

1946

Present : Howard C.J. and Canekeratne J.

TRUSTEES OF THE WIJEYWARDENE CHARITABLE TRUST, Appellants, and COMMISSIONER OF INCOME TAX, Respondent.

29-S—Income Tax, No. 93/175.

Income tax—Trust for relief of the poor relations of settlor—A valid charitable trust—Exemption from taxation—Income Tax Ordinance (Cap. 188), s. 7 (1) (c).

A trust for the relief of the poor relations of a settlor constitutes a valid charitable trust, and any income derived from property held under such trust is exempt, under section 7 (1) (c) of the Income Tax Ordinance, from taxation.

CASE stated for the decision of the Supreme Court under the provisions of section 74 of the Income Tax Ordinance (Cap. 188). The appellants were the trustees appointed under the last will of Mrs. Helen Wijeyewardene, who died in the year 1940. By Clause 7 of the said last will the deceased devised certain properties to her trustees in trust to use the nett income thereof for the following purposes :—

- “ (a) To continue gradually the restoration work now being carried on by me at the Kelaniya Temple.
- (b) To aid either occasionally or regularly my relations who are or may become poor including members of my own family and who in the judgment of my trustees are in need of such aid in consequence of illness, financial difficulties and the like or on the occasion of marriage, deaths, and the like.
- (c) To support in such manner and to such extent as my trustees may think fit such Buddhist charitable institutions and temples as my trustees may from time to time select.”

The questions of law on which the decision of the Supreme Court was sought were formulated in the case stated as follows :—

- “ (a) In view of the provisions of Clause 7 (b) of the last will of the deceased, is the Trust ‘of a public character’ within the meaning of section 7 (1) (c) of the Income Tax Ordinance ?
- (b) In view of the provisions of the said Clause 7 (b) has the Trust been ‘established solely for charitable purposes’ within the meaning of the said section 7 (1) (c) ? ”

H. V. Perera, K.C. (with him *C. E. L. Wickremesinghe*), for the assessee, appellant.—The income of any institution or trust of a public character established solely for charitable purposes is exempted from taxation under section 7 (1) (c) of the Income Tax Ordinance (Cap. 188). Charitable purpose includes relief of the poor, education and medical relief—*vide* section 2 of the Ordinance. “Poor relations” must be distinguished from “next of kin”. Charitable trusts are mainly an institution of English law. In the case of *Compton, Powell v. Compton and others* (1944) 2 A.E.R. 255 certain moneys

were to be invested in trustee stocks for the education of children of three specified families. All the cases dealing with poor relations are cited at the bottom of page 256 and at page 257. In the present case the poor relations are not specified and therefore a larger class of persons would be able to claim than in *Compton's* case; the benefit of poor relations indirectly benefits the public. Trusts for the benefit of poor relations are to be considered charitable trusts—See Tudor on Charities (5th Edition) p. 26.

[HOWARD C.J.—Are not poor relations a fluctuating body of private individuals ?]

Poor relations of an individual are a section of the public. Where an estate was bequeathed to the trustees of a fund for the benefit of New South Wales returned soldiers, it was held that the gift created a valid charitable trust:—*Verge v. Somerville and others* (1924) A.C. 496. Lord Greene discusses the meaning of the terms “public character” and “a section of the public” in *Re Compton, Powell v. Compton* (1945) 1 A. E. R. 198 at 201. Section 7 (1) (c) of our Income Tax Ordinance uses the words “public character” and therefore it is wider in its application than the words “for the relief of the public”.

H. H. Basnayake, Acting Solicitor-General (with him *T. S. Fernando, Crown Counsel*), for the Commissioner of Income Tax, respondent.—The decision itself of *Compton's* case is inapplicable to the present case, but the reasons given by Lord Greene are very helpful. It is submitted that this trust has a private family purpose, lacking the necessary public character as stated by Lord Greene at page 206 of *Compton's* case. The fundamental requirement of a charitable trust is its public character; the purpose must be directed to the benefit of the community or a section of the community; see at page 200 and also section 7 (1) (c) of our Income Tax Ordinance. It is submitted that poor relations are a body of private individuals or a fluctuating body of private individuals.

[CANEKERATNE J.—Isn't the essential element the relief of poverty ?]

Yes, but this is for the relief of poverty among relations, and therefore lacks the “public character”. A trust for the benefit of poor relations is not one for a charitable object; it has to benefit the public at large and not the relatives of the deceased—See *Commissioner of Income Tax, Madras v. Aga Abbas Ali Shirazi* (1944) A. I. R. Madras, 292.

[HOWARD C.J.—Do you draw a distinction between a trust “for the benefit of the public” and “of a public character” ?]

“Public character” is much wider than “for the benefit of the public”. But a trust for the benefit of the members of a family is of a private not of a public character; it imports a conception or notion of something private and not something which is public—*Arur v. Commissioner of Income Tax, Bombay* (1946) A. I. R. Bombay, 44 at page 47. The exemption only applies to trusts of a public character—*Commissioner of Income Tax, Madras v. Jamal Mohamed Sahib* (1941) A. I. R. Madras, 535, which is referred to in (1944) A. I. R. Madras 292 (supra).

For the purposes of Income Tax the meaning to be assigned to the term “charitable” should be different from that given to it in the Trusts

Ordinance—*The Commissioner of Income Tax v. Pemsel (1891) A. C. 531.* “Charity” in its legal sense comprises four principal divisions; these divisions are stated in *Pemsel’s Case* at page 583.

The class to be benefited should not be described by their relationship to the donor, but it should have reference to geographical limits. In English statutes the words “of a public character” are not used, but they are found in section 7 (1) (c) of our Ordinance; they are used in addition to the term “charitable purposes” in our section. The first essential is an institution or trust of a “public character”, and secondly it must be for a “charitable purpose”. In determining what a charitable trust is under the Income Tax Ordinance the English decisions are not applicable—*Spinners’ Association v. Income Tax Commissioner (1944) A. I. R. (Privy Council) 88 at 91-92.* The Indian Act uses the words “general public utility”.

[HOWARD C.J.—Our Ordinance does not contain the phrase “general public utility”.]

No, but our Ordinance uses the words “of a public character”; these words are wider than “public utility” and therefore our section goes further than the Indian section. The English Act does not contain the words “of a public character”. “Poor relations” cases are charitable trusts of a private character, not of a public character.

In *Trustees of Wernher’s Charitable Trusts v. Inland Revenue Commissioners (1937) 2 A. E. R. 488* the question of “section of the public” is discussed: employees of a particular Company were held not to be a section of the public at large. The deciding factor in the present case is not the poverty element, but the element of “public character”.

The words “charitable purposes” must be construed in their ordinary meaning—*In re Mercantile Bank of India (Agency), Ltd., (1942) 10 Income Tax Reports (Calcutta) 512 at p. 517-518.* Where it is not for a public purpose, it is not charitable.

H. V. Perera, K.C., in reply.—The Indian decisions are very unsafe guides. Our law of trusts is the English law of trusts. In (1944) *A. I. R., Privy Council, 88 at 91* Lord Wright distinguished the English law from the Indian law. In India the law of “charitable trusts” is that recognised by customary law—See *Trustees of Tribune Press, Lahore v. Commissioner of Income Tax, Punjab (1939) A. I. R. Privy Council, 208.* The Indian cases are based on the interpretation of the words “general public utility”. The wording of our Ordinance is different.

[HOWARD C.J.—Why should we apply the English law when we have the provisions of our Income Tax Ordinance?]

Lord Greene himself in *Compton’s* case uses the words “public character”. We have adopted Lord MacNaghten’s definition of charitable trusts in our Trusts Ordinance. The term “general public utility” had to be used in the Indian Income Tax Ordinance because of the wide general meaning given to charitable trusts in that country; but in Ceylon conditions are different. We have the English law of trusts and therefore those words must be presumed to have been deliberately omitted by our Legislature. Hence we must have recourse to the English law and English decisions would be applicable. In (1939) *A. I. R.*

Privy Council, 208 (supra) Sir George Rankine stressed the use of the words “general public utility” in the Indian Act as opposed to the English law. It is not a question of one definition being narrower or wider than the other. Our law of trusts differs much from that of India. In (1946) *A. I. R. Bombay 44 (supra)* at p. 45 Stone J. refers to *Compton's* case and holds that English cases regarding charities are inapplicable to Indian cases as the conception of charitable trusts in India is different from that in England. In India the words “general public utility” would exclude the “poor relations” cases of English law. The “public character” does not refer to the trustees or to the source from which the income is derived. Hence the public character can only refer to the persons benefited.

In *Hall v. Urban Sanitary Authority of the Borough of Derby (1885) L.R.Q.B.D. 163* Manisty J. at p. 170 says that the general character of the institution should be considered in ascertaining what a “public charity” is. In deciding whether a trust is of a public character one must apply the same tests that determine what amount of publicity is required for the constitution of a valid charitable trust under our law.

H. H. Basnayake (with permission of Court) refers to *Adamson and others v. Melbourne and Metropolitan Board of Works (1929) A. C., 142 at p. 147*; it is always unsatisfactory and generally unsafe to use definitions which appear in one enactment in interpreting the law in another enactment. The definition in the Trusts Ordinance should not be adopted in interpreting section 7 (1) (c) of the Income Tax Ordinance.

Cur. adv. vult.

July 19, 1946. CANEKERATNE J.—

This appeal arises out of an assessment to income tax made on the appellants for the years 1940–41, 1941–42, 1942–43 and 1943–44 on the sums of Rs. 3,838·00, Rs. 10,732·00, Rs. 9,716·00 and Rs. 11,972·00 respectively.

These sums represent the income received by the appellants from certain properties devised to them by the testatrix, they were to hold the same in trust and to use the net income thereof for three purposes, one of which (b) is:—

“To aid either occasionally or regularly my relations who are or may become poor including members of my own family and who in the judgment of my Trustees are in need of such aid in consequence of illness, financial difficulties and the like or on the occasion of marriage, deaths and the like.”

The assessor held that these sums were liable to income tax as clause “b” was not a charitable purpose: this assessment was confirmed by the Commissioner of Income Tax. On appeal the Board of Review came to the conclusion that there was no material difference between a charitable trust as defined in section 99 (1) of the Trust Ordinance (Cap. 72 of the Legislative Enactments of Ceylon) and a trust such as would satisfy the requirements of the Income Tax Ordinance but as the trust established by this will was not “for the benefit of the public or any section of the public” it was not of a public character. The Board

affirmed the assessment and, on the requisition of the Trustees, stated a case for the opinion of the Court.

The main contention of Counsel for the appellants was that a trust for the relief of the poor relations of a settlor constitutes a valid charitable trust and that the income received during each of the years in question is exempt from taxation.

The Acting Solicitor-General contended that such a settlement is a private trust and is not saved from taxation under section 7 (1) (c) of the Income Tax Ordinance, that the construction of this section must be based on the actual words used therein and that it is not permissible to resort to the provisions contained in Section 99 of the Trust Ordinance to construe the language of the sub-section. To exemplify his contention that the limits fixed by this section must be strictly observed, reference was made to a series of Indian decisions on Income Tax ¹.

It is not disputed that the will creates a trust nor is it denied that had the will contained only the purposes specified in clause "a" and clause "c", the income would be exempt from taxation. Some of the principles of the English Law of trusts found their way in the course of years to the Law of Ceylon: thus by 1874 our Law had been greatly influenced by English rules ², the media of influence being the citation by Advocates of English textbooks and decisions, sometimes the process of assimilation was also helped by legislation (see Ordinance No. 7 of 1871). Perhaps the Courts in Ceylon may have evolved similar rules by applying the principles of the Roman-Dutch Law, notably those relating to *fidei commissa*, to the circumstances of modern life. The Law relating to Trusts is now to be found in Cap. 72 of the Legislative Enactments of Ceylon which contains the text of an Ordinance passed in 1917 (Ordinance No. 9 of 1917). By section 110 (5) the rule against perpetuities is not applicable to charitable trusts as defined by section 99.

By the Income Tax Ordinance, the income of any institution or trust of a public character established solely for charitable purposes is exempt from tax (section 7 (1) (c)). The explanation in section 2 provides that charitable purpose includes relief of the poor, education and medical relief: thus the income of any institution or trust of a public character established solely for the relief of the poor, education and medical relief is freed.

Neither the word "trust" nor the words "public character" are defined in the Ordinance. A person may settle property for the benefit of certain specific individuals, this would generally be recognised as a private trust. There may also be a settlement of property for the benefit of the public at large as the inhabitants of a particular tenement; such a grant would create that which is called a charitable, that is to say a public, trust or interest for the benefit of the free inhabitants of an ancient tenement: a trust of that kind would not in any way infringe the Law or rule against perpetuities for a trust for the benefit of private individuals or a fluctuating body of private individuals would if it creates a charitable, that is to say a public, interest will be free from anything obnoxious to the rule with regard to perpetuities ³.

¹ See under foot-note Nos. 19, 20, and 21.

² *Saibo v. Oriental Bank Corporation* (1874) 3 N. L. R. 148.

³ *Lord Cairns, in Saltash's case*—from 38 Ch. D. at 532.

A charitable trust is sometimes referred to as a charitable institution or as a legal charity or as a charity. Mere kindness, generosity or benevolence on the settlor's part is not enough to constitute a charitable purpose. A charity should be unselfish, *i.e.*, for the benefit of other persons than the settlor. If it is the settlor's intention to benefit certain specific individuals there is no public purpose and the gift is therefore not charitable. If the persons to be benefited form a class worthy, in numbers or importance, of consideration as a public object of generosity the trust would be a public trust. A legal charity must be public.

"In the first place it may be laid down as 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, in order to be charitable, be directed to the benefit of the community or a section of the community." (Tudor on Charities, 5th Edition, page 11). Gavan Duffy, J. : "Courts of Equity have been consistently insistent on the public character of a legal charity. Importing a benefit to the community or a section of the community." (1945) *I A. E. R.* page 204.

No gift can be charitable unless it is of the necessary public character (Greene, M. R., in *re Compton*⁴). The public character of a trust is ascertained from the object of the trust : the trust must be for the benefit of the community or a section of the community.

The preamble of the Statute of 1601 gave a list of charitable objects, the enumeration contained therein is not exhaustive. This Statute was repealed by the Mortmain and Charitable Uses Act of 1888 but the enumeration of charitable objects contained in the preamble was reproduced by the Act of 1888. Charity in its legal sense, according to Lord Macnaghten⁵, comprises four principal divisions :—

- (a) trusts for the relief of poverty.
- (b) trusts for the advancement of education.
- (c) trusts for the advancement of religion.
- (d) trusts for other purposes beneficial to the community not falling under any of the preceding heads.

Lord Macnaghten's fourth heading does not contain the word "poor". He does not say beneficial to the poorer members of the community : he says beneficial to the community. Did he mean his words to be read as confined to the poor? Education and religion, two of the heads which he had just mentioned, do not require any qualification of poverty to be introduced to give them validity. He goes on to say the trusts referred to (*i.e.*, the fourth class) are not less charitable in the eye of the Law, because incidentally they benefit the rich as well as the poor.⁶

There must be the element of poverty or need on the part of the object or else the gift must be dedicated to some purpose, such as education, religion or the like, which the Law regards as charitable. Charities may conveniently be grouped under two heads. The essential qualification of one group is poverty, the persons whom the settlor means to benefit are poor persons, no such qualification is required in the other group but the purpose of the charity must be one of those referred to in the list, *i.e.*,

⁴ (1945) *I A. E. R.* 201.

⁵ *Pemsel v. Commissioner of Income Tax* (1891) *A. C.* 531 at page 583.

⁶ *Lewin : Trusts* (1928 *Ed.*) page 58.

education, religion or the like. Thus a gift to the free inhabitants of ancient tenements (*in Saltask*, 7 A.C. 633), a gift for a particular type of education (1891) A. C. 531, *Pemsel's* case, gifts for the benefit of ministers of religion in a particular place (6 *Hare* 453), a gift to the incumbent of a church for the time being (*Amb.* 201), are good charitable gifts—so is a trust for the occupiers of certain cottages, a comparatively small and tolerably well defined class (*re Christchurch Inclosure Act*, (1888) 38 Ch. D. 520). The education of the descendants of a named person is not one for the benefit of a section of the community (*re Compton*), nor is a trust to pay the holiday expenses of certain of one's work-people (*re Drummond*). Similarly a fund for the relief of air-raid distress among employees of a particular company is not a charitable trust (*re Hobourn Aero Co. Ltd.*, (1946) 1 A. E. R. 501).

Attempts are sometimes made to show that trusts falling within class "b" or "c" or "d" above are trusts for the relief of poverty and are therefore valid trusts. In *re Drummond*, *re Compton*, *re Hobourn Aero Co. Ltd.* and in *Keren K. I. J. Ltd. v. Inland Revenue* (1932) A. C. 650 such attempts were made but as poverty did not seem to be a necessary qualification these attempts did not succeed.

Trusts for the relief of poverty stand on a different footing. The persons to be benefited are poor and because they are poor they form a class worthy of consideration as an object of generosity. Besides gifts to the poor generally, gifts to particular classes of poor persons are also charitable, e.g., the poor of a specified place or parish. So in *Bristow v. Bristow*⁷ the relief of the poor "on my little estate in Suffolk". Gifts to the inmates of a work-house⁸, to widows and orphans (whether generally or of a specified class or place⁹), to servants¹⁰, poor house-keepers¹¹ are all charitable: trusts to poor relations, whether generally, or of particular classes, such as descendants have also been regarded as charities¹², and so also have gifts for the poor, with a preference for the testator's poor relations¹³.

In *Isaac v. Defries*¹⁴ there was a gift of two annuities to the poorest relations of the testator and of his wife, a gift of income to one poor relation of the testator and a similar gift of income to one poor relation of his wife. These gifts were upheld as good charitable gifts. This case was followed in *Attorney-General v. Price*¹⁵. Greene, M. R., reviews the cases decided since 1810 and continues "It will be seen that they are really all derived from *Isaac v. Defries* and *Attorney-General v. Price*. We are invited to overrule them. I agree that they are far from satisfactory and the original decisions were given at a time when the public character of a charitable gift had not been as clearly laid down as it has been in more modern authorities But it is in my view quite impossible for this Court to overrule these cases There may perhaps be some special quality in gifts for the relief of poverty

⁷ (1842) 5 *Beav.* 289.

⁸ *A. G. v. Vint* (1850)—3 *De G & S* 704.

⁹ *A. G. v. Comber* (1824) 2 *S & S* 93. *Waldo v. Calley* (1809) 16 *Ves* 206.

¹⁰ *Reeve v. A. G.* (1843) 3 *Hare* 191.

¹¹ *A. G. v. Pearce* (1740) 2 *Atk.* 87.

¹² *A. G. v. Price* (1810) 17 *Ves* 371.

¹³ *Waldo v. Calley* (1809) 16 *Ves* 206.

¹⁴ *Isaac v. Defries* (1754) *Amb.* 595.

¹⁵ *Attorney-General v. Price* (1810) 17 *Ves* 371.

which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded.¹⁶ Where there is a fund directed to the relief of poverty, there is a public element sufficient to give it the character of charity : there is a charitable gift even though those who are to participate in the liberality of the settlor are the poor of a particular town in which he lived or his poor kinsmen and kinswomen dwelling in his county or his descendants or poor relations.

A trust established for giving relief to certain persons would be a charitable trust if poverty is an essential qualification for the receipt of relief : if its purpose is not the relief of poverty it would be a private trust and would not fall within the class of charitable trusts (see Tudor on Charities quoted at p. 507 and p. 508 of (1946) *I. A. E. R.* Thus a friendly society established to provide allowances to members would be a good charitable institution if poverty is an ingredient in the qualification of members who were to receive the benefits (*I. R. Comrs. v. Medical Men*, 42 *T. L. R.* 612). If poverty is not required as a requisite for relief it would not be a charitable trust (*re Clarke* (1875) *1 Ch. D.* 497 ; *Brown v. Dale*, (1879) *9 Ch. D.* 78).

There is a public element in a gift to the poor, *i.e.*, where a person must be poor to get relief from a fund, the recipients of the bounty then may be even a limited class of persons provided the individuals are not ascertained ; if there is a public element in a gift, the trust dealing with that gift can be described as being one for the benefit of a section of the public¹⁷.

The trust constituted by the testatrix is for the benefit of her poor relations : if the question arose in England, it would be difficult to come to any other conclusion than that this trust is a valid charitable trust. The authorities show that where a trust benefits the public or a section of the public, there is a trust of a public character¹⁸.

It is convenient to discuss the Indian decisions. The Charitable Endowments Act VI of 1890 of India uses the words "charitable purposes" ; the expression is defined as including relief of the poor, education, medical relief and the advancement of any other object of general public utility but not a purpose which relates exclusively to religious teaching or worship. It was passed one year before the case of *The Commissioner of Income Tax v. Pemsel* was decided. The words of the section are for the advancement of any other object of general public utility whereas Lord Macnaghten's words were other purposes beneficial to the community. The rule against perpetuities is contained in section 14 of the Transfer of Properties Act of 1882. The exception in respect of charity is provided by section 18 which is in these terms : "The restrictions in section 14 . . . shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind".

¹⁶ *re Compton* ; see also *H. Aero Co., Ltd.*, (1946) *1 A. E. R.*, page 508.

¹⁷ *Spiller v. Maude* (1864) *11 L. T.* 329 ; (1946) *1 A. E. R.* 508.

¹⁸ See *Tudor on Charities*, p. 11 ; (1945) *1 A. F. R.* 204.

Section 4 (3) (1) of the Indian Income Tax Act (Act XI of 1922) provides that the income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and in the case of property so held in part only for such purposes the income applied or finally set apart for application thereto shall not be liable to income tax. The expression charitable includes "relief of the poor, education, medical relief and the advancement of any other object of general public utility"; the definition is the same as that contained in the Charitable Endowments Act of 1890. By an amendment made in 1939 a proviso was added "but nothing contained in clause i, clause (ia) or clause (ii) shall operate to exempt from the provisions of the Act that part of the income of a private religious trust which does not enure for the benefit of the public".

The difference in language between Lord Macnaghten's words and those used in the Act particularly the inclusion of the words "public utility" is of importance.

It was stated in one of the cases¹⁹ that the test of general public utility is the test so far as the Income Tax Act is concerned and that it is not necessary to consider whether a trust would be deemed to be charitable in England. It is suggested that though the words "general public" *prima facie* mean the public at large and not merely a section, if the object of a charity is to benefit a fairly large number of the public it would be sufficient²⁰.

The Indian Courts have excluded settlements made for poor relations of the family of the settlor from the class of settlements saved from taxation under the Income Tax Act. The exemption in section 4 (1) only applies to a trust, the object of which is public utility.²¹ Great importance has been attached to the presence of the words "general public utility". Such settlements as do not benefit a large number of the public are not charitable.

The discussion of cases where a similar question has arisen on an Act which is differently framed does not clarify the position. There seems to be no reason for reading into the words "public character" limitations found in a similar statute of another country. Where the two statutes happen to deal with the same subject their wording is not the same. The language used in the two sections is not even "practically identical".

It is thus a question of interpreting the words used in the Ceylon Ordinance. There must be a public element in a charitable trust according to the Income Tax Ordinance, the same element is required for the constitution of a charity according to English Law; the public element of the latter is furnished by the presence of a benefit to the community or a section of the community. A settlement for the benefit of the poor relations of the settlor is recognised by English Law as one that has a public element as it confers a benefit on at least a section of the community.

¹⁹ *Com. of Income Tax v. Mohamed Sahib A. I. R. 1941, Madras 535.*

²⁰ *D. V. Arur v. I. T. Commissioner (1946) A. I. R. Bom. 49.*
Tribune Press case (1939) A. I. R. (P. C.) 208. Supplying a province with an organ of educated public opinion.

²¹ *Spinners Association v. I. T. Com. (1944), A. I. R. (P. C.) 88.*
Commissioner of Income Tax v. Aga Abbas Ali A. I. R. (1944) Madras 292.
Commissioner of Income Tax v. M. J. Mohamed Sahib A. I. R. (1941) Madras 535.

The answer to the first question in the case stated is in the affirmative. As no dispute has been raised about the other purposes of the instrument of trust, the answer to the second question is also in the affirmative.

The appeal is allowed with costs. The appellants are entitled to the refund of the sum of Rs. 50 deposited by them under section 74 (1) of the Income Tax Ordinance.

HOWARD C.J.—I agree.

Appeal allowed.
