

G4G2 15, 1961

IN THE PRIVY COUNCIL

No. 53 of 1959

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON
LONDON
1959
63665

BETWEEN

MOHAMED FALIL ABDUL CAFFOOR
MOHAMED MOHIDEEN ABDUL CAFFOR
MOHAMED RAFI ABDUL CAFFOOR
ABDUL HAMEED MOHAMED ISMAIL

The Trustees of the Abdul Gaffoor Trust Appellants

- and -

10 THE COMMISSIONER OF INCOME TAX, COLOMBO Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal from a Judgment and Decree of the Supreme Court of Ceylon (H.N.G. Fernando J. and Sinnetamby J.) dated the 26th day of November 1958, allowing an appeal by the Respondent (by way of case stated) from a decision dated 19th February 1957 and given by the Board of Review constituted under the Income Tax Ordinance of Ceylon (Cap:188). By its said decision the Board of Review had allowed an appeal by the Appellants against a determination of the Respondent dated the 2nd day of July 1956 confirming assessments to income tax made upon the Appellants for the years 1950/51 to 1954/55 inclusive.

App., pp
36-56

App., pp.
23-28

App., pp.
11-16

2. The main question raised by this Appeal is whether, during the years covered by the above-mentioned assessments, the Abdul Gaffoor Trust ("the Trust") was a "Trust of a public character established solely for charitable purposes" and was therefore exempt from tax by virtue of Section 7 (1) (c) of the Income Tax Ordinance. In the proceedings leading up to this Appeal the main question has given rise to a consideration of the following issues, inter alia, namely (1) whether

the word "trust" in Section 7 (1) (c) of the Income Tax Ordinance denotes only a trust of the kind defined by Section 3 of the Trusts Ordinance of Ceylon (Cap:72) (2) whether the Trust is a charitable trust within the meaning of Section 99 of the Trust Ordinance and is protected as such (by Section 110(5)) from the operation of the rule against perpetuities and (3) whether the reference to a "trust ... established solely for charitable purposes" in Section 7(1) (c) of the Income Tax Ordinance is properly construed as applying only to a trust whose purposes from its inception have been solely charitable. 10

In addition this Appeal raises the question whether and if so to what extent a decision of the Board of Review in relation to a particular matter operates as a res judicata.

3. In the years of assessment to which this Appeal relates the relevant provisions of the Income Tax Ordinance and the Trusts Ordinance were as follows :- 20

The Income Tax Ordinance 1932.

Section 7(1). "There shall be exempt from the tax - ...

(c) the income of any institution of a public character established solely for charitable purposes".

Section 2. " - 'charitable purpose' includes relief of the poor, education, and medical relief". 30

(With effect from 1st April 1959 these provisions have been amended by the Income Tax (Amendment) Act No. 44 of 1958).

Chapter XI of the Ordinance deals with Appeals, which may be made :-

(a) against the assessment raised by the Assessor, to the Commissioner: see Section 69.

(b) against the decision of the Commissioner, to the Board of Review: see Sections 70 to 73. (Under Section 72, if the Commissioner is of opinion that no useful purpose would be served by his hearing an appeal against an assessment he may refer it directly to the 40

Board of Review), and

- (c) against the decision of the Board of Review, to the Supreme Court by way of case stated on a question of law.

The duties and powers of the Board of Review and the Supreme Court respectively with regard to the determination of appeals are set out in the following provisions :-

- 10 Section 73(8). "After hearing the appeal the Board (of Review) shall confirm, reduce, increase or annul the assessment as determined by the Commissioner on appeal, or as referred by him under Section 72, as the case may be, or may remit the case to the Commissioner with the opinion of the Board thereon. Where a case is so
- 20 remitted by the Board, the Commissioner shall revise the assessment as the opinion of the Board may require".
- Section 74(1) "The decision of the Board shall be final. Provided that either the Appellant or the Commissioner may make an application requiring the Board to state a case on a
- 30 question of law for the opinion of the Supreme Court ..."
- Section 74(5) "Any two or more Judges of the Supreme Court shall hear and determine any question of law arising on the stated case and may in accordance with the decision of the Court upon such question confirm, reduce, increase or annul the assessment determined by the Board, or may remit the
- 40 case to the Board with the opinion of the Court thereon. Where a case is so remitted by the Court the Board shall revise the assessment as the opinion of the Court may require".

The Trusts Ordinance 1918 (Cap: 72).

- Section 3(a) " 'trust' is an obligation annexed to the ownership of

property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person, or of another person and the owner, of such a character that, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in such other person, or in such other person concurrently with the owner". 10

Section 110(1) "No trust shall operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the constitution of the trust, and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong". 20

Section 110(5) "The restrictions of this section shall not apply to charitable trusts as defined by Section 99". 30

Section 99(1) "The expression "charitable trust" includes any trust for the benefit of the public or any section of the public within or without the Island of any of the following categories :-

- (a) for the relief of poverty: or
- (b) for the advancement of education or knowledge: or 40
- (c) for the advancement of religion or the maintenance of religious rites and practices: or
- (d) for any other purposes beneficial or of interest to mankind not falling within the preceding categories". 50

4. The facts of the matter appear from the Record and may be summarised as follows :-

On 24th December 1942 Mr. N.L.H. Abdul Gaffoor, ("the Grantor") by Deed No. 1832, conveyed certain immovable property to four persons described as the Trustees upon the trusts set out in Deed No. 1833 ("the Trust Deed") of the same date. Under the terms of the Trust Deed the Trustees were obliged to apply the income of the property (after the deduction of certain outgoings) for all or any of the purposes therein set out at the discretion of a Board consisting of the Trustees and seven other persons therein named. The passages in the Trust Deed over which the present dispute has arisen appear from the following extracts from Clause 2 of the Deed :-

App.,p.75

App.,p.63

10

20

30

40

50

"2. The Trustees shall stand possessed of the trust property ... and shall apply the nett rents, profits and dividends thereof ... for all or any of the purposes following as the Board in its absolute and uncontrolled discretion may decide that is to say :- ...

(b) A sum not exceeding in all one thousand rupees (Rs.1000/-) a month for the education instruction or training in England or elsewhere abroad of deserving youths of the Islamic Faith in such professions, vocations, occupations, industries, arts or crafts trades employments subjects lines or any other departments of learning or human activity whatsoever as the Board may in its aforesaid discretion decide in the case of each such deserving youth with a like discretion in the Board from time to time to change modify or alter or completely discontinue in the case of each such youth either the object or objects of instruction, education or training selected for him by the Board (from among the objects enumerated above) or the place or places or countries where at such education, training or instruction is being given from time to time. The Board may under a like discretion partially or wholly discontinue any assistance it may have given or may be giving in the case of any of such youths. It shall be lawful for the Board out of the said sum to pay for or provide the whole or any part of the cost of any such youth going abroad from or in returning to Ceylon once or oftener as the Board may

RECORD

under such discretion aforesaid from time to time decide. The recipients of the benefits provided for in this Clause shall be selected by the Board from the following classes of persons and in the following order :-

- (i) Male descendants along either the male or female line of the Grantor or of any of his brothers or sisters failing whom 10
- (ii) Youths of the Islamic Faith not being male descendants as aforesaid of the Grantor or of his brothers or sisters born of Muslim parents of the Ceylon Moorish Community permanently resident in the City of Colombo (wherever such youths may have been or be resident from time to time) failing whom 20
- (iii) Youths of the Islamic Faith not being male descendants as aforesaid of the Grantor or of his brothers or sisters born of Muslim parents of the Ceylon Moorish Community permanently resident anywhere else in the said Island of Ceylon other than in Colombo (wherever such youths may have been or be resident from time to time) ... 30
- (f) A sum not exceeding one thousand rupees (Rs.1000/-) a month to be accumulated from month to month and distributed for charity once a year during the month of Ramalhan.
- (g) Any surplus or any sums not expended on any of the above objects shall be credited to a reserve fund to be used in such proportions to such extents at such time or times and from time to time and in such manner as the Board may in its absolute and uncontrolled discretion decide (1) for the purpose of meeting any unforeseen expenditure or contingency in connection with the trust property (2) in furtherance of all or any one or more of the various objects of the trust (3) for educating in a 40

secondary school or secondary schools in Ceylon poor deserving boys of the Islamic Faith born of Muslim parents permanently resident in Ceylon (wherever such boys may have been or be resident from time to time) and (4) for the relief of poverty distress or sickness amongst members of the Islamic Faith in Ceylon

10

PROVIDED however that during the lifetime of the Grantor the Trustees shall apply the nett rents, profits dividends and income of the trust property for such purposes and in such manner as the Grantor in his absolute discretion whether such purposes shall fall within the objects specified in any provision above or not may through the Board direct. The Board shall not be nor be liable to be questioned regarding or asked the grounds or reasons for and decision of the Board in regard to any of the matters provided for in sub-clauses (b), (c), (d), (e), (f) and (g) of this clause it being the aim, intention and object of these Presents that the Board and every member thereof shall at no time be liable to have their decisions or their grounds or reasons in regard to such matter revised discussed gone into challenged modified or altered in any manner howsoever by any person body authority or Court".

20

30

The Grantor died on 1st November 1948. In view of the proviso to Clause 2 of the Trust Deed it is common ground that there was not, during the lifetime of the Grantor, a trust to which Section 7 (1)(c) of the Income Tax Ordinance applied.

40

5. The Trustees appealed against an assessment to income tax made upon them for the year 1949/50, claiming that they were entitled to the protection of Section 7 (1)(c). The appeal was dismissed by the Respondent, but a further appeal by the Trustees to the Board of Review was allowed, (on 22nd December 1954) it being held by the Board that the trust was one of a public character established solely for charitable purposes within the meaning of Section 7(1)(c). The Respondent did not appeal to the Supreme Court against that decision of the Board of Review.

App., p. 165.

6. Further assessments to income tax having

RECORD

App., p.1. been made upon the Trustees for the years 1950/51 to 1954/55 inclusive the Trustees once again appealed to the Respondent on the grounds firstly that the Assessor was estopped by the decision of the Board of Review dated 22nd December 1954 from raising assessments against the Trustees, and secondly that on a proper construction of the terms of the Trust Deed the Trust was within the exemption conferred by Section 7(1)(c). The Respondent rejected the first of these contentions, holding that the principle of res judicata did not apply to decisions given by himself or by the Board of Review. As to the second contention the Respondent accepted that the position of the Trust must be considered, for the purposes of Section 7(1)(c), solely by reference to the terms of the Trust Deed. But, construing the terms of the Trust Deed, he arrived at the view that the purposes set out in Clause 2(b) were educational only in a very loose sense, and were not therefore charitable purposes within the meaning of Section 2 of the Income Tax Ordinance. Further, in his view, the word "charity" in Clause 2 (f) of the Trust Deed was used only in the popular sense, and would also allow the Trustees to use trust income for purposes which were not legally charitable. The Respondent found in the first sentence of the proviso to Clause 2 of the Deed a more fundamental objection to the granting of the relief claimed and concluded that, in view of this proviso, the Trust was not established solely for charitable purposes.

App., p.11 10

App., p.14. 20

App., p.16 30

App., p.16 40

App., p.17

App., p.24 50

7. On 24th November 1956 the Trustees appealed to the Board of Review, under Section 71 of the Income Tax Ordinance, against the determination of the Respondent. The Trustees put forward the same grounds of appeal as those which had been advanced before the Respondent. The Board noted that the first of these grounds - resting on the principle of res judicata - had not been abandoned by the Trustees although their case had been argued on its merits, and held that it was not bound by one of its previous decisions relating to a previous year of assessment.

The Board agreed with the Respondent that the questions whether the Trust income was exempt from income tax under Section 7(1)(c) must be determined entirely by reference to the terms of the Trust Deed. The Board held, however, disagreeing with the Respondent, that the purposes set out in Clause 2(b) of the Deed were solely educational,

10 that those set out in Clause 2(f) were for the relief of poverty and that both were charitable in the legal sense. The Board further held that the first sentence in the proviso to Clause 2, having become inoperative when the Grantor died in 1948, did not affect the position in years of assessment subsequent to his death. Counsel for the Crown had argued that the word "establish" means "create" or "set up" and that accordingly the Trust Deed must be construed for the purposes of Section 7(1)(c) as at the date when it was executed; but this argument was rejected by the Board, which expressed the view that the Deed must be construed in accordance with the facts as they existed at the time when it became necessary to construe it for Income Tax purposes.

App., p.26

App., p.26

20 The Board also decided, contrary to the arguments put forward by Counsel for the Crown, that the absolute and uncontrolled discretion conferred on the Trustees by Clause 2 did not enable them to act outside the objects set out in Clause 2(b) to (g); and, in particular, that the Trustees' power under Clause 2(g) to spend surplus funds "in furtherance of" the objects of the Trust did not enable them to spend money on objects other than those specified in the Clause.

App., p.27

App., p.28

30 In the result the Board held that on a construction of the Trust Deed omitting the first sentence of the proviso to Clause 2, which was inoperative, the Trust established was one of a public character and solely for charitable purposes, and that accordingly the Trust income was exempt from tax under Section 7(1)(c).

8. On 20th March 1957 the Respondent applied to the Board of Review, under Section 74(1) of the Income Tax Ordinance, for a case to be stated for the opinion of the Supreme Court on the following questions of law :-

App., p.28

- 40
1. Was a Trust of a Public character, established solely for charitable purposes, created by N.D.H. Abdul Gaffoor by Deeds Nos. 1832 and 1833 of 24th December 1942, attested by C.M.G. de Saram, N.P?
 2. Is the income of the said Trust exempt from tax for the years of assessment 1950/51 to 1954/55 under the provisions of Section 7(1)(c) of the Income Tax Ordinance (Cap:188)?

RECORD

The Board of Review duly stated a case on 6th July 1957 in which, after stating the facts and decisions, and reciting (in paragraph 11) the questions raised in the application by the Respondent the Board declared (in paragraph 12) that in its view an important point of law that needed the consideration of the Supreme Court was the following :-

App., p.35

"The creator of the Trust, N.D.H. Abdul Gaffoor, having died on 1st November 1948, can the terms of the Trust Deed No. 1833 of 24th December 1942 be construed in accordance with the facts as they exist at the time it becomes necessary to construe it for Income Tax purposes or must it be construed for such purposes only in accordance with the facts existing at the date it was executed?"

10

9. The Respondent's appeal to the Supreme Court by way of case stated was argued before H.N.G. Fernando J. and Sinnetamby J. on 30th September and 1st, 2nd, 3rd, 7th, 8th, 9th and 10th October 1958 and on 26th November 1958 the Supreme Court gave judgment allowing the appeal with costs.

20

App., p.36

In the course of his judgment H.N.G. Fernando J. (with whom Sinnetamby J. agreed) first set out the relevant passages from Clause 2 of the Trust Deed and then, after noting the previous decision of the Board of Review on 22nd December 1954, considered the question raised by the Board of Review in the stated case. Having regard to the matters argued before the Supreme Court he was of the opinion that the questions arising for the determination of the Court were better formulated thus :-

30

(1) Does the decision dated 22nd December, 1954, of the Board of Review constituted under the Income Tax Ordinance, on appeal against the assessment made on the Trustees for the year of assessment 1949/50, operate as res judicata in respect of subsequent years upon the question whether the income of the Trustees is income of a "trust of a public character established solely for charitable purposes" within the meaning of Section 7(1)(c) of the Income Tax Ordinance?

40

(2) Is the income derived from the property described in the schedule to the instrument No. 1833 of 24th December, 1942,

exempt from tax for the years of assessment 1950/51, 51/52, 52/53, 53/54, 54/55, under Section 7(1)(c) of the Income Tax Ordinance as being the income of trust of a public character established solely for charitable purposes?

10 The learned Judge did not consider that the first of these questions had been concluded by the case of Attorney General v. Vallyama Atchie, 45 N.L.R. 230: in that case the decision which was relied on as creating an estoppel by means of res judicata had been given under the Income Tax Ordinance whereas the question in dispute arose under the Estate Duty Ordinance. In these circumstances the Vallyama Atchie case might be distinguishable and it would be desirable for the Court to consider the matter afresh.

App.p.40

20 Nevertheless, after considering the statutory provisions regulating appeals to the Board of Review, and referring to the decision of the Privy Council in the case of Shell Company of Australia v Federal Commissioner of Taxation (1931) A.C.275 and the decision of the English Court of Appeal in Commissioners of Inland Revenue v Sneath (1932) 2 K.B. 362, the learned Judge concluded that the Board of Review was not intended to function as a Court to decide litigation between the subject and the Crown and that accordingly the first question must be answered in the negative. The Appellants' case was not assisted by the decision in Hoystead v Commissioner of Taxation (1926) A.C. 155 because the decision there held to operate as res judicata was one of the High Court of Australia and not of any statutory Board of Commissioners.

App.p.42

30 Turning to the second question the learned Judge said that he had at first been impressed by the Appellants' argument that there was nothing in Section 7(1)(c) or in Section 2 of the Income Tax Ordinance to confine the phrase "charitable purposes" to purposes which were legally charitable. The meaning of "public character" should be clear, and - as appears from certain observations of Lord Wright in All India Spinners Association v Commissioner of Income Tax 31 A.I.R. (P.C. 88) at p.91 - is not to be regarded as being governed by English decisions on the subject. But the learned Judge thought the Solicitor-General right in saying that the word "trust" in Section 7(1)(c) of the Income Tax Ordinance denoted only such a trust as is contemplated by the Trusts Ordinance: and that the Trust in the present case will be

App.p.43

50

RECORD

void as a perpetuity, under Section 110 of the Trusts Ordinance unless it is a charitable trust as defined in Section 99 of that Ordinance. Accordingly it became necessary to consider whether the Trust was a charitable trust as there defined.

App.p.44

The learned Judge decided that the Trust was not a charitable trust as there defined for the reason, shortly stated, that the Trust was not "for the benefit of the public or any section of the public". The reference in Clause 2 (b) of the Trust Deed to "deserving youths of the Islamic faith" might well denote an intention on the part of the Grantor to benefit a section of the public, but upon construction of the whole clause, the Board was directed to give preference to deserving descendants of the Grantor's family, and could in the exercise of its discretion refrain from utilising the specified monthly sums except for the purposes of the education of such descendants. The Solicitor-General had submitted that any surplus accumulated by the Board could be applied by the Board under Clause 2 (g) in its absolute and uncontrolled discretion in furtherance of all or any one or more of the trust objects, and could therefore be applied for the exclusive benefit of the family descendants mentioned in Clause 2(b).

10

20

App.p.45

The learned Judge said that the test was whether, although a class or section of the public was designated in the instrument, members of that class or section could as such qualify for the benefit. The answer to the question whether deserving youths of the Islamic faith were as such qualified to benefit under Clause 2(b) was "Yes, but if only moneys remain available from the specified monthly sum or from apportionments from the reserve fund after providing for the education of such deserving family descendants as the Board may decide to assist and furthermore only if the Board in its absolute discretion desires to educate Islamic youths who are not family descendants". That being so Clause 2(b) did not contain the requisite element of public benefit.

30

40

App.,p.46

App.,p.47

The learned Judge, after repeating his reference to the remarks of Lord Wright in the Indian Spinners Association case, nevertheless proceeded to consider a number of decisions of the English Courts which had turned on language closely corresponding to that of the Trusts Ordinance. He noted that under English law a trust for the relief of poverty would be charitable

50

even if the benefit is restricted to the kin of the settlor but the validity of this type of trust had been doubted. The cases concerned with this type of trust were regarded as anomalous and had no bearing on Clause 2(b), which was not directed to the relief of poverty.

10 So far as the "founder's kin" cases were concerned, the authorities only supported the view that the trust was valid if it was to some particular college or foundation upon trust to educate descendants there. The Trust Deed was not of this type.

Counsel for the Appellants argued, however that the correct method of construing Clause 2(b) was to ascertain the primary object of the disposition, which was "the education instruction and training of deserving youths of the Islamic faith born of Muslim parents of the Ceylon Moorish community permanently resident in Ceylon". The learned Judge was prepared to assume for the purposes of the discussion that this class was a section of the public. The argument for the Appellants was that the order of selection set out in the latter part of Clause 2(b) merely conferred a right of preference on such deserving youths within the primary class as were also family descendants of the Grantor; and, contrary to the Solicitor General's submission, the right of preference extended only to the monthly sums mentioned in Clause 2(b) and not to surpluses dealt with under Clause 2(g). The Appellants argued that the right of preference did not detract from the public character of the primary object of Clause 2(b). They relied upon the decision in Re Koettgen (1954) Ch.252, where it was held that a trust primarily for the benefit of a section of the public did not lose its public character by virtue of the inclusion of a right of preference in favour of employees of a particular company. App., p.48.

40 The learned Judge reviewed the decision in Re Koettgen at length, and declared that he did not propose to follow it, but that at least it could be distinguished on the ground that a preference clause in favour of family descendants was not there involved. App., p.52

The learned Judge further held that even if he were wrong in thinking that the Trust did not qualify for tax exemption unless it came within Section 99 of the Trusts Ordinance it would still fail to qualify because it did not attain the public character required by Section 7(1)(c) of the Income Tax Ordinance. App. p.52

RECORD

The Solicitor General had also argued that the Trust was not established solely for charitable purposes because it was not originally set up solely for those purposes; that the word "charity" in Clause 2(b) was not confined to charity in the legal sense; and that the class of beneficiaries named in the Trust Deed, being not only confined to a particular area but selected from within it by reference to a particular creed, did not rank as a section of the public. These arguments were rejected by the learned Judge who held that apart from the arguments based on the true construction of Clause 2(b) of the Trust Deed, and of Clause 2(g) read in relation to Clause 2(b), there were no other grounds for holding that the income of the Trust was not entitled to exemption from income tax.

App.,p.54

10

10. A Decree in accordance with the Judgment of the Supreme Court was entered on 26th November 1958, and against the said Judgment and Decree this Appeal to Her Majesty in Council is now preferred, the Appellants having been granted final leave to appeal by a Decree of the Supreme Court dated 3rd March 1959.

App.,p.56

20

App.,p.62.

In the Appellants' humble submission the Appeal should be allowed, with costs throughout, and the said Decree of the Supreme Court dated 26th November 1958 should be set aside for the following among other

R E A S O N S

30

(1) BECAUSE since the death of the Grantor on 1st November 1948 the Trust has been one "of a public character established solely for charitable purposes" within the meaning of Section 7(1)(c) of the Income Tax Ordinance and has therefore qualified for the exemption from tax conferred by the said Section.

(2) BECAUSE on the true construction of the Trust Deed the Trust is for the benefit of a section of the public and is of a public character in that its primary objects are of a public nature; and (as the decision in Re Koettgen shows) not the less so because of the order of preference laid down in Clause 2(b) of the Deed, or of the terms of Clause 2(g) read in conjunction with Clause 2(b).

40

- (3) BECAUSE the Supreme Court was wrong in deciding that the principle applied in the case of Re Koettgen does not apply to the present case and was wrong in deciding not to adopt the decision of Upjohn J. in that case.
- (4) BECAUSE the Respondent is estopped by the decision of the Board of Review dated 22nd December 1954 from denying that the Trust is one of a public character established solely for charitable purposes within the meaning of Section 7(1)(c) of the Income Tax Ordinance
- 10
- (5) BECAUSE in so far as the Supreme Court has formed the view that the respondent is not estopped as aforesaid, and that the Trust is not for the benefit of a section of the Public nor of a public character, the reasoning of the Judgment of the Supreme Court upon this Appeal is not well founded.

E.F.N. GRATIAEN.

MICHAEL NOLAN.

No. 53 of 1959

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF CEYLON

B E T W E E N
MOHAMED FALIL ABDUL GAFFOOR & OTHERS
(The Trustees of the Abdul Gaffoor
Trust) Appellants

- and -

THE COMMISSIONERS OF INCOME TAX,
COLOMBO Respondent

CASE FOR THE APPELLANTS

SMILES & CO.,
15, Bedford Row,
W.C.1.

Solicitors for the Appellants.