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Chandrakant Krishnarao Pradhan
v.
The Collector of Customs, Bombay

Subba Rao J.

BY COURT : In accordance with the opinion of the majority, the petitions must fail except to the extent that we declare r.10 (c) to be an unreasonable restraint upon the right of the petitioners to carry on their avocation, and r.11, when it prescribes a renewal fee of Rs. 50, invalid inasmuch as it has provided not for a fee but for a tax. Subject to this, the petitions are dismissed. The petitioners will pay the costs of the other side (one set only), as they have lost substantially.

Petitions dismissed except for slight modification.

COMMISSIONER OF INCOME-TAX, KERALA AND COIMBATORE

v.

PUTHIYA PONMANICHINTAKAM WAKF MANAGER P. P. AYESHA BI BI

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August 14.

(P. B. GAJENDRAGADKAR, K. SUBBA RAO and M. HIDAYATULLAH, JJ.)

Income Tax—Wakf—Assessment—If must be in the status of individual or as association of persons—Mutawalli, if a trustee—Indian Income-tax Act, 1922(11 of 1922), s. 41(1), First proviso—Mussalman Wakf Validating Act, 1913 (6 of 1913), ss.3,4.

The question for determination in the appeal was whether the wakf in question should be assessed to tax under s.41(1) of the Indian Income-tax Act. 1922, through the manager as individual or as an association of persons at the maximum rate under the first proviso to that section on the ground that the individual shares of the beneficiaries were indeterminate and unknown. The wakf deed directed the mutawalli to do acts necessary for charitable purposes and to meet the maintenance expenses of the wakif's children, grand-children, the female children born in the future and the male children born to the said female children and after payment of taxes and meeting of expenses for repairs and maintenance of properties, to utilise the balance of the income for daily necessary expenses of the house and for food for purchasing dresses and other necessities for the male and female members of the *tarwad*, for conducting specified ceremonies, for feeding the poor and for meeting such other necessary expenses and thereafter to utilise the balance, if any, in acquiring properties yielding good income.

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Held, that under the terms of the wakf deed the individual shares of the beneficiaries were indeterminate within the meaning of the first proviso to s.41(1) of the Indian Income-tax Act, 1922, and as such the assessee was liable to pay income-tax thereunder at the maximum rate.

It was not correct in view of ss.3 and 4 of the Mussalman Wakf Validating Act, 1913, to say that under the wakf deed the property vested in the Almighty and the Mutawalli did not therefore, receive the income on behalf of any person within the meaning of s.41(1) of the Indian Income-Tax Act and as such the proviso could not come into operation.

Under the Mahomedan law wakf property vests in the Almighty only in an ideal sense and the Mutawalli, acting in his name, utilises the income for the advantage of the beneficiaries. The words "on behalf of any person" in s.41 of the Act, therefore, could only mean on behalf of the beneficiaries and not on behalf of the Almighty.

Jewun Doss Sahoo v. *Shah Kubeer-ood-deen*, (1841) 2 M.I. A. 390, referred to.

Held, further, that there was no scope for importing the Mahomedan Law of wakf in s.41 of the Act since that section in express terms treated the Mutawalli as a trustee though he is not one in the technical sense under the Mohamedan Law.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 397 of 1960.

Appeal from the judgment and order dated November 24, 1958, of the Kerala High Court in I. T. R. No. 23 of 1957.

K. N. Rajagopala Sastri and *P.C. Menon*, for the appellant.

A. V. Viswanatha Sastri, Narayanaswami and *R. Gopalakrishnan*, for the respondent.

1961. August 14. The Judgment of the Court was delivered by

Subba Rao J.

SUBBA RAO, J.—This appeal by certificate granted by the High Court of Kerala raises the question of the application of s. 41(1) of the Indian Income-tax Act (hereinafter called the Act) to the facts of the case.

One P. B. Umbichi and his wife executed a deed dated December 20, 1915, creating thereunder a wakf of their properties. It was provided therein, *inter alia*, that the income from the properties mentioned therein should be utilised for the maintenance of their two daughters and their children on the female side. For 40 years upto and inclusive of the assessment year 1954-55, the income-tax assessments were made on the wakf through its manager under s. 41 of the Act in the status of an individual. But, for the assessment year 1955-56, the Income-tax Officer treated the assessee as an association of persons, and, on the ground that the shares of the beneficiaries are indeterminate, levied tax at the maximum rate under the first proviso to s. 41 of the Act. On appeal, the Appellate Assistant Commissioner of Income-tax held that the Income-tax Officer was not right in holding that the members of the family were indeterminate, but he confirmed the assessment for the reason that, as the shares were not specified among the individual members of the family and also between the members of the family on the one hand and the charitable and religious purposes on the other, the first proviso to s. 41 would be applicable to the assessee. On further appeal, the Income-tax Appellate Tribunal took the view that the proprietary rights in the property in question vested in the Almighty and that the Mutawalli was only to look after and administer the properties as a manager and, therefore, the proper person in whose hands the income from the properties should be assessed was the Mutawalli in his status as an "individual" at the rates applicable to an individual. In that view, the appeal was allowed. At the instance of the Commissioner of Income-tax, the Appellate Tribunal referred to the High Court of Kerala the following question for its determination :

> "Whether in the facts and circumstances of the case, the first proviso to section 41 is applicable."

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The High Court held that the said proviso was not applicable, as under the wakf deed the beneficiaries and their shares were ascertainable. Aggrieved by the said order, the Commissioner of Income-tax has preferred the present appeal.

Mr. Rajagopala Sastri, learned counsel for the Commissioner of Income-tax, contended that on a fair reading of the terms of the wakf deed it would be clear that the Mutawalli was only directed to maintain the members of the family, that none of the members of the family had any ascertainable share in the income, and that, therefore, the case squarely fell within the first proviso to s. 41 of the Act.

Mr. Viswanatha Sastri, learned counsel for the respondent, in addition to his attempt to sustain the construction put upon the wakf deed by the High Court, contended that the instant case fell outside the scope of s. 41(1) of the Act, as the Mutawalli was only receiving the income on behalf of the Almighty, that the Almighty was not a "person", and that, therefore, as the main section did not apply, the proviso also would not be attracted, with the result that the Mutawalli would have to be assessed as an "individual".

As the argument turns upon the construction of s. 41 of the Act, it will be convenient at the outset to read the relevant parts thereof.

> "*Section* 41 : (1) In the case of income, profits or gains chargeable under this Act which.....any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise, including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913, are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such.....trustee or trustees,

in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly :

Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate, but, where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons."

This section in terms applies to a trustee under a wakf deed which is valid under the Mussalman Wakf Validating Act, 1913. Under the substantive part of the section, tax is leviable on the trustee of the wakf in the like manner and to the same amount as it would be leviable upon and recoverable from the beneficiary, that is, the assessment would be at the individual rates of tax applicable to the beneficiary. But, under the first proviso to that section, there are two exceptions to the general rule, *viz.*, (i) where the income is not specifically receivable on behalf of any one person ; and (ii) where the individual shares of the persons on whose behalf the income is receivable are indeterminate or unknown. In those two circumstances, tax shall be levied and recoverable at the maximum rate. It is agreed that the first exception does not apply to the instant case. But the question that falls to be decided is whether the individual shares of the persons on whose behalf the income is receivable are indeterminate or unknown. The answer to the question depends upon the construction of the

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provisions of the Wakf deed. The Wakf deed was executed on December 20, 1950 by Umbichi and his wife dedicating their entire property, moveable and immoveable, of total value of rupees one lakh for the objects mentioned therein. The Mutawalli appointed thereunder was directed to manage the properties in such a way as "to do acts necessary for charitable purposes and to meet the maintenance expenses of their children and grand-children and the female children that might be born to them in future, and to the male children born to the said female children". The document proceeded to give further specific directions in the management of the properties. After payment of taxes and meeting the expenses incurred for repairs and maintenance of the properties, the balance of the income should be utilised for the "daily necessary expenses of the house and food expenses as we are doing now", and for purchasing "dresses and other necessities for the then male and female members of the tarwad" and for conducting "nerchas (ceremonies) such as Yasin, Moulooth, etc., charitable ceremonies for feeding the poor and such other necessary expenses", and out of the balance, if any, the Mutawalli was directed to acquire properties yielding good income. The rest of the recitals in the document are not relevant for the present purpose.

Can it be said that, under the document, the individual shares of the beneficiaries are specified ? The document does not expressly specify the shares of the beneficiaries; nor does it do so by necessary implication. Indeed, the individual shares of the beneficiaries are not germane to the objects of the document. The Mutawalli was directed to bear, out of the income, the expenses necessary for maintaining the members of the tarwad and to conduct the necessary religious ceremonies. The distribution of the family income and family expenses was left to the discretion of the

Mutawalli, the document also further contemplated that the Mutawalli by his prudent and efficient management would save sufficient amounts for purchasing properties. The directions indicate beyond any reasonable doubt that no specified share of the income was given to any of the beneficiaries, and their right was nothing more than to be maintained, having regard to their reasonable requirements which were left to the discretion of Mutawalli. While it is true that the number of beneficiaries would be ascertainable at any given point of time, it is not possible to hold, as the High Court held, that under the document the beneficiaries had equal shares in the income. The beneficiaries had no specified share in the income, but only had the right to be maintained. The construction put upon the document by the High Court cannot, therefore, be sustained on the plain wording of the document. We, therefore, hold that under the terms of the document the individual shares of the beneficiaries are indeterminate within the meaning of the first proviso to s. 41(1) of the Act. If so, under the said proviso, the assessee is liable to pay income-tax at the maximum rate.

The alternative contention of learned counsel for the respondent remains to be considered. The argument is that under the Wakf deed the properties vest in the Almighty and, therefore, the Mutawalli receives the income only on behalf of the Almighty and not on behalf of any person within the meaning of s. 41(1) of the Act, with the result that s. 41(1) is not applicable to the assessment in question. The argument is rather subtle, but it has no force. There are three effective answers to this contention :

Firstly, it was not raised before the High Court—the only question argued before the High Court was whether the beneficiaries of the trust and their individual shares of the income of the trust were ascertainable.

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Secondly, though under the Mahomedan Law the properties dedicated under a Wakf deed belong to the Almighty, it is only in the ideal sense, for the Mutawalli in the name of the Almighty utilises the income for the purposes and for the benefit of the beneficiaries mentioned therein. Under the Mahomedan Law, the moment a Wakf is created all rights of property pass out of the wakif and vest in the Almighty. The property does not vest in the Mutawalli, for he is merely a manager and not a trustee in the technical sense. Though Wakf property belongs to the Almighty, the practical significance of that concept is explained in *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* (1) thus :

> ".....Wakf signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures."

That is, though in an ideal sense the property vests in the Almighty, the property is held for the benefit of His creatures, that is, the beneficiaries. Though at one time it was considered that to constitute a valid Wakf there must be dedication of property solely to the worship of God or for religious or charitable purposes, the Wakf Validating Act, 1913, discarded that view and enacted by s. 3 that a Mussalman can create a wakf for the maintenance and support, wholly or partially, of his family, children or descendants provided the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character. Section 4 of the said Act, goes further and says that a wakf shall not be invalid by the mere circumstance that the benefit

(1) (1840) 2 M.I.A. 390, 421.

reserved for the poor or for religious purposes is postponed until the extinction of the family. It is, therefore, manifest that under the Mahomedan Law, the property vests only in the Almighty, but the Mutawalli, acting in His name, utilises the income for the advantage of the beneficiaries. Therefore, the words "on behalf of any person" in s. 41 of the Act can only mean on behalf of the beneficiaries and not on behalf of the Almighty.

The third and more effective answer to the argument is that s. 41(1) of the Act provides for a vicarious assessment in order to facilitate the levy and collection of income-tax from a trustee in respect of income of the beneficiaries. In express terms it equates the Mutawalli of a wakf to a trustee. For the purpose of s. 41 the Mutawalli is treated as a trustee and, on the analogy of a trustee, he holds the property for the benefit of the beneficiaries. There is no scope for importing the Mahomedan Law of Wakf in s. 41 when the section in express terms treats the Mutawalli as a trustee, though he is not one in the technical sense under the Mahomedan Law. If the argument of learned counsel for the respondent be accepted, it would make s. 41 of the Act otiose so far as wakfs are concerned, for in every case of wakf the property would be held for the Almighty and not for any person. We, therefore, reject this contention and answer the question in the affirmative.

In the result, we set aside the order of the High Court and hold that the respondent was rightly assessed by the Income-tax Officer at the maximum rate. The appeal is allowed with costs.

Appeal Allowed.