality of being a public trust. It was a mere private or family benefaction and mere numbers could not have the effect of raising a family or private benefaction into the class of charitable gifts. The learned Master of the Rolls said at page 201 :

> "In the case of many charitable gifts it is possible to identify the individuals who are to benefit or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character. Thus if there is a gift to relieve the poor inhabitants of a parish the class to benefit is readily ascertainable. But they do not enjoy the benefit when they receive it by virtue of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into class is essentially an impersonal one. It is definable by reference to what each has in common with the others and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are A. B., C. D., and E. F., but because they are poor inhabitants of the parish. If in asserting their claim it were necessary for them to establish the fact that they were the individuals A. B., C. D., and E. F., I cannot help thinking that on principle the gift ought not to be held to be a charitable gift since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character. It seems to me that the same principle ought to apply when the claimants, in order to

[9](1945) 1 All England Reporter 198

> establish their status, have to asert and prove, not that they themselves are A. B., C. D., and E. F., but that they stand in some specified relationship to the individuals A. B., C. D., and E. F., such as that of children of employees. In such a case, too, a purely personal element enters into and is an essential part of the qualification which is defined by reference to something, i.e., a personal relationship to individuals or an individual which is in its essence non-public."

After discussing the case of In re, Drummond, (1914) 2 Ch 90, which was cited before him, he summed up his conclusion in the following words at page 202 :-

> " I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named porosities cannot on

> principle be a valid charitable gift. and this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim upon it.

This test was approved by the House of Lords in 1951 AC 297 (supra). In that case the trust was for providing for the education of children of employees or former employees of a British Limited Company or any of its subsidiaries or allied Companies. The employees so indicated numbered over 1,10,000 and vet Lord Simonds held that the children of the employees who were the beneficiaries under the trust did not constitute a Section of the public so as to satisfy the test of public benefit. He observed:

> "These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or as in 1945-1 All England Reporter 198, of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several proposity they are neither the community nor a section of the community for charitable purposes."

The other learned law Lords barring Lord MacDermott also expressed their approval of this test. In every case, therefore, where the question arises whether a class of beneficiaries under a gift constitutes a section of the community or is a mere conglomeration of individuals that is not a section of the community, the inquiry must be what is the common quality which unites those within the class and is that quality essentially impersonal or essentially personal: If the former, the class will rank as a section of the community and the gift will have the element common to and necessary for all legal charities; but, if the latter, the gift will be private and not charitable.

9. Mr. Kaji disputed the validity of this test in its aplication to India and urged upon us that though the test may be a good test under English Law, it cannot be bodily lifted and applied in India. He drew our attention to the warning uttered by the Privy Council in relying on English cases on the subject of charity while applying the language of the Indian statute to circumstances emerging under conditions of Indian life and contended that whatever might be the validity of this test in England, it cannot afford a proper criterion for determining what, having regard to the conditions of Indian life, would constitute a section of the community. Now it is true that in determining whether a particular object of a gift is an object of general public utility or, in other words, an object tending to public benefit, the Courts must apply, to use the words of Sir Raymond West in *Fatma Bibi v. Advocate General of Bombay*[10], approved by the Privy Council

in the Tribune's case (supra) "the standard of customary law and common opinion amongst the community to which the parties interested belong." As observed by Lord Wright in All India Spinners' Association's case 1944-12 ITR 482 (supra), English decisions may sometimes afford help or guidance but they "cannot relieve the Indian Courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life. But we do not see anything peculiar to English law or peculiar to conditions of English life in the test which has been formulated in the English decisions to which we have referred. The test is a broad general test for determining when can a class of beneficiaries be said to have a public character or significance so as to constitute a section of the community as distinguished from a mere conglomeration of individuals and since the element of public benefit, that is, benefit of the community or a section of the community is an essential requirement of charity in both the systems of law, this test must apply equally in India as in England. Of course in applying the test the Court must take into account 'the standard of customary law and common opinion amongst the community to which the parties interested belong" and "the conditions of Indian life" and not blindly hold that whatever constitutes a section of the community according to English view must be regarded as a section of the community for determining the charitable character of a gift in India. But the test certainly applies and we cannot reject it on any such ground as is suggested by Mr. Kaji. As a matter of fact we find that this test has been approved by a Division Bench of the Bombay High Court in *Commissioner of Income-tax v. Walchand Diamond Jubilee Trust*[11], We must, therefore, proceed to apply this test to the facts of the present case.

10. The class of beneficiaries under the Wakf being the class of Murids as conceded before the Tribunal, the question is; does the class of Murids constitute a section of the community? Now one ground must be cleared at the outset. There were at the material time about 500 families of Murids in Gujarat. This number, argued Mr. Kaji, could not be considered negligible or insignificant from the numerical point of view and could well be regarded as an appreciable section of the community. This may be right so far as numbers go, but it must be remembered that mere numbers cannot raise a private or family benefaction into the class of charitable gifts. No doubt in deciding whether a gift which is in its nature not a mere private or family benefaction is or is not for the benefit of a section of the community so as to make it a good charitable gift, the question of the number of potential beneficiaries is a relevant one. But if a gift is in its nature a private or family benefaction, it cannot be regarded as a charitable gift merely because the number is or may at some future date become considerable. What we must, therefore, inquire is not whether the Murids were considerable in number but whether they could be said to

[10](1881-82) ILR 6 Bom 42

[11](1958) 34 ITR 228 at page 236 : AIR 1959 Bom 148 at p. 150

form a section of the community.

11. Mr. Kaji, contended that the common quality which united the beneficiaries into the class of Murids was the fact that each one of them was a Murid and the attribute of being a Murid was, in

his submission, an attribute of an impersonal nature which constituted the class of Murids into a section of the community. He agreed that after the death of the Saint, there could be no Murids by initiation and one could be a Murid only by being born in the family of a Murid. But that by itself, he argued, could not be a reason for holding that the attribute of being a Murid was essentially of a personal nature. He gave the example of castes in the Hindu Community, where in order to belong to a caste, one has to be born in the caste and pointed out that merely because the entry in the class can be obtained only by birth, it does not mean that the class does not constitute a section of the community. He also tried to illustrate the point he was making by taking the case of a religion like the Jewish religion where conversion not being possible, entry can be secured only by birth and stressed his argument in the form of an interrogation by asking the question; can the Jews, therefore, not be regarded as a section of the community? Now we certainly go with the argument of Mr. Kaji upto the point that he says that merely because entry in a class can be secured only by birth, it cannot be said that the class does not constitute a section of the community. Where for example the class consists of a religious sect or community, entry in it can always be secured by birth but in addition, entry may also be possible by initiation or conversion depending on the doctrines and beliefs of the religious sect or community. But these would be only the different modes of entry in the class; the common characteristic of the class would be the fact that each member subscribes to the doctrines and beliefs of the class and that would certainly be an impersonal characteristic in the sense in which that expression is judicially understood. and it would make no difference to the proposition whether all modes of entry in the class are permissible or the mode of entry is confined only to birth. In such a case where the mode of entry is confined only to birth, it is not birth or descent which constitutes the common quality defining the class; it merely provides an entry in the class which is defined by reference to some other quality of an impersonal nature. That is the basis on which the examples given by Mr. Kaji can be explained. Mr. Kaji is, therefore, right in his submission that merely because a person can be a Murid only by birth in the family of a Murid, that by itself is not sufficient to show that the class of Murids does not form a section of the community. So far we go with the argument of Mr. Kaji, but we part company when he wants us to conclude that Murids, therefore, constitute a section of the community. What, we may ask, is the common quality which distinguishes Murids from the rest of the community? Mr. Kaji contended that the common quality was that they were followers of the sectarian doctrine preached by the Saint and, therefore, constituted a class. But this claim collapses when we examine how the Murids came to be initiated by the Saint. It is not as if the Murids were the only followers of the Saint or of the sectarian doctrine preached by him. There were a considerable number of followers and from out of them the Saint selected 100 and initiated them as his disciples. It cannot, therefore, be said that the common quality which united the Murids into a class was the following of the sectarian doctrine preached by the Saint. Mr. Kaji then contended that the common quality was to be found in the fact that they were disciples of the Saint but if this be the common quality, the argument of Mr. Kaji runs into serious difficulties. The relationship of a Saint and his disciples is clearly a personal relationship, being in the nature of an intimate spiritual relationship. It is difficult to see how this relationship can be described as of an impersonal nature. The nexus which connects

disciples is the personal bond or relationship which each disciple has with the Saint and if this be the common characteristic defining and demarcating the class of Murids, it is clear, having regard to the lest which we have set out above, that the class of Murids cannot be regarded as a section of the community. Moreover, in order to base a claim to be a Murid, a claimant must be able to show that he is a descendant of an original Murid initiated by the Saint. This relationship too would be a personal relationship with the original Murid who was a Murid by reason of the fact that he was initiated as a disciple by the Saint. It is, therefore, clear that the class of Murids did not constitute a section of the community so as to satisfy the test of public benefit involved in a charitable purpose but was merely a fluctuating body of private individuals and the purposes of the Wakf could not be regarded as purposes tending to the benefit of the community or a section of the community so as to constitute the Wakf a Wakf for charitable purposes. The claim for exemption on the basis that the Wakf was a Wakf wholly for charitable purposes, must, therefore, be rejected.

12. The next contention of Mr. Kaji was a rather ingenious contention and we must say, an able argument was advanced by him in support of it. The contention was based on that part of the Section which provides that income from property held under trust or other legal obligation wholly for religious purposes is exempt from assessment and it was built up by taking the following steps. Mr. Kaji first contended that the Wakf of the Roza properties was a Wakf wholly for religious purposes of the Murids and though, the Murids not being a section of the community, those purposes might not be regarded as being of a public character yet the Wakf was within the exemption since the Section did not require that religious purposes like charitable purposes must be purposes of a public character or that there should be an element of public benefit involved in those purposes. He pointed out that as a matter of fact, it was held by the Tribunal that the Wakf of the Roza properties was a Wakf for the religious purposes of the Murids. The next step which he took was that being within the exemption contained in the main part of the section, it was not taken out of the exemption by the last paragraph of the Section and this step was sought to be made good by the following process of reasoning. He urged that it was held by the Tribunal that the Roza properties were properties held by way of Wakf and since in a Wakf the property which is the subject matter of the Wakf always vests in God Almighty and the Muthavalli is merely the custodian and manager of the property and not a trustee in the legal sense, the Roza properties could not be said to be held under trust but they were held only under a legal obligation for the purposes of the Wakf. Since, the argument ran, the Roza properties were not held under trust (but merely under a legal obligation), the Wakf could not be regarded as a private religious trust within the meaning of that expression as used in the last paragraph of the Section and the income from the Roza properties held by way of Wakf was, therefore, not taken out of the exemption enacted in the main part of the section. The alternative argument was that even if the Wakf could be regarded as a private religious trust, its income enured for the benefit of the public and was, therefore, still exempt under the main part of the Section. This was broadly the contention urged by Mr. Kaji on behalf of the assessee and we shall now proceed to examine the validity of this contention.

13. Turning to the main argument, the first question that must be considered is whether the Wakf was wholly for religious purposes for unless the assessee could show that the Wakf was wholly for religious purposes, the assessee could not claim the benefit of the exemption enacted in the main part of the Section. It is only if the assessee could show that the Wakf was wholly for religious purposes and, therefore, within the exemption as found in the main part of the Section that the next question could arise for consideration, namely, whether the Wakf was a private religious trust income whereof did not enure for the benefit of the public so as to be out of the exemption by reason of the last paragraph of the Section. The learned Advocate General on behalf of the Revenue drew our attention to that part of the order of the Tribunal where the Tribunal after holding that Murids did not constitute a section of the community observed that since Murids for whose benefit the Roza properties were held were not a section of the community, the Roza properties could not be said to be held under legal obligation wholly for charitable or religious purposes and urged that this observation, containing as it did a finding of fact, concluded the present point against the assessee. Now, undoubtedly this observation does oppear to have been made by the Tribunal but a little scrutiny will show that this observation was based on a misconception as to the true legal requirement under section 4 (3) (i). In order that a purpose may be charitable within the meaning of Section 4 (3) (i), it must be directed to the benefit of the community or a section of the community but no such requirement is necessary in the case of a religious purpose. A religious purpose may be private as distinguished from public and even if property is held under trust or legal obligation for a private religious purpose directed to the benefit of particular private individuals or fluctuating body of private individuals in-come of such property would be within section 4 (3) (i). The Tribunal, it appears, proceeded on the basis that unless the purpose for which the properties were held under trust or legal obligation was a public purpose directed to the benefit of the community or a section of the community - which the Roza properties were not in the view taken by the Tribunal - the properties could not be said to be held under trust or legal obligation wholly for religious purposes and hence the observations relied on by the learned Advocate-General on behalf of the Revenue. As a matter of fact while dealing with the argument based on the last paragraph of the section the Tribunal made it clear that they accepted the contention of the Revenue that the income derived from Roza properties was income derived from properties held under trust - assuming that there was a trust as distinguished from a legal obligation - for private religious purposes of the Murids and that it did not enure for the benefit of the public. It is, therefore, clear that the Tribunal found that the Roza properties were held by the assessee for private religious purposes of the Murids. This finding, contended Mr. Kaji, was a finding of fact and being a finding of fact, it was binding upon us and in view of this finding, it was submitted, it was not open to us to hold that the Wakf was not wholly for religious purposes. The learned Advocate General, however, urged that the question whether the Wakf was wholly for religious purposes was a question of law and the finding of the Tribunal on this question was, therefore, not immune from scrutiny by the Court. Now the determination of the question whether the Wakf was wholly for religious purposes would involve findings on two constituent questions. One would be as to what were the purposes

of the Wakf and the other would be whether those purposes could be regarded as religious purposes. The second question would of course be a question of fact since its determination would not involve the application of any legal principles but the first question would in most cases be a question of law or at any rate a mixed question of law and fact. Now in the present case the determination of the question as to what was the legal obligation with which the Roza properties were impressed and for what purposes, involved not only appreciation of facts but also application of legal principles and the first question, namely, as to what were the purposes of the Wakf was, therefore, a mixed question of law and fact which this Court would be competent to inquire into on a reference under section 66. The learned Advocate General was, therefore, entitled to assail the finding of the Tribunal in regard to the question as to what were the purposes for which the Roza properties were held or in other words, what were the purposes of the Wakf.

14. The learned Advocate General contended that in view of the concession made before the Tribunal that the benefit of the Wakf was confined strictly to the Murids, it was impossible to say that the Roza properties were held wholly for religious purposes. He urged that the Roza properties being held for the benefit of the Murids, the income of the Roza properties could be availed of for the personal benefit of the Murids and since there was nothing to show that Murids were performing any religious duties or functions or that conferment of benefit on the Murids was for advancement of religion, it could not be said that the purposes for which the Roza properties were held were wholly of a religious character. This contention is in our opinion not well founded for it confuses the purposes of a trust with the beneficiaries under the trust. When a trust is created, the income may be directed to be applied for any purposes and those purposes may be directed to the benefit of particular private individuals or fluctuating body of private individuals or to the benefit of the community or a section of the community. The beneficiaries under the trust in such a case would be the particular private individuals or fluctuating body of private individuals in the one case and the community or a section of the community in the other and the manner in which they would be benefited would be by the application of the income of the trust to the purposes set out in the trust. Take for example, a case where a trust directs the income to be applied for the relief of poverty. That is the purpose for which the income is to be applied but the beneficiaries who would be benefited by the execution of the purpose would be either (1) the particular private individuals or fluctuating body of private individuals or (2) the community or a section of the community, as the case may be. If the beneficiaries satisfy the former description, the trust would be a private trust and if they satisfy the latter, the trust would be a public trust. It is, therefore, not correct to say that merely because a concession was made on behalf of the assessee that the benefit of the Wakf was confined strictly to Murids, the purposes of the Wakf did not require to be independently investigated. All that the concession meant was that the purposes of the Wakf were purposes for the benefit of Murids and not for the benefit of Muslim community as a whole or any section of that community. The concession did not project itself into the purposes of the Wakf and when we look at the finding of the Tribunal, we find that the Tribunal also understood the concession in the same sense, for when they gave the finding, they said that the Roza properties were held under trust for private religious purposes of the

Murids. We cannot, therefore, hold that in view of the concession the purposes of the Wakf did not require to be considered and that the concession must per se lead to the conclusion that the purposes of the Wakf were not wholly religious.

15. It was then contended by the learned Advocate General that in any view of the matter it was clear on the evidence that the purposes of the Wakf included the maintenance of Madrasas and Library and considerable expenses were incurred by the assessee out of the income of the Roza properties on the maintenance of Madrasas and Library and the Wakf could not, therefore, be said to be a Wakf for wholly religious purposes. He urged that the maintenance of Madrasas and Library was not a religious purpose and either the Tribunal overlooked this purpose of the Wakf or if the Tribunal took that into account and yet characterised the purposes of the Wakf as wholly religious, the finding of the Tribunal that the purposes of the Wakf were wholly religious must be regarded as unreasonable and perverse. He also submitted and that was an argument in the alternative, that even if the view be taken that the question as to what were the purposes of the Wakf was a question of fact, we were still entitled to set aside the finding of the Tribunal on this question since it was perverse. The argument was that the finding of the Tribunal was inconsistent with the evidence and contrary to it since the evidence clearly showed that Madrasas and Library were maintained by the Wakf out of the income of the Roza properties and the maintenance of Madrasas and Library was, therefore, plainly a purpose of the Wakf and if that be so, the purposes of the Wakf could not be said to be wholly religious.

16. Mr. Kaji on behalf of the assessee pointed out in reply to the contention of the Revenue that according to the finding reached by the Tribunal the purposes of the Wakf were maintenance of the Roza and the mosque and the observance of festive occasions such as Urs, death anniversaries etc., at these institutions and it was on the basis of this finding that the Tribunal came to the conclusion that the purposes of the Wakf were wholly religious purposes. This finding, argued Mr. Kaji, was a finding of fact and it did not suffer from any of the infirmities alleged on behalf of the Revenue and we were not entitled to interfere with it. If this finding of the Tribunal stood and the purposes of the Wakf were as recorded in this finding, the argument proceeded, it was clear that the purposes of the Wakf were wholly religious. Now there is no doubt that the Tribunal did find that the purposes of the Wakf were maintenance of the Roza and the mosque and the observance of festive occasions such as Urs, death anniversaries etc., at these institutions but, as we have pointed out above, this finding was mot a finding on a pure question of law and it would, therefore, be open to us to examine its correctness. Mr. Kaji, however, raised an objection of a preliminary nature against our entertaining the contention of the Revenue that the finding of the Tribunal as regards the purposes of the Wakf was erroneous and liable to be set aside. He urged that there was in fact no dispute before the Tribunal on the question whether if there was a Wakf, the purposes of the Wakf were wholly religious. He pointed out that the only dispute between the parties was whether the properties were held under trust or other legal obligation and if they were so held, whether the purposes for which they were held were for the benefit of the public or for the benefit of only a fluctuating body or private individuals, namely,

the Murids. He contended that the assessee's case before the Tribunal was that the Roza properties were held under trust or other legal obligation wholly for religious or charitable purposes and the Revenue rejoined by saying that the Roza properties were neither held under trust nor under legal obligation nor were they held for any religious or charitable purposes of a public character but that if at all they were held under trust, the trust was a private religious trust income whereof did not enure for the benefit of the public. The Revenue, according to the assessee, did not dispute the proposition that the purposes of the Wakf were wholly religious and as a matter of fact contended that if it was found contrary to its submission that the Roza properties were held under trust, the income derived from the Roza properties was income of a private religious trust and since it did not enure for the benefit of the public, it was not entitled to exemption under section 4 (3) (i). This being the stand taken up by the Revenue before the Tribunal, it was contended that it was not open to the Revenue to contend to the contrary before us and to argue that the purposes of the Wakf were not wholly religious and that on that account the Wakf did not constitute a private religious trust and the Tribunal could not be said to have reached a perverse or even an erroneous finding in accepting the case urged on behalf of the Revenue. This contention is, however, in our opinion fallacious and cannot be accepted. The burden of establishing that the case fell within section 4 (3) (i) was on the assessee and it was for the assessee to prove that the Roza properties were held under trust or other legal obligation wholly for religious or charitable purposes so as to fall within the Section. The question as to what were the the purposes of the Wakf was, therefore, a question which was very much before the Tribunal and the Tribunal actually went into that question and found that the purposes of the Wakf were maintenance of the Roza and the mosque and the observance of festive occasions such as Urs, death anniversaries etc., at these institutions. It should, therefore, be open to the Revenue to contend that the purposes of the Wakf were not solely those found by the Tribunal but included maintenance of Madrasas and Library and that the Wakf was, therefore, not a Wakf wholly for religious purposes as contended on behalf of the assessee. We must accordingly proceed to consider this contention of the Revenue and see how far it is justified.

17. Now it is clear from the record that the ussessee incurred expenditure on maintenance of Madrasas and Library and the figures which we have for the expenses from the year 1942-43 onwards show that the amounts expended on maintenance of Madrasas and Library were almost as large as the amounts expended on (1) the Dargah and the mosque; and (2) the observance of festive occasions such as Urs, death anniversaries etc., at these institutions. There is nothing on the record before us to show that the Madrasas and the Library were started as adjuncts of the Roza and the mosque and were only for imparting religious instruction to Muslims. The order of the Charity Commissioner which is Anncxure O to the Statement of the Case on the contrary shows that schools were being run by the Wakf in Ahmedabad and also outside Ahmedabad and that those schools were open to non-Muslims as well as Muslims. It is, therefore, clear that the maintenance of Madrasas and Library was a purpose of the Wakf. Mr. Kaji, however, contended that the Wakf came into existence since about 1742 when the Saint died and the fact found by the Tribunal was that the properties were gifted by Murids for the purposes of maintenance of the

Roza and the mosque and the observance of festive occasions such as Urs, death anniversaries etc., at these institutions and these were, therefore, the original purposes of the Wakf. So far as Madrasas and Library were concerned he urged that the only evidence before the Tribunal in regard to the maintenance of Madrasas and Library was from the year 1942-43 onwards and there was no evidence to show that Madrasas and Library existed at any time prior to that during about 175 years of the existence of the Wakf. He contended that the mere fact that expenditure on Madrasas and Library was incurred by the Wakf in the year 1942-43 and the subsequent years did not establish that the original purposes of the Wakf had been altered by the addition of the new purpose of maintenance of Madrasas and library. He urged that the amounts applied in the maintenance of Madrasas and library were out of the surplus income remaining in the hands of the assessee after meeting the expenses of maintenance of the Roza and the mosque and the celebration of festive occasions such as Urs, death anniversaries etc , and it is possible that the assessee might have *bona fide* taken the view that they were entitled to expend those amounts in running Madrasas and library and merely from the fact of expenditure of those amounts on the maintenance of Madrasas and library, it could not be urged that the maintenance of Madrasas and library had become a purpose of the Wakf. This contention, however, does not appeal to us. It must be noted that it was not the case of the assessee that in incurring expenditure on maintenance of Madrasas and library, the assessee acted in breach of the terms of the Wakf. Unless the maintenance of Madrasas and library was a purpose of the Wakf, the assessee could not have applied any part of the income of the Wakf for that purpose. When the assessee expended diverse amounts out of the income of the Wakf for the maintenance of Madrasas and library the assessee must have obviously done so in accordance with the terms of the Wakf and it would be an unreasonable view to take that the assessee did so in violation of the legal obligation imposed on them under the Wakf. It is undoubtedly true that there is no evidence on record to show that the income of the Wakf was applied for maintenance of Madrasas and library prior to the year 1942-43 but equally there is no evidence to show that it was not so applied. The fact that the Wakf maintained Madrasas and library and Income of the Wakf was applied for that purpose at any rate from 1942-43 onwards must lead to the inference that the maintenance of Madrasas and library was a purpose of the Wakf and that even if that was not the original purpose for which the properties were gifted by the Murids, it had become a purpose of the Wakf. We are, therefore, of the view that the Tribunal was in error in taking the view that the purposes of the Wakf were confined only to maintenance of the Roza and the mosque and the celebration of festive occasions such as Urs, death anniversaries etc. Along with these purposes, the maintenance of Madrasas and library was also a purpose of the Wakf. We may point out that even if the view be taken that the question as to what were the purposes of the Wakf is a question of fact, we would still be entitled to interfere with the finding of the Tribunal, on that question since the finding was clearly inconsistent with the evidence and contrary to it and could, therefore, be regarded as perverse. Now, no specific properties were allocated for the purpose of meeting the expenses of maintenance of Madrasas and library and it was open to the Mutavallis to apply the income at their own discretion for religious purposes as also for non-religious purposes and the Wakf could not, therefore, be held to be wholly for religious purposes and the

claim for exemption made by the assessee must accordingly be negatived.

18. The last point urged by Mr. Kajiwas that by reason of the decision of the Charity Commissioner under the Bombay Public Trusts Act, 1950, holding the Wakf to be a public trust, it was not open to the Revenue authorities to examine the question afresh for themselves, but that they were bound to regard the decision of the Charity Commissioner as binding. This contention has absolutely no force. The inquiry by the Charity Commissioner under the Bombay Public Trusts Act, 1950, is of an entirely different character from the inquiry under the Indian Income-tax Act and if we look at the provisions of sections 79 and 80 of the Bombay Public Trusts Act, 1950, it is clear that the decision of the Charity Commissioner which is made final and conclusive is only for the purpose of proceedings before the Civil Court and there is nothing in those sections that precludes the Revenue Authorities from examining whether the terms of the Section under which the claim for exemption is made by the assessee are satisfied or not. This contention of Mr. Kaji must, therefore, be rejected.

19. In this view of the matter our answers to both the questions are in the negative. The assessee will pay the costs of the Reference to the Commissioner. The advocate's fee is fixed at Rs. 600. Certificate for leave to appeal to the Supreme Court under section 66-A.
Reference answered in the negative.