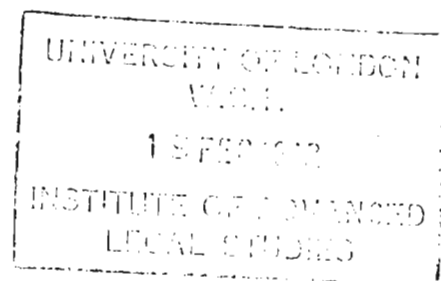


15, 1961

IN THE PRIVY COUNCILNo. 53 of 1959ON APPEALFROM THE SUPREME COURT OF CEYLONB E T W E E N :

- (1) MOHAMED FALIL ABDUL CAFFOOR
 (2) MOHAMED MOHIDEEN ABDUL CAFFOOR
 (3) MOHAMED RAFI ABDUL CAFFOOR
 (4) ABDUL HAMEED MOHAMED ISMAIL

The Trustees of the Abdul Gaffoor Trust

Appellants

63664

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- and -

CECIL ALEXANDER SPELDEWINDE
 Commissioner of Income Tax, Colombo

RespondentCASE FOR THE RESPONDENTRecord

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1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon (Fernando, J., and Sinnetamby, J.), dated the 26th November 1958, from a decision of the Board of Review, dated 19th February 1957, whereby an appeal by the Respondent upon a Case stated for the opinion of the Supreme Court by the Board under Section 74 of the Income Tax Ordinance was allowed, and the decision of the Board was reversed.

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2. The matter arises upon assessments to income tax made upon the Appellants as Trustees of what has been called the Abdul Gaffoor Trust, upon the income of the property of the said trust for the five years of assessment 1950/51 to 1954/55 upon the basis that they were not entitled to exemption from income tax in respect of the said income under Section 7(1)(c) of the Ordinance (which confers exemption upon the income of any trust of a public character established solely for charitable purposes).

3. The questions in dispute in this appeal in summarized form are formulated in the Judgment of the Supreme Court :-

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(1) Does the decision, dated 22nd December 1954, of the Board of Review constituted under the Income Tax Ordinance, on appeal against the assessment

pp.39 11.23-36.

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made upon the Trustees for the year of assessment 1949/50 operate as res judicata in respect of subsequent years upon the question at issue under Section 7(1)(c) of the Income Tax Ordinance?

(2) Is the income exempt from tax for the years now in dispute under the same paragraph of the said Ordinance as being the income of a trust of a public character established solely for charitable purposes?

- p.24 11.1-3. The former question was decided in the present Respondent's favour both by the Board of Review and the Supreme Court. The latter was decided in the present Respondent's favour by the Supreme Court reversing the decision of the Board of Review. 10
- p.54 11.20-21. 4. Clause 2 of the purported trust (Deed No.1833, P.1) contains the terms which, according to the Appellants, establish a charitable trust. That clause is in the following terms :-
- "2. The Trustees shall stand possessed of the trust property with power to let lease and manage the same or any part or portion thereof and shall apply the nett rents profits dividends and income thereof (after payment thereof of all rates taxes and other outgoings and after reserving a sum of One thousand Rupees (Rs.1000/-) a month for the proper upkeep repair and maintenance of the trust property) for all or any of the purposes following as the Board in its absolute and uncontrolled discretion may decide that is to say :- 20
- (a) A sum not exceeding One thousand rupees (Rs. 1000/-) a month for the remuneration of the Trustees and the expenses incurred by them in connection with the administration of the trust and for the payment of the costs of professional Accountants Solicitors Counsel or Agents or Managers or other persons whomsoever for or relating to any services rendered or other things done in connection with matters relating to the trusts hereby created or the trust property. 30
- (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 subject lines or any other departments of learning or human activity 40

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 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 whereat 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 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
- (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
- (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).

(c) A sum not exceeding Two hundred and fifty rupees (Rs.250/-) a month for the education of deserving youths of the Islamic Faith born of Muslim parents of the Ceylon Moorish Community permanently resident in Ceylon at either the University of Ceylon or any Institution associated with or affiliated to it or the Ceylon Law College or any other scholastic or vocational or professional or agricultural or industrial or other technical institution public or private in Ceylon.

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(d) A sum not exceeding Two hundred and fifty rupees (Rs.250/-) a month for providing dowries for poor girls of the Islamic Faith wherever resident born of Muslim parents of the Ceylon Moorish Community permanently resident in the City of Colombo.

(e) A sum not exceeding Two hundred and fifty rupees (Rs.250/-) a month for supplementing the income of the Ghaffooriyah Arabic School at Maharagama in the said Island founded by the Grantor in the event of the funds already provided for the said School under the relative trusts proving insufficient. 10

This is the mark and left thumb impression of Noor Deen Hadjiar Abdul Caffoor.

(Sgd.) N.D.H. Abdul Careem
 (Sgd.) Illegibly.
 (Sgd.) E.L.M.M. Mohideen
 (Sgd.) A.H.M. Ismail.

(Sgd.) C.M.G. de Saram 20
 Notary Public
 Colombo, Ceylon.

(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 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. 30 40

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

10 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 any 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 matters revised discussed gone into challenged modified or altered in any manner howsoever by any person body authority or Court".

The membership of "the Board" is set out in Clause 9 of the said Deed.

p.68 11.17-21.

5. The main provisions of statute law relevant are :-

20 (i) The Income Tax Ordinance :-

"Section 2. In this Ordinance, unless the context otherwise requires

.....

.....

.....

"charitable purpose" includes relief of the poor, education, and medical relief"

.....

....."

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

(a)

(b)

(c) the income of any institution or trust of a public character established solely for charitable purposes;

(iii) The law relating to trusts is in the Trusts Ordinance (Volume 2 Legislative Enactments of Ceylon 1938 Revision Chapter 72)

40 Section 99(1) thereof reads :-

"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 :-

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- (a) for the relief of poverty; or
- (b) for the advancement of education or knowledge; or
- (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".

(iv) Section 110 thereof contains the following:- 10

- (1)
- (2)
- (3)
- (4)
- (5) The restrictions of this Section shall not apply to charitable trusts as defined by Section 99.

(The preceding sub-sections of Section 110 deal with the rule against perpetuities).

pp. 1-7. 6. The said appeals were heard by the Commissioner pursuant to Section 69 of the Income Tax Ordinance on the 5th February 1956 and on the 3rd March, 1956. 20

p.8 11.10-20. At the hearing oral evidence was given on behalf of the present Appellants who also produced Exhibits P1-P5. In support of the assessments there were produced the Exhibits R.1 to R.12 from which it appeared that considerable sums of money had been lent to relations of the grantor as interest free loans and that other expenditure not authorised by the trust deed had been incurred by the present Appellants out of trust funds. 30

p.7 1.23 to
p.16 1.20. 7. The Commissioner, by his Determination and Reasons dated the 2nd July, 1956, dismissed the appeals, holding against the present Appellants on both grounds of appeal summarized in paragraph 3 of this Case.

8. From this decision of the Commissioner the present Appellants appealed to the Board of Review under Section 71 of the Income Tax Ordinance.

pp.16-22. At the hearing before the Board, Counsel for the present Appellants led further evidence (Exhibit X.3) and made the submissions set out in the Record at page 31, line 32 to page 32 line 24. 40

At the said hearing Counsel for the Crown made

Record

the submissions set out in the Record at page 32 line 27 to page 34 line 17.

9. The Board of Review, by its decision dated the 19th February 1957, held against the present Appellants on the ground of res judicata, but held that the income in dispute was exempt from Income Tax under Section 7(1)(c) of the Income Tax Ordinance. p.23 1.29 to p.24 1.3. p.28 11.14-16.
10. The present Respondent being dissatisfied with the decision of the Board of Review, applied to the Board for a Case to be stated to the Supreme Court on two questions of law namely - p.28 1.20 to p.29 1.14.
- (a) Was a trust of a public character established solely for charitable purposes created by N.D.H. Abdul Caffoor by deeds Nos. 1832 and 1833 of the 24th December, 1942?
- (b) Is the income of the said trust exempt from tax for the years of assessment 1950/51 to 1954/55 under the provisions of 7(1)(c) of the Income Tax Ordinance? 20
11. On the 6th July 1957 a Case was stated accordingly and the Board included therein the following point of law which in their view needed the consideration of the Supreme Court :- p.29 1.20 to p.35 1.22.
- "The creator of the Trust, N.D.H. Abdul Caffoor having died on the 18th November 1948, can the terms of the Trust Deed No.1833 of the 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?" p.35 11.2-8.
12. The Supreme Court (H.N.G. Fernando, J., and Sinnetamby, J.) heard the case stated and by its Judgment dated the 26th November 1958 decided (1) that the decision of the Board of Review on an appeal from a previous assessment did not operate as res judicata and (2) that the income derived by the present Appellants from the property in question was not exempt from Income Tax. They had formulated these as the two issues in the following passage in the Judgment of Fernando, J. (summarized in paragraph 3 of this Case). p.36 1.25 to p.54 foot. p.42 11.39-40.
- 40

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p.39 11.23-36.

"Having regard to the matters which have been argued before us, I am of opinion that the questions arising for our determination would be better formulated thus:- (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?"

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(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?"

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13. The Judgment of Fernando, J. (with which Sinnetamby, J. agreed) may be summarised as follows:-

p.36 1.31 to
p.38 1.40.

(a) The Learned Judge first set out in extenso some of the provisions of the instrument No.1833 of 24th December 1942 (P.1 Record page 63 to page 74).

p.39 11.17-22.

(b) He then referred to the question in the Case Stated for the opinion of the Court. Shortly, the creator of the trust having died on 1st November, 1948, can the terms of the trust deed (P.1) be construed in accordance with the facts when it becomes necessary to construe it for Income Tax purposes, or must it be construed for such purposes only in accordance with the facts at the date of execution?"

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p.39 11.23-36.

(c) The Learned Judge then stated the two questions arising for determination as summarized in paragraph 3 of this Case and set out at the end of paragraph 12 hereof.

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p.40 11.18-19.

(d) On the res judicata point the Learned Judge first decided it was desirable to consider the matter afresh without regarding the case of Valliyamma Atchie (Attorney General v. Valliyamma Atchie (45 N.L.R.230) as having already decided it.

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The Learned Judge then examined the machinery for assessment to Income Tax under the Income Tax Ordinance, and said .

p.40 1.20 to
p.41 1.51.

"The main point for determination is whether the Board of Review performs judicial and not merely administrative functions, for, if the Board's decision on appeal is merely administrative it would not create an estoppel by means of res judicata".

p.41 11.6-9.

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(f) Fernando, J., then found the decision of the Court of Appeal in England in C.I.R. v. Sneath (1932 2 K.B. 362) as directly of assistance on the res judicata point and adopted the ratio decidendi of Greer, L.J. therein.

p.41 1.29 to
p.42 1.29.

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(g) He then decided that Section 75 of the Income Tax Ordinance gives finality to a determination of the Board as regards the assessable income assessed thereby, that is to say as regards the amount of the income for the year to which the determination relates, and not as regards income for subsequent years and for these and other reasons decided the first point, viz. the res judicata point (as set out at the end of paragraph 12 of this Case) in favour of the present Respondent.

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14.(a) Fernando, J., thereupon proceeded to deal with the second point for determination stating that he was at first impressed by the argument for the Trustees (i.e. the present Appellants) that the answer is to be ascertained only from a consideration of Section 7(1)(c) read with Section 2 of the Income Tax Ordinance and the contention that there is nothing therein indicative of an intention that a purpose must be legally charitable as required by the law of England.

p.43 11.1-14.

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(b) He then however approved the counter-argument of the Solicitor General for the present Respondent that the first question is whether there is a trust at all in the present case having regard to the provisions of Sections 99 and 110(5) of the Trusts Ordinance, (set out in paragraph 5(iii) and (iv) of this Case) and stated that the preliminary question is whether the "trust" is a "charitable trust" as defined in Section 99 of the Trusts Ordinance.

p.43 1.31 to
p.44 1.6.

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- p.44 11.6-8. (c) Fernando, J., thereupon proceeded to examine the question whether or not there is here a "charitable trust" as defined in Section 99 of the Trusts Ordinance.
- p.44 1.9 to
p.45 1.6. (d) He referred to the argument of the Solicitor General for the present Respondent shortly, that Clause 2(b) of the instrument (P.1) must be read with Clause 2(g) and that assuming the gift in Clause 2(b) fails to satisfy the requirement that it must be for the benefit of the public or a section of the public (Section 99 of the Trusts Ordinance). 10
- p.45 1.7 to
p.47 1.2. (e) Fernando, J., then referred to the expressions "public", "public benefit" and "benefit of the public" as occurring in statutory expressions which have often to be construed by the Courts, and held that it is legitimate, if not necessary, to consult the English authorities.
- p.47 11.14-34. (f) He distinguished the English "founder's kin" cases. 20
- p.48 1.41 to
p.52 1.8. (g) Fernando, J. considered at some length the English cases of Re Koettgen, Westminster Bank Ltd., and Another v. Family Welfare Association Trustees Ltd., and Others (1954) 1 All E.R. 581; (1954) Ch. 252, and Re Scarisbrick's Will Trusts v. Public Trustee and Others (1951) 1 All E.R.822; (1951) 1 T.L.R. 989). He held thereupon that the instrument (P.1. No.1833 of 1942) does not create a valid trust. 30
- p.52 11.16-24. (h) The learned Judge observed that Counsel for the Trustees (the present Appellants) did not argue that income under paragraphs (c) to (f) of the instrument (P.1) can be regarded as a separate trust and therefore entitled to exemption from tax and that having regard to the powers exercised by the Board under paragraph (g) thereof and the uncontrolled discretion to restrict the use of the income and of the reserve fund one can well understand why no question of separation was raised. 40
- p.52 11.25-31. (i) Fernando, J., then said :-
"I have considered the Trust instrument on the basis that the trust does not qualify for the tax exemption unless it comes within the scope of the definition of Section 99 of the Trusts Ordinance. But even if that is an erroneous basis, I would hold that the income

of this trust is not exempt from tax because the Trust fails to attain the qualification of "public character" required by paragraph (c) of Section 7(1) of the Income Tax Ordinance".

(j) The learned Judge then proceeded to reject two of the arguments of the Solicitor General appearing for the present Respondent. p.52 l.43 to p.54 l.15.

(k) He concluded :-

10 "Apart then from the arguments based on the true construction of paragraph (b) of the instrument, and of paragraph (g) read in relation to paragraph (b)" (which he had accepted) "there are in my opinion no other grounds for holding that the income of the trust is not entitled to exemption from income tax". p.54 ll.16-19.

(l) In the result, he answered the second question (as set out in the Record page 39, lines 33 to 37) also in favour of the present Respondent and Sinnetamby, J., expressed agreement p.54 l.20 to end of page.

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15. By a Decree dated 26th January, 1959, the Supreme Court of Ceylon granted conditional leave to the Appellant to appeal to Her Majesty in Council from the Judgment of the Court, and by further Decree dated 3rd March, 1959 granted final leave to appeal. pp.58 & 62.

16. The Respondent hereby submits that the Judgment of the Supreme Court is right (save in respect of the two matters mentioned in paragraph 14(j) and (k) of this Case) and should be affirmed and that this appeal should be dismissed with costs both here and below for the following amongst other

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R E A S O N S

(1) BECAUSE the Instrument P.1 does not constitute a trust at all within the meaning of Section 7(1)(c) of the Income Tax Ordinance read, as it should be, with the Trusts Ordinance.

40 (2) BECAUSE the said Instrument was not, and is not, established solely for charitable purposes within the meaning of Section 7(1)(c) of the Income Tax Ordinance.

- (3) BECAUSE the assessments appealed against were rightly made.
- (4) BECAUSE the earlier decision of the Board of Review does not operate as res judicata in respect of the assessments under appeal.
- (5) BECAUSE (save in respect of the two matters mentioned in paragraph 14(j) and (k) of this Case) the Judgment of the Supreme Court is right.

JOHN SENTER.

WALTER JAYAWARDENA.

IN THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME
COURT OF CEYLON

B E T W E E N :

- (1) MOHAMED FALIL ABDUL CAFFOOR
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Appellants

- and -

CECIL ALEXANDER SPELDEWINDE
Commissioner of Income Tax,
Colombo Respondent

CASE FOR THE RESPONDENT

T.L. WILSON & CO.,
6, Westminster Palace Gardens,
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Solicitors for the Respondent.