Privy Council Appeal No. 53 *of* 1959

Mohamed Falil Abdul Caffoor and others The Trustees of the Abdul Gaffoor Trust - - - - - - - - - - *Appellants*

v.

The Commissioner of Income Tax, Colombo - - - - *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH APRIL, 1961

Present at the Hearing:

LORD MORTON OF HENRYTON.
LORD RADCLIFFE.
LORD MORRIS OF BORTH-Y-GEST.
MR. L. M. D. DE SILVA.

[*Delivered by* LORD RADCLIFFE]

This appeal from a Judgment of the Supreme Court of Ceylon dated 26th November, 1958 concerns five assessments to income tax for the revenue years 1950/51 to 1954/55 which have been made upon the income of a trust, styled the Abdul Gaffoor Trust, of which the appellants are the Trustees. The Appellants' case is that these assessments ought to be discharged because the Trust is an " institution or trust of a public character established solely for charitable purposes " within the meaning of S.7(1) (*c*) of the Ceylon Income Tax Ordinance, 1932 (No. 2 of 1932, as subsequently amended) and its income is accordingly exempt from liability to the tax. For the moment it is sufficient to note that by virtue of the Interpretation section of the Ordinance, S.2, " charitable purpose " is to be held to include " relief of the poor, education and medical relief ".

The Trust in question was set up by a Deed dated 24th December, 1942 executed by one Noor Deen Hadjiar Abdul Caffoor, the Grantor, of the one part and certain persons of the other part who were to act as the intended trustees. The trust property was stated to be of the value of Rs. 2,050,000, lawful money of Ceylon, at the date of the Deed. The overriding trust in the Deed was that during the life of the Grantor the Trustees were to apply the whole of the income for such purposes and in such manner as the Grantor himself should in his absolute discretion direct, whether or not such purposes should fall within those directed by the Deed to be operative after the Grantor's death. It is plain therefore that until his death, which took place on 1st November, 1948, the current trust income was not in any sense devoted to charitable purposes. Accordingly it can be argued that for this reason alone the Abdul Gaffoor Trust is not capable of being described as " established solely for charitable purposes ". This argument was placed before the Supreme Court by the Respondent and was there rejected on the ground that the word " established " had no essential connection with the date of the founding Trust Deed and that the critical test for the purposes of the exemption of income from tax was the nature of the trusts that were operative in the year to which the claimed exemption related. The respondent's submission was repeated to their Lordships on the ground that it was desired to keep the point open. The point was not fully developed

in argument and, for reasons which will shortly appear, their Lordships find it unnecessary to express any opinion upon it,

Once the Grantor was dead his overriding trust came to an end. The trust income thereafter was to be held by the Trustees upon trust, after reserving a sum of Rs. 1,000 a month for upkeep and maintenance of the trust property, for all or any of a number of enumerated purposes which were set out in subheads (*a*) to (*g*) inclusive of paragraph 2 of the Trust Deed. The application of the income for or among these purposes was left to the absolute and uncontrolled discretion of a Board, to be set up under the Trust, consisting of the Trustees and certain other named persons.

It is more convenient to set out these trust purposes in full as expressed in the Deed than to try to reduce the expression of them by an abridgement.

They are as follows :—

(*a*) A sum not exceeding one thousand rupees (Rs. 1,000/-) 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.

(*b*) A sum not exceeding in all one thousand rupees (Rs. 1,000/-) 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 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 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 descendents 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.

(*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 the Grantor in the event of the funds already provided for the said School under the relative trusts proving insufficient.

(*f*) A sum not exceeding one thousand rupees (Rs. 1,000/-) a month to be accumulated from month to month and distributed for charity once a year during the month of Ramadan.

(*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.

If one accepts, as their Lordships do, the Supreme Court's reading of the words " for charity " in subhead (*f*) as meaning no more than " for the relief of the poor ", it appears that in any year after the Grantor's death the whole of the trust income, after allowing for administrative expenses, was destined to be applied for purposes that can broadly be described as serving education or the relief of poverty or of sickness or distress. Prima facie, these would qualify as charitable purposes.

The first main point taken on behalf of the appellants is that as between themselves and the Respondent the question of exemption has been conclusively decided in their favour by a decision of the Board of Review, constituted under the Income Tax Ordinance, which decision was given on the 22nd December, 1954 upon an appeal made by them to that Board against assessment for the revenue year 1949/50. It is not in dispute that this decision was given or that the ground upon which exemption was allowed was that the income was that of a trust of a public character established solely for charitable purposes.

The appellants therefore are seeking to treat the decision of the Board of Review as setting up an estoppel per rem judicatam on the question of the trust income's right to be exempted from tax. This plea has not hitherto prevailed in the various hearings in Ceylon, it has been rejected in turn by the Commissioner of Income Tax, acting under S.69 of the Ordinance, by the Board of Review, acting under S.73, and by the Supreme Court, under S.74. For the reasons which will appear their Lordships are also of opinion that it cannot succeed.

The grounds for rejecting the estoppel in the Courts of Ceylon have been stated either as " the previous decision of the Board of Review which relates to an assessment for a year previous to the years of assessment which are now before us is not binding on us " (Decision of the Board of Review, paragraph 2) or as depending upon the question whether the Board of Review performs judicial and not merely administrative functions or, to

put it in yet another way, upon the question whether the Board was intended to function as a Court of competent jurisdiction to decide litigation between the subject and the Crown (Judgment of the Supreme Court). These different ways of approaching the issue reflect differences of formulation which are to be found in judgments in this country on similar or analogous issues. It is to be observed however that such differences could well lead to different conclusions in certain circumstances; for, if the fundamental reason why there is no estoppel is based upon the idea that the Board of Review does not possess adequate status as a judicial court of competent jurisdiction, it might seem to follow that a decision of the Supreme Court on the other hand when given on a Case stated to it would set up an estoppel per rem judicatam in respect of tax for other years; whereas if the essence of the matter is that a question of liability to tax for one year is always to be treated as inherently a different issue from that of liability for another year, even though there may appear to be similarity or identity in the questions of law on which they respectively depend, it would seem to be the consequence on the contrary that a Supreme Court decision would no more be capable of setting up an estoppel than would one made by the Board of Review, whatever its precise status as a judicial tribunal.

In their Lordships' opinion the question of estoppel cannot be decided merely by inquiring to what extent the Board of Review exercises judicial functions. The critical test is not the bare issue whether or not such a Board exercises judicial power, an issue which can indeed arise in other contexts, such as the constitutional question decided in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* [1931] A.C. 275. What is important here is that the Board of Review is a tribunal set up under the Income Tax Ordinance for the purpose of deciding income tax appeals at a certain stage of their prosecution, and that decisions given with regard to such appeals are effective only within the limited jurisdiction that the Ordinance creates for all tribunals that deal with the matter of an appeal. All such appeals remain in one sense a part of the process of assessment since all the tribunals, including the Supreme Court, have independent power to increase or reduce the assessment under appeal. While therefore it is unexceptionable to say that the Board of Review when exercising its powers under S.73 is acting in a sense judicially, that the dispute which it has to determine is at any rate somewhat analogous to a lis inter partes and that the assessor who made the assessment or some other representative of the Commissioner (S.73 (3)) resembles a party hostile to the appellant, these considerations are not those that are critical to the issue of estoppel. The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it (see S.75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning upon the construction of the Ordinance or of other statutes or upon the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination (cf *Reg* v. *Hutchings* 6 Q.B.D.300).

It is in this sense that in matters of a recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with "eadem quaestio " as that which arises in respect of an assessment for another year and, consequently, not to set up an estoppel. It is precisely that point that was raised and accepted by this Board in 1926 in *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council* [1926] A.C.94, where it is said (p. 100) " The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely the valuation for a different year and the liability for that year. It is not eadem quaestio, and therefore the principle of res judicata cannot apply ".

The *Broken Hill* decision is in itself a striking application of the principle involved, since the earlier judgment which it was sought to set up as an estoppel was one given by the High Court of Australia on a rating assessment referred to it by way of appeal under the tax procedure. It underlines the point that it is not the status of the tribunal itself, judicial or administrative, that forms the determining element for estoppel in cases of this kind but the limited nature of the question that is within the tribunal's jurisdiction. The judgment of the High Court that had been given in the earlier year was explicitly directed to the construction of a particular section of the rating Act and to the correct measurement of the liability in the light of that construction. Precisely the same point arose in the later year and was ultimately decided by this Board in a sense contrary to that which had previously been adopted.

So, in the present appeal, the earlier decision of the Board of Review governing the 1949/50 assessment was based upon a construction of S.7 (1) (*c*) of the Income Tax Ordinance as applied to the income of the Abdul Gaffoor Trust; and the same point of construction now arises again but in respect of assessments of that income for other and later years. In their Lordships' opinion it is not possible to distinguish the principle of the *Broken Hill* decision from that which should prevail in the present case on any such ground as that here the earlier decision related to the taxpayer's " status " as an exempt person while in the *Broken Hill* the decision " merely " related to the correct amount of the assessment: for in truth, as has been explained, in all these cases which arise under income tax or rating appeal procedure the decision is essentially as to the correct amount (if any) of the assessment and in the one case as much as in the other the decision was based upon a question of law, the proper interpretation of one of the provisions of the taxing Act.

To apply the principle of the *Broken Hill* decision to the case now before their Lordships is to bring it into line with what seems to be by now the regular course of authority with regard to appeals in successive years against income tax or rating assessments—See *Inland Revenue Commissioners* v. *Sneath* [1932] 2 K.B.362. *Patuck* v. *Lloyd* 171 L.T.340. *Reg* v. *Hutchings*, supra, *Society of Medical Officers of Health* v. *Hope* [1960] A.C.551. It may be that the principles applied in these cases form a somewhat anomalous branch of the general law of estoppel per rem judicatum and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered; but in their Lordships' opinion they are well established in their own field and it is not by any means to be assumed that the result is one that should be regretted in the public interest.

The decision of this Board in *Hoystead* v. *Commissioner of Taxation* [1926] A.C.155 is not consistent with this line of authority and the appellants naturally relied upon it in their argument. What happened in that case was that an assessment to federal land tax in Australia for the year 1918/19 had been the subject of appeal and a case was stated for the opinion of the High Court on a point of law that determined the assessment, the correct interpretation of the taxing statute with regard to joint interests in land taken by the assessees under their father's will.

There was a later appeal in respect of the assessment for the year 1920/21; and the question that was brought to this Board was whether the Commissioner of Taxation was estopped in the matter of that assessment by the judgment that had been delivered by the High Court in the earlier proceedings. The Board decided that he was. Unfortunately however the argument that the determination of an assessment for one year could not set up an estoppel upon an assessment for another year, an argument that was accepted by the Board at almost the same time in the *Broken Hill* case, does not appear either to have been presented to the Board or to have been noticed or adjudicated upon in the opinion which was delivered by Lord Shaw. It is not possible to explain why the matter was dealt with in this way; and it is fair to note that in the majority judgment of the High Court, which was reversed on the appeal, there is a reference, though a passing one, to the point of " eadem quaestio ". In the result however the attention of the Board in delivering its opinion was wholly occupied with a discussion of

what is quite a different issue in connection with estoppel, whether there can in law be estoppel per rem judicatam in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Their Lordships are of opinion that it is impossible for them to treat *Hoystead's* case as constituting a legal authority on the question of estoppels in respect of successive years of tax assessment. So to treat it would bring it into direct conflict with the contemporaneous decision in the *Broken Hill* case; and to follow it would involve preferring a decision in which the particular point was either assumed without argument or not noticed to a decision, in itself consistent with much other authority, in which the point was explicitly raised and explicitly determined.

For these reasons their Lordships are satisfied that the respondent is not estopped by the 1954 decision of the Board of Review from challenging the appellants' claim that the income of the Abdul Gaffoor Trust is exempt from tax under S.7 of the Income Tax Ordinance.

It is necessary now to turn to the question of exemption. To qualify at all there must be income of an " established " trust. Having regard to the nature of the Abdul Gaffoor Trust it cannot be validly established unless it falls within the definition of " charitable trust " which is contained in S.99 (1) of the Trusts Ordinance 1918. This definition includes any trust " for the benefit of the public or any section of the public " falling within any one of a number of categories which extend to such purposes as the relief of poverty and the advancement of education or knowledge. To satisfy the definition contained in the Income Tax Ordinance therefore the Abdul Gaffoor Trust must be a charitable trust " of a public character ": to be a subsisting charitable trust at all it must be a trust for the benefit of the public or some section of it.

In order to determine this question their Lordships think that the following principles may safely be applied in the interpretation of the Ceylon Ordinances. First, the general principles that govern the English law as to the validity of charitable trusts can be invoked. It seems plain that both the conception of a trust itself and the conception of what constitutes a charitable trust have been much influenced by English law. Secondly, there is no necessity to include in those general principles rules of the English law that appear to be specially associated with English local conditions or English history or which appear to be now accepted as anomalous incidents of the general law. Thirdly, there is no significant difference between the meaning of " of a public character " and the meaning of " for the benefit of the public or any section of it ". The two phrases are often used interchangeably in English decisions and text books—see, e.g., the quotation from Tudor. Charities, 5th Ed., p. 11, employed by Lord Greene M.R. in *Re Compton* [1945] Ch.D. 123 at 128—" a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say a purpose . . . must be directed to the benefit of the community or a section of the community ". Charitable trusts must be " trusts of a public nature " (see Lord Macnaghten in *Pemsel's* case [1891] A.C.531 at 580). Fourthly, although educational purposes are themselves charitable purposes, no trust under which the beneficiaries are defined by reference to a purely personal relationship with a named propositus can be a valid charitable gift. If, therefore, persons for whose benefit an educational trust is created, derive their title to their benefits by proving their qualifications in this way, whether as descendants of a named person or as employees of a named company, the trust must be regarded merely as a family trust and not as one for the benefit of a section of the community (see *Re Compton* supra, *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297).

Their Lordships do not think that it would be consistent with these principles to apply to the law of Ceylon any doctrine that had as its foundation the ancient English institution of educational provision for " Founders Kin " in certain schools and colleges or old English decisions about charitable relief for poor relations of a testator. The former provisions were commonly

accepted as validly instituted, though there seems to be virtually no direct authority as to the principle upon which they rested and they should probably be regarded as belonging more to history than to doctrine: the latter are today treated as no more than an anomaly in the general law.

Is then the Abdul Gaffoor Trust a charitable trust? It was not disputed that to determine this it is necessary to treat the whole trust income as if it were appropriated for the purposes specified in clause 2 (*b*). This is so because the form in which the various trust sub-heads are expressed is such that no definite sum of money is dedicated to any one and the power given by sub-head (*g*) makes it possible for the whole of the income to be carried to a reserve fund which could then be expended as from time to time the Board thought proper in the exclusive implementation of the purposes of sub-head (*b*). To test whether any particular trust is a charitable one what must be asked is whether the income is bound with certainty to be applied to charitable purposes, not whether it may be so applied. Unless therefore sub-head (*b*) itself declares a valid charitable purpose, no part of the Trust comes within the exempting provision of the Ordinance.

There are several material constituents in this particular purpose. The money is to be used for " education, instruction or training " in any department of human activity. Their Lordships will assume, without deciding, that this could be called an educational purpose. The recipients of the benefit are " deserving youths of the Islamic Faith ". So long, however, as there are male descendants in either the male or female line of the Grantor or any of his brothers or sisters for whose education the Board are prepared to provide or reserve money on the ground that they qualify as deserving youths of the Islamic Faith, no other youth of that Faith can obtain any benefit under the trust purpose. They can only come in " failing " the line of the descendants.

It was argued with plausibility for the appellants that what this trust amounted to was a trust whose general purpose was the education of deserving young people of the Islamic Faith and that its required public character was not destroyed by the circumstance that a preference in the selection of deserving recipients was directed to be given to members of the Grantor's own family. Their Lordships go with the argument so far as to say that they do not think that a trust which provides for the education of a section of the public necessarily loses its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection. They part with the argument, however, because they do not consider that the trust which is now before them comes within the range of any such qualified exception. Considering what is in effect the absolute priority to the benefit of the trust income which is conferred on the Grantor's own family by clause (i) of sub-head (*b*), the only fair way to describe this Trust is as a family trust under which the income is made available to provide for the education or training of relatives of the propositus, in this case the Grantor himself, provided only that they are young, deserving and of the required Faith. These conditions do not make it the less a family trust. Such a trust is not a trust of a public character solely for charitable purposes.

In the Supreme Court judgment much consideration was given to the English decision *Re Koettgen's Will Trusts* [1954] 1 Ch. 253, the facts of which have much in common with those of the present case. The trust there created was expressed to be for the promotion and furtherance of commercial education; the persons eligible were British born subjects without sufficient means to obtain at their own expense an education for a higher commercial career; and in selecting beneficiaries the trustees were directed to give preference to employees or members of the families of employees of a named company. It is evident that the Court's decision, which upheld the trust as a valid trust for charitable purposes, turned on the exact construction which was given to the words of the will. It was argued that the trust was one " primarily for the benefit of the employees . . . and their families, and that it was only if there were insufficient employees or members of their families that the public could come in as beneficiaries under the trust." The learned

judge says in his judgment that he did not accept that as the true construction of the clause in question; if he had accepted it, it is evident that he would have rejected the trust as a charitable bequest. The construction that he adopted as correct was that the primary class of beneficiaries consisted of persons without sufficient means to obtain commercial education at their own expense and that the preference given merely amounted to a duty in the trustees to select employees or members of their families, if available, out of this primary class.

It is not necessary for their Lordships to say whether they would have put the same construction on the will there in question as the learned Judge did or whether they regard the distinction which he made as ultimately maintainable. The decision edges very near to being inconsistent with *Oppenheim's* case, but it is sufficient to say that the construction of the gift which was there adopted does not tally with the construction which their Lordships are bound to place upon the Trust which is now before them. Here the effect of the wording of clause 2 (*b*) (i) is to create a primary disposition of the trust income in favour of the family of the Grantor.

For the reasons which have been set out above their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the Respondent's costs of the appeal.

(82452) Wt. 8109/53 100 5/61 Hw.

In the Privy Council

MOHAMED FALIL ABDUL CAFFOOR AND OTHERS

v.

THE COMMISSIONER OF INCOME TAX, COLOMBO

DELIVERED BY
LORD RADCLIFFE

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