KERALA HIGH COURT

P. Krishna Warrier

Vs

Commissioner of Income-Tax

(V Gopalan Nambiyar,C.J. G Vadakkel and C Menon, JJ.)

23.11.1979

JUDGMENT

Gopalan Nambiyar, C.J.

1. These references relate to the assessment of Shri Krishna Warrier, the managing trusteeof the Arya Vaidya Sala, Kottakkal. The main question involved is whether the income derived from the Arya Vaidya Sala is liable to be excluded under Section 11(1)(a) of the I.T. Act, 1961, read with Section 2(15), or Section 4(3) of the Indian I.T. Act, 1922. The questions arising in these references and the circumstances under which they have come up are as follows : ITR Nos. 95 of 1974 and 40 of 1976 relate to the assessment year 1964-65. For the year 1964-65, the assessee was assessed in the status of an association of persons. The other members of the association consisted of the trustees appointed under the will dated 30th October, 1939, of the late Vaidya Ratnam P. S. Warrier who died on 30th June, 1944. The will provided that the A schedule properties were tarwad properties and all the other properties, movable and immovable, and all outstanding transactions and the institutions known as Arya Vaidya Sala, the Arya Vaidya Hospital and allied institutions together with all outstandings relating to them are the testator's private acquisitions. The B schedule properties were given to the tavazhi of Lakshmi Warassiar, daughter of the testator's mother's younger sister, and her children then existing and to be born in future ; the C schedule, to the tavazhi of Kunchi Warassiar (another daughter of the mother's sister) and her children born and to be born; the D schedule properties were left in common to the two tavazhis. Clause 7 of the will constituted all the remaining properties into a trust to be managed by the trustees. These were described in the E schedule to the will. Clause 7 may well be extracted "7. Apart from the properties mentioned in schedules B, C and D all other properties, movable as well as immovable, belonging to me, I hereby constitute into a trust to be managed by the trustees as per the directions in the will. They are described in schedule E. On my demise those properties will vest in the trustees. It is my intention that except the properties mentioned in paras. 4 and 5, all my other properties are to be included in the trust and, therefore, even if some item of property is left out by inadvertence, it is also to be deemed included in the trust and vested in the trustees."

2. It is enough to notice that among the properties mentioned in the E schedule is the Arya Vaidya Sala. Clause 9 of the will provided that the trust shall be managed and conducted according to the conditions mentioned. Condition G stated that the primary and chief objects of the trust are to carry on for ever the two institutions, i.e., the Arya Vaidya Sala and the Arya Vaidya Hospital. Clause H provided for the matters conducted in the Arya Vaidya Hospital. They were to examine poor patients free-of-charge and to treat them; to take in at least 12 poor patients at any time and to give them free boarding and lodging and medicines and treatment, etc. Clause K provided that the Arya Vaidya Patasala was being run from out of the profits of the Arya Vaidya Sala. Clauses L, M and N are as follows ;

"L. Out of the net profits of the Arya Vaidya Sala 25% is to be devoted to the development of the Arya Vaidya Sala, 25% for meeting the expenses of the Arya Vaidya Sala Hospital and 25% for the division equally between the two tavazhis (this only for 20 years). Out of the remaining 25% a sum not exceeding 10% may be, according to requirements, utilised for the purposes of the Arya Vaidya Patasala. The balance if any that may remain out of the 10% after disbursement to the Arya Vaidya Patasala, may be used for the Arya Vaidya Sala itself. The balance 15% are to be deposited by the trustees each year in approved banks as a reserve fund for the two tavazhis for a period of 20 years and the fund thus accumulated inclusive of interest is to be divided equally among the two tavazhis equally, i.e., in moiety and it will be the duty of the trustees to invest the same on the security of immovable properties.

M. The trustees are not bound to pay any amount to the said two tavazhis after the expiry of the 20 years. The 40% of the profits so earmarked for 20 years and so released after the expiry of 20 years are thereafter to be utilised for the development of the Arya Vaidya Sala and Arya Vaidya Hospital according to the discretion of the trustees.

N. The amount of 25% allotted to the two tavazhis as per para. L to be paid on the joint receipt of the karnavan, the seniormost anandaravan and the seniormost lady of the respective tavazhis."

3. Up to the assessment year 1951-52, excluding the 40% of the income earmarked for the two tavazhis, exemption was being granted to the other 60% of the income. For the years 1952-53 and 1953-54, after the amendment to the Indian I.T. Act, 1922, in respect of Section 4(3)(i) of the Act, the department took the view that the exemption granted should be withdrawn except regarding the 25% granted to the vaidyasala. At the instance of the revenue a reference came up to this court against the Tribunal's decision which was adverse to the department. The decision of this court is reported as CIT v. Krishna Warriar [1962] 44 ITR 828, 833 (Ker). The question referred was :

"Whether 60% of the income of the assessee applied to the development of Arya Vaidya Sala and the conduct of the hospital and school aforesaid is not exempt under Section 4(3)(i) having regard to Clause (b) of the proviso to that sub-section ?"

4. A Division Bench of this court (M. S. Menon and M. Madhavan Nair JJ.) noticed Section 4 of the Indian I.T. Act, 1922, which deals with the application of' the Act. Sub-section (3) thereof directed that any income, profits or gains falling within the classes specified therein, shall not be included in the total income of the persons receiving them. The class of income specified in Clause (i) of Sub-section (3) was :

"...any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, in so far as such income is applied or accumulated for application to such religious or charitable purposes as relate to anything done within the taxable territories, and in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto."

5. There is a proviso to Clause (i) of Sub-section (3) of Section 4. Clause (b) of proviso which was material is as follows :

"Provided that such income shall be included in the total income--... (b) in the case of income derived from business carried on behalf of a religious or charitable institution, unless the income is applied wholly for the purposes of the institution and either-

(i) the business is carried on in the course of the actual carrying out of a primary purpose of the institution, or

(ii) the work in connection with the business is mainly carried on by beneficiaries of the institution....."

6. The Division Bench observed (p. 834):

"It is settled law that a business itself can be held on trust for religious or charitable purposes and

that the income derived from such a business will fall within the ambit of the exclusion granted by Clause (i) of Sub-section (3) of Section 4. The only contention we are called upon to decide is the contention of the department that such an income can be governed by the proviso as well and thus brought back into the net of taxation. The Tribunal negatived this contention, and as stated in the last preceding paragraph we are in agreement with the conclusion reached by the Tribunal.

Raghavachariar puts the matter thus:

'If the business itself is held under trust for religious or charitable purpose, then income is to be considered as falling under Section 4(3)(i). But if the business is not itself the subject of the trust, but the business is carried on by an institution which is held under a trust, but the business itself does not form part of trust, then Section 4(3)(i)(b) will apply.' (Volume I, page 254);

and Desai J. in Dharma Vijaya Agency v. Commissioner of Income-tax [i960] 38 ITR 392, 412 (Bom):

'On a fair reading of Clause (i), it must be held, in my judgment, that there is nothing in proviso (b) to Clause (i) of Section 4(3) which in any manner touches the case of a business which is held under trust for religious or charitable purposes. The income derived from such business is not to be included in the total income of the person receiving it.' In the light of what is stated above we agree with the Tribunal and hold that the income in controversy is exempt under Section 4(3)(i) of the Indian Income-tax Act, 1922, and that it is not brought back into the net of taxation by Clause (b) of the proviso to that sub-section. We answer the reference accordingly though in the circumstances of the case without any order as to costs."

7. On appeal against the said decision, the judgment of this court was affirmed--vide CIT v. P. Krishna Warriar [1964] 53 ITR 176 (SC). Subba Rao J., who spoke for the court, extracted the terms of the will. After noticing Section 4(3)(i) of the Indian I.T. Act, 1922, and Clause (b) of the proviso to the section, the Supreme Court examined the decisions which had considered the scope of this provision including the decision of the Division Bench of this court in Dharmodayam v. CIT [1962] 45 ITR 478 (Ker). It stated thus (pp. 182, 183):

"If business is property and is held under trust wholly or partly for religious or charitable purposes, it falls squarely under the substantive part of Clause (i) and in that event Clause (b) of the proviso cannot be attracted, as under that clause of the proviso the business mentioned therein is not held under trust but one carried on behalf of a religious or charitable institution. To take a business out of the substantive Clause (i) of Section 4(3) and place it in Clause (b) of the proviso, it is suggested that business is not property and that even if it is property the said property is not wholly or partly held in trust for religious or charitable purposes. That business is property is now

well settled. The Privy Council in In re Trustees of the Tribune [1939] 7 ITR 415 (PC) did not question the view expressed by the Bombay High Court that the business of running the newspaper, Tribune, was property held under trust for charitable purposes. This court in J. K. Trust v. Commissioner of Income-tax [1957] 32 ITR 535 endorsed the said view and held that 'property' is a term of the widest import and that business would undoubtedly be property unless there was something to the contrary in the enactment. If business was property, it could be held under trust for religious and charitable purposes. As the business of running the Arya Vaidya Sala vested under trust for religious and charitable purposes, it would fall under Clause (i), if the other conditions laid down therein were satisfied. The necessary condition for the application of Clause (i) of Section 4(3) of the Act is that the said property, namely, the business, shall have been wholly or in part held for religious or charitable purposes. As 40 per cent. of the profits in the business would be given to purposes other than religious or charitable purposes it cannot be said that the business was held wholly for religious or charitable purposes. But as 60 per cent. of the profits thereof would be spent for religious or charitable purposes, the question is whether it can be held that the business was held in trust in part for religious or charitable purposes."

8. At the end of the discussion, the position was summed up thus (p. 186):

"The legal position may briefly be stated thus. Clause (i) of Section 4(3) of the Act takes in every property or a fractional part of it held in trust wholly for religious or charitable purposes. It also takes in such property held only in part for such purposes. Business is also property within the meaning of the said clause. Clause (b) of the proviso to Section 4(3)(i) applies only to a business not held in trust but carried on behalf of religious or charitable institutions."

9. We may at this stage refer to the decision of a Division Bench of this court in Dharmodayam Co. v. CIT [1962] 45 ITR 478, which is referred to in the Supreme Court decision noticed. The same Division Bench which dealt with Krishna Warriar's case [1962] 44 ITR 828, restated the position thus (p. 485 of 45 ITR):

"We are dealing with a case where the business itself is held under a trust for religious or charitable purposes ; we are not dealing with a case where the business is conducted on behalf of the religious or charitable institution. This is abundantly clear from the memorandum of association. The first object of the company, as stated therein, is 'to raise funds by conducting kuris with the company as the foreman ; receiving donations and subscriptions ; and by such other means as the company deems fit'.

In the light of what is stated above we must hold that the proviso is not attracted and that the question referred has to be answered in the affirmative and in favour of the assessee. We do so."

10. After the enactment of the I.T, Act of 1961, the applicability of the above principle arose before a Division Bench of this court in CIT v. Dharmodayam Company [1974] 94 ITR 113. The Dharmodayam Company was a company registered under the Cochin Companies Act and later under the Indian Companies Act. The sources of income of the company were interest on securities, income from properties and the business of conducting kuris. The decision of the previous Division Bench in Dharmodayam v. CIT [1962] 45 ITR 478 was in respect of one relating to kuris conducted by the company under Section 4(3)(i) of the Indian I.T. Act, 1922. This court, as noticed, held that the business of conducting kuris was held by the company under trust for religious or charitable purposes and the prov. (b) to Section 4(3)(i) was not attracted. On the second occasion, with respect to the provisions of the 1961 Act, the Division Bench noticed the definition of the term "charitable purpose" in Section 2(15) of the Act, to include "relief of the poor, education, medical relief and the advancement of any other object of general public utility not involving the carrying on of any activity for profit". The Division Bench, on the second occasion, explained the scope of the provision thus (p. 116):

"From the very language of this definition, what appears is that, in so far as relief of the poor, education and medical relief are concerned, no question of any activity for profit can arise. In other words, the question whether there is involved any activity for profit is confined only to the last part of the definition, namely, the advancement of any other object of general public utility."

11. This second decision of the Division Bench in Dharmodayam Company's case [1974] 94 ITR 113 was taken in appeal to the Supreme Court and was dealt with in CIT v. Dharmodayam Co. [1977] 109 ITR 527 (SC). Chandrachud J. (as he then was), who spoke for the court, noticed the significant changes made by the Act of 1961 in regard to the law relating to exemption from taxation. After noticing these changes it was observed (pp. 532, 533):

"But we are unable to accept the submission made by Mr. Ramamurthi on behalf of the revenue that by reason of the change brought about by the Act of 1961 in the definition of the expression 'charitable purpose', the judgment of the Kerala High Court in Dharmodayam's case [1962] 45 ITR 478 (Ker) is not good law and that the decision therein cannot any longer govern the question whether income received by the assessee by conducting the kuris is exempt from taxation. The entire argument is built around the words 'advancement of any other object of general public utility not involving the carrying on of any activity for profit' which occur in the definition of 'charitable purpose' contained in Section 2(15) of the Act of 1961, particular emphasis being laid by counsel on the expression 'not involving the carrying on of any activity for profit'. This argument assumes that the respondent is running the kuris as a matter of advancement of an object of general public utility. If that were so, it would have been necessary to inquire whether conducting the kuri business involved the carrying on of any activity for

profit. The answer, perhaps, to that inquiry might have been in the affirmative since, speaking generally, the conduct of a business involves the carrying on of an activity for profit. But the assumption that the respondent is running the kuri business as a matter of advancement of an object of general public utility or for that purpose is plainly contrary" to the finding of the Kerala High Court in Dharmodayam Co.'s case [1962] 45 ITR 478 (Ker), that the kuri 'business itself is held under a trust for religious or charitable purposes'. It is a necessary implication of this finding that the business activity was not undertaken by the respondent in order to advance any object of general public utility. The decision of the Kerala High Court was challenged by the revenue in an appeal filed in this court, but that appeal was withdrawn by it. The relevant legislative provision has certainly undergone a change, but the nature of the respondent's activity remains what it was when the Kerala High Court gave its judgment in Dharmodayam Co.'s case [1962] 45 ITR 478 (Ker). It will, therefore, be erroneous to say, as contended by Mr. Ramamurthi on behalf of the revenue, that the Kerala judgment has lost its validity. That judgment, in our opinion, concludes the point that the kuri business is not conducted by the respondent in order to advance or for the purpose of advancing any object of general public utility."

12. The Supreme Court also noticed the decision of this court in Dharmodayam Company's case [1962] 45 ITR 478 and pointed out that despite the change brought about by the Act of 1961 by the framing of a definition of a charitable purpose, a business which was held in trust cannot, by reason of the amendment, become a business started for the purpose of advancing an object of general public utility. It was also noticed that in Krishna Warriar's case [1964] 53 ITR 176, the Supreme Court had referred to the Kerala High Court's decision in Dharmodayam Company's case [1962] 45 ITR 478 approvingly.

13. Attention of the Supreme Court was drawn to the pronouncement of the Kerala High Court in CIT v. P. Krishna Warner [1972] 84 ITR 119 in which the impact of Section 2(15) of the 1961 Act was noticed. The High Court in this case [1972] 84 ITR 119 took the view that the income in respect of which exemption was claimed was not excludible from the total income of the assessee, as the assessee had commenced a business for the purpose of advancing an object of general public utility involving the carrying on of an activity for profit. In Dharmodayam Co.'s case [1977] 109 ITR 527 the Supreme Court pointed out that the last clause of Section 2(15) of the 1961 Act had no application to the facts in Krishna Warrier's case [1972] 84 ITR 119 (Ker). The Supreme Court then referred to East India Industries (Madras) P. Ltd. v. CIT [1967] 65 ITR 611 (SC), where it was held that the business of carrying on of manufacture, sale and distribution of pharmaceutical, medicinal and other preparations was neither charitable nor religious and the assessee was not entitled to claim deduction under Section 15B of the 1922 Act in respect of donations received by the trust. Reference was also made to Sole Trustee, Loka Shikshana Trust

v. CIT [1975] 101 ITR 234 (SC). It has held that the decision had no application as the business of the kuris was not started with the object or for the purpose of advancing an object of general public utility. Reliance was also placed for the revenue on the decision of the Supreme Court in Indian Chamber of Commerce's case [1975] 101 ITR 796 (SC). That case referred to the decision of the Kerala High Court in Dharmodayam Co.'s case [1974] 94 ITR 113. The case had come in for criticism in Indian Chamber of Commerce's case [1975] 101 ITR 796 (SC). Adverting to the criticism, made in [1975] 101 ITR 796, of the decision in [1974] 94 ITR 113, the Supreme Court observed in CIT v. Dharmodayam Co. [1977] 109 ITR 527 as follows (p. 536):

"This is square and scathing comment on the judgment now in appeal before us and the court has expressed its view in unequivocal language. But we cannot accept that the court 'overruled', as stated in the head-note of the report (page 797), the judgment of the Kerala High Court and that we must, without considering the facts of the case, allow the appeal straightaway. The facts of the instant case were not before the court in the case of Indian Chamber of Commerce [1975] 101 ITR 796 (SC) and it is evident from the passage extracted above that the test applied by the Kerala High Court was held to be wrong on the assumption that the case fell under the last clause of Section 2(15) of the Act of 1961, which was the only part of Section 2(15) relevant for deciding the case of Indian Chamber of Commerce [1975] 101 ITR 796 (SC). Considering further that the word 'industry' has been italicised in the passage extracted above, it is plain that the court assumed that the assessee was engaged in running an industry. We have endeavoured to point out that, on the facts of the case, it is impossible to hold that the last clause of Section 2(15) has any application and that, in the light of the activities of the respondent spread over the past several years, no importance can be attached to Clause 39 of its articles of association which enables it ' to do the needful for the promotion of.....industry'. With great deference, therefore, we are unable to read the decision in the case of Indian Chamber of Commerce [1975] 101 ITR 796 (SC) as overruling the judgment which is under appeal before us. The court was not even apprised there that this appeal was pending against the decision of the Kerala High Court,"

14. In Dharmadeepti v. CIT [1978] 114 ITR 454, the Supreme Court clearly approved the view taken in Dharmodayam Co.'s case [1974] 94 ITR 113 (Ker) regarding the construction of the residuary clause in Section 2(15) of the 1961 Act. It was observed that the words "not involving the carrying on of any activity for profit" governed the words "the advancement of any other object of general public utility" and not the words "relief of the poor, education and medical relief" in Section 2(15) of the I.T. Act, 1961. It was ruled that the income of the appellant from the kuri business was income held under trust for charitable purposes and the appellant was entitled to exemption under Section 11(1)(a) of the Act. The decision of this court in CIT v. Dharmadeepti [1975] 100 ITR 375 [FB] was reversed. In Dharmaposhanam Co. v. CIT [1978]

114 ITR 463 (SC), it was ruled that whether the trust is for a charitable purpose or not, falls to be determined by reference to all the objects for which the trust had been brought into existence and not merely to the activity actually conducted by the assessee. Applying the principle, it was ruled that the claim for exemption failed.

15. Considerable reliance was placed on the decision of this court in CIT v. P. Krishna Warrier [1972] 84 ITR 119. A Division Bench of this court held that the objects of the Vaidyasala did not constitute a charitable purpose within the meaning of Section 2(15) of the Act. It was also held that the intention of the testator was that the Vaidya Sala by its working must apply the financial resources essential for the existence of all the three institutions and should also pay the other bequests. It was, therefore, a trust of mixed objects of charitable and non-charitable purposes and, therefore, fell outside the definition of Section 2(15) of the Act. The principle and the test thus formulated by the Division Bench seems to be open to objection. It appears to us that there can be no question of the trust being with mixed objects. On a construction of the deed of trust as a whole, the court has to come to the conclusion whether the trust is for a charitable purpose or not. On that would depend its claim for exemption. That, in its turn, must essentially depend on the predominant object or the primary purpose of the trust. So viewed, we are of the opinion, that the predominant object of the trust in the instant case was charitable in nature. The order of reference in the instant case has itself expressed considerable doubts on the principle of the decision in CIT v. P. Krishna Warrier [1972) 84 ITR 119 (Ker) and stated that the decision requires reconsideration. The order of reference observed that too much emphasis was placed on the vast income derived from the preparation and sale of medicines by the Arya Vaidya Sala and the negligible amount spent for the treatment of apparently affluent persons in the Vaidya Sala itself. Besides, in this case, a conspectus of the provisions of the will leave us in no doubt that the business of the Arya Vaidya Sala itself, which is property, was constituted into a trust. The basic distinction of the business itself being impressed with the character of the trust, and of the business having been carried on for the purpose of the trust seems to have been lost sight of in CIT v. P. Krishna Warrier [1972] 84 ITR 119 (Ker). It was this distinction that was succinctly and lucidly stressed by the Division Bench in CIT v. Krishna Warriar [1962] 44 ITR 828 (Ker), and by the Supreme Court in the decision which affirmed it in CIT v. P. Krishna Warriar [1964] 53 ITR 176 (SC). The principle was repeated by this court in Dharmodayam Co.'s case [1962] 45 ITR 478 and again in Dharmodayam Co.'s case [1974] 94 ITR 113. This last decision was affirmed on appeal by the Supreme Court in CIT v. Dharmodayam Co. [1977] 109 ITR 527. The principle was again restated in Dharmadeepti's case [1978] 114 ITR 454 (SC) and Dharmaposhanam's case [1978] 114 ITR 463 (SC). In the last of these cases, the Supreme Court observed (at page 470):

"It has been urged on behalf of the appellant that what should be taken into consideration is the activity actually conducted by the assessee, and not what is open to it under the provisions of its memorandum of association. We do not agree. Whether a trust is for charitable purposes falls to be determined by reference to all the objects for which the trust has been brought into existence. See Tennent Plays Ltd. v. Commissioners of Inland Revenue [1948] 30 TC 107 (CA) and Incorporated Council of Law Reporting for England and Wales v. Attorney-General and Commissioners of Inland Revenue [1971] 47 TC 321 (CA). In Rex v. Special Commissioners of Income-lax [1922] 8 TC 286 (CA), it was pointed out by the Court of Appeal in England that if the settlor reserves to himself the power of appointment under which he might appoint to non-charitable purposes, the trust cannot claim exemption even though the power of appointment is in fact exercised in favour of a charitable object. It would be a different case where one or more of the objects mentioned in the memorandum of association, although included therein, were never intended to be undertaken. If there is evidence pointing to that conclusion, clearly the court will ignore the object and proceed to consider the case as if it did not exist in the memorandum. In Commissioner of Income-tax v. Dharmodayam Co. [1977] 109 ITR 527 (SC), it was that basis on which this court proceeded when it observed that the assessee had never engaged itself in any industry or in any other activity of public interest."

16. In the light of these principles, we hold that CIT v. P. Krishna Warrier [1972] 84 ITR 119 (Ker) was wrongly decided. It did not even notice Clause H of the will, nor the crucial fact that the will had constituted the Vaidya Sala itself as a trust. This court failed to notice the distinction between the business itself being impressed with the character of a trust, and its being carried on for the purposes of the objects of the trust. For these reasons, we would overrule the decision in CIT v. P. Krishna Warrier [1972] 84 ITR 119 (Ker) in so far as it held that the income from the Vaidya Sala was not income from a charitable purpose, and was liable to be assessed.

17. Counsel for the revenue placed strong reliance on the decision in CIT v. Dharmodayam Co. [1977] 109 ITR 527 (SC). We have dealt with the decision. He further relied on the decision of the Supreme Court in East India Industries (Madras) P. Ltd. v. CIT [1967] 65 ITR 611 (SC). There the trust was established for various objects, one of which was to manufacture, buy, sell and distribute pharmaceutical, medicinal, chemical and other preparations. The objects included several charitable and religious purposes. The last clause of para. 2 of the trust deed provided that the objects shall be independent of each other and that the trustees shall have discretion to apply the property of the trust in carrying out all or any of such objects of the trust as the trustees may deem fit. The question was whether the property was held wholly for religious or charitable purposes. It was held that it was carrying on the business of manufacture, sale and distribution of pharmaceutical, medicinal and other preparations which was neither charitable nor religious in

character. The trustees could validly spend the entire income of the trust on the non-charitable object and, therefore, the trust property was not held wholly for religious or charitable purposes within the meaning of Section 4(3)(i) of the Act. The assessee was held not entitled to deduction under Section 15B in respect of donations made by the trust. The decision is surely distinguishable. There was no question of the business itself having been impressed with the character of the trust as in the present case and as was stressed by the principle of the decision in CIT v. P. Krishna Warrier [1962] 44 ITR 828 (Ker) and the other cases that we have referred to. Counsel for the revenue repeatedly stressed the decisions in CIT v. Dharmodayam Co. [1977] 109 ITR 527 (SC), CIT v. P. Krishna Warrier [1972] 84 ITR 119 (Ker) and Dharmaposhanam's case [1978] 114 ITR 463 (SC) at 466 and 468. We have examined these decisions and showed how the principle of those decisions can have no application.

18. In the light of the principles discussed above, we shall proceed to answer the various references before us.

I.T.R. Nos. 95 of 1974 and 40 of 1976 :

19. The question referred in I.T.R. No. 95 of 1974, was only one, viz.:

"Whether the Tribunal was justified in law in declining to grant the request of the assessee to admit the additional evidence, the particulars of which are specified in annexure D ?"

20. The assessment year is 1964-65. The dispute was regarding the 60% of the income under the will of Shri P. S. Warrier to be devoted to the development of the Arya Vaidya Sala, the Arya Vaidya Hospital and the Arya Vaidya Patasala. The ITO denied the benefit of exemption to this income and held it was assessable. The assessee appealed to the AAC. By that time, the assessee's appeal for the assessment years 1962-63 and 1963-64 had been allowed by the Tribunal. The Tribunal held that the entire scheme of the trust was one integral whole, that the work of the Arya Vaidya Sala was interconnected with the work of the other institutions and had to be viewed as a composite activity. The Tribunal held that the income derived was accordingly exempt from tax. This decision of the Tribunal was followed by the AAC for the assessment year 1964-65. The department preferred an appeal to the Tribunal. By the time the appeal came before the Tribunal, the Kerala High Court by its decision in CIT v. Krishna Warrier [1972] 84 ITR 119 had decided the issue against the assessee. The Tribunal had only to apply this judgment and to hold against the assessee. But the assessee at the stage of hearing the appeal filed two affidavits before the Tribunal, one from Shri P. Krishna Warrier, the managing trustee, and the other from one Dr. P. Ramankutty Warrier, with a petition to receive those affidavits in evidence; It was also prayed at the hearing that the deponents of the affidavits may, if necessary, be examined, and the

documents referred to in the affidavits be summoned.

The Tribunal refused to admit any further evidence. It followed the judgment of the Kerala High Court in CIT v. Krishna Warrier [1972] 84 ITR 119 and decided the appeal against the assessee. The question of law was referred for decision. As the Tribunal referred only one of the questions and not the other two questions, this court compelled reference of the other two questions under Section 256(2) of the Act for the assessment year 1964-65. The questions so referred are the two questions in I.T.R. No. 40 of 1976, viz.:

"1. Whether, on the facts and in the circumstances of the case and in the light of the materials placed before it, the Appellate Tribunal was justified in holding that the amount earmarked for being spent for Arya Vaidya Sala under the will of the testator (of late P. S. Warrier--will dated November 3, 1939), is not entitled to exemption under Section 11(4) of the Income-tax Act, 1961, for the assessment year 1964-65 ?

2. Is the approach made and interpretation placed on the will of late P. S. Warrier dated November 3, 1939, by the Tribunal proper, valid and justified in law ?"

21. In the light of our discussion above, we answer question No. 1 in I.T.R. No. 40 of 1976, in the negative, that is, in favour of the assessee and against the revenue. We answer question No. 2 again, in the negative, that is, in favour of the assessee and against the department. There will be no order as to costs.

22. In view of our answer to the questions in I.T.R. No. 40 of 1976, it is unnecessary to deal with the question referred in I.T.R. No. 95 of 1974. We, accordingly, decline to answer the question referred in I.T.R. No. 95 of 1974.

I.T.R. Nos. 13 to 18 of 2978 :

23. These relate to the assessment years 1965-66 to 1970-71. For the assessments for the six years with which we are concerned the assessment for 1965-66 was completed before the judgment of the Kerala High Court in CIT v. P. Krishna Warrier [1972] 84 ITR 119, and the rest, only after the said judgment. The period of 20 years during which 40% of the income is to be allotted to the two tavazhis under the will had also expired by 1964. For these six years, the assessment of 40% stood on a different footing from that of the immediately preceding years. For 1965-66, the ITO brought to tax the 25% of the income set apart for the Vaidya Sala and also the unspent portion out of the 10% set apart for the Arya Vaidya Patasala. He held that the assessee was not entitled to exemption in respect of 25% of the income set apart for expenses of the Vaidya Sala and 10% of the income set apart for Arya Vaidya Patasala. As regards the 40%

previously earmarked for use of the family members and now available for Arya Vaidya Sala and Arya Vaidya Hospital, the officer held that the trustees have the discretion to utilise it, and such absolute discretion having been granted to the trustees, the provisions of Section 11 of the I.T. Act would not apply. Hence, the entire 40% of the income was held to be taxable. For the next five assessment years, that is, 1966-67 to 1970-71 the pattern of assessment was the same with the difference that the entire 10% set apart to Arya Vaidya Patasala was also brought to tax on similar reasoning as the one applied to the 40% set apart for family members. On appeal, the AAC came to the conclusion that the object of the Arya Vaidya Sala was medical relief, which was charitable. So he did not discuss the other question about the taxability of the entire 40% and the entire 10%. Having held that the Arya Vaidya Sala is a charitable institution, he allowed the appeals of the assessee for the five assessment years 1966-67 to 1970-71, both inclusive, and cancelled the assessment of 75% made up of 25% earmarked for the Vaidya Sala, 10% earmarked for Arya Vaidya Patasala and 40% earmarked for Arya Vaidya Sala and Arya Vaidya Hospital. With regard to the balance 25%, the ITO himself had given the exemption. Regarding the appeal for 1965-66, when the same was pending before the AAC, the Commissioner acting under Section 263 of the I.T. Act, 1961, passed an order directing the ITO to modify the assessment by assessing the entire 10%. The AAC was of the view that in view of this order of the Commissioner, the appeal for 1965-66 could no longer subsist. It was, therefore, dismissed. Against the order of the AAC for 1965-66, the assessee appealed to the Tribunal; and the ITO also appealed against the order for the assessment years 1966-67 to 1970-71. The Tribunal followed the decision in CIT v. Krishna Warrier [1972] 84 ITR 119 and held that 25% of the income devoted to the development of Arya Vaidya Sala is taxable and not entitled to exemption. It rejected the objections of the ITO about the admissibility before the AAC of fresh evidence. It also held that the fresh evidence had not in any way altered the position of the assessee. It was of the view that the business of sale and manufacture of ayurvedic medicines in the Arya Vaidya Sala was property held under trust along with other items of property, that the object of the trust declared by the will as medical relief, relief of the poor and education, were all relevant only if the decision in CIT v. Krishna Warrier [1972] 84 ITR 119 (Ker) is reconsidered, which the Tribunal was not competent to do, and, therefore, it was not necessary for it to discuss and decide the merits of these contentions. As regards the 40% formerly allotted to the two tavazhis, which portion of the money was spent for the Arya Vaidya Hospital, and as regards the 10% earmarked for the Arya Vaidya Patasala, the Tribunal held that these are not taxable, and they are entitled to exemption under Section 11. The appeal by the assessee for 1965-66 and the appeals of the ITO for the assessment years 1966-67 to 1970-71 (both inclusive) were allowed in part. On these facts and circumstances, the following questions were directed to be referred under Section 256(2) of the I.T. Act to the High Court of Kerala :

"(A) Is the approach made and interpretation placed on the will of late Sri. P.S. Warrier dated November 3, 1939, by the Appellate Tribunal, proper, valid and justified in law ?

(B) Whether, on the facts and in the circumstances of the case, and in the light of materials available or placed before it, the Appellate Tribunal was justified in law in holding that the amount (set apart) earmarked for being spent for Arya Vaidya Sala under the will of the testator (late P.S. Warrier)--will dated November 3, 1939--is not entitled to exemption under Section 11 of the Income-tax Act, 1961? (for all the years 1965-66 to 1970-71).

(C) Was the Appellate Tribunal justified in its view that it is bound to follow the decision in CIT v. P. Krishna Warrier [1972] 84 ITR 119 (Ker), regarding 25% devoted to development of Arya Vaidya Sala for the assessment years 1965-66 to 1970-71 ? Is not the said decision distinguishable?

(D) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in totally discarding the additional evidence and materials admitted by the Appellate Assistant Commissioner and relied on by him for interpreting the will of late P. S. Warrier ?

(E) Is the reasoning and conclusion of the Appellate Tribunal (para. 13) to hold 'that the fresh materials placed on record have not in any way altered the position of the assessee to its advantage from that of the two previous years for which the case was considered by the High Court, rational, valid and justified in law ?

(F) Was the Appellate Tribunal justified in failing to adjudicate or pronounce upon the various submissions made and in particular specified in para. 14 of the appellate order, for all or any of the reasons stated by it in para. 15 of its appellate order ?

(G) Is the finding and conclusion of the Appellate Tribunal in para. 15 of the order 'that 25% devoted to the development of Arya Vaidya Sala was rightly brought to tax by the Income-tax Officer', valid and justified in law ? Is not the said finding vitiated due to non-advertence to relevant facts and circumstances and advertence to irrelevant and immaterial factors, germane to the issue involved in the instant case ?

(H) Is not the assessee entitled to full exemption from tax, of its income, as pleaded and earmarked or spent for Arya Vaidya Sala, Arya Vaidya Hospital and Arya Vaidya Patasala, for all the six years ? (1965-66 to 1970-71)"

24. On the basis of our discussion, we answer the questions as follows: Question (A) in the

negative, that is, in favour of the assessee, and against the revenue ; and question (B) in the negative, that is, in favour of the assessee and against the revenue. Question (C) we answer the first part of the question in the affirmative, that is, against the assessee and in favour of the department, and the second part again in the affirmative, viz., in favour of the assessee. Questions (D), (E) & (F): In view of our answers to questions (A) and (E), these questions do not arise and we decline to answer the same. Question (G): In the light of our conclusions on questions (A) and (B), we answer the first part of the question in the negative, that is, in favour of the assessee and against the revenue, and we decline to answer the second part in view of our answer to questions (A) and (B). Question (H) we answer the question in the affirmative, that is, in favour of the assessee and against the department. There will be no order as to costs.

I.T.R. No. 21 of 1976

25. This reference is at the instance of the revenue under Section 256(1) of the Act for the assessment year 1965-66. The question referred is the following :

"Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is justified in law in holding that the assessee is entitled to exemption under Section 11 on the amount spent towards Arya Vaidya Patasala out of the profits of the Arya Vaidya Sala ?"

26. In the light of our discussion, we answer the question referred in the negative, that is, in favour of the assessee and against the revenue. No costs.

I.T.R. No. 22 of 1976

27. This is a consolidated reference by the Tribunal for the assessment years 1965-66 to 1970-71 at the instance of the revenue. The two questions referred are :

"(i) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is justified in law in holding that the assessee is entitled to exemption under Section 11 on the amounts spent towards Arya Vaidya Patasala out of the profits of the Arya Vaidya Sala;

(ii) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is justified in law in holding that the assessee is entitled to exemption under Section 11

on the amounts spent towards Arya Vaidya Hospital out of the 40% profits of the Arya Vaidya Sala ?"

28. In the light of our discussion, we answer the question No. 1 in the negative, that is, in favour of the assessee and against the revenue, and question No. 2 again in the negative, that is, in favour of the assessee and against the revenue. There will be no order as to costs.

29. A copy of this judgment under the signature of the Registrar and the seal of this court will be communicated to the Income-tax Appellate Tribunal, Cochin Bench, as required by law.