

(1946) 01 CAL CK 0014
In the Calcutta High Court

In Re: Sm. Charusila Dassi as trustee to the Sm. Charusila Trust Estate

Date of Decision : 16-01-1946

Acts Referred:

Income Tax Act, 1961 — Section 33

Citation : AIR 1947 Cal 148

Hon'ble Judges : Ormond, J;Gentle, J

Bench : Full Bench

Judgement

Gentle, J.—This reference by the Commissioner of income tax of Calcutta arises out of a deed of settlement dated 11-3-1938 executed by Sm. Charusila Dassi (hereinafter called "the Settlor") in favour of herself, her deceased husband's adopted son, Debi Prosanna Ghose, and three other gentlemen, who were not members of her or her husband's family (they are hereinafter called "the trustees"). By the deed the settlor created a trust, called the Sm. Charusila Trust Estate, of lands and other immovable properties in Deoghar, Bihar, and in Calcutta (stated to be worth Rs. 10 lacs) which she conveyed unto the trustees to receive the income therefrom, subject to the trusts therein mentioned. The lands and properties comprised: (a) a piece of land at Karanibagh in Deoghar upon which to build a temple, (b) A house and land known as "Charunibas" in Deoghar in which the settlor resided, (c) Five immovable properties in Calcutta.

2. The trusts mentioned in the deed were : 1. To permit the settlor to use and occupy Charunibas free of rent during her lifetime and to effect repairs thereto as reasonably desired by her. 2. Out of the income, in the next place, to complete the construction of the twin temple of Jugal Mandir and the Nutmandir at Karanibagh according to plans and specifications approved by the settlor. 3. After completion of the temple to install therein the deity "Sri Gopal," which the settlor had established in her house, and a marble image of Sri Sri Issur Balanand Brahmachari Moharaj, the settlor's guru and religious preceptor, in the manner enjoined by the Hindu Sastras and to celebrate within the temple land the founding or the consecration ceremony of the temple and the installation ceremony of the deity and the image. 4. To pay for the daily seba and periodic festivals of the : deity, or such other deities as might be installed, and of the

image, in the manner prescribed in Sch. E to the deed. 6. To form a reserve fund out of the in-come and from donations. 6. To establish and manage a hospital for Hindu females and a dispensary for all patients of any religion or creed whatsoever, to the extent of Rs. 12,000 annually, or such sum as would be available and sufficient after meeting the expenses of the other trusts, and after paying the allowances of the sebaith, trustees, members of the temple committee and the office charges in Calcutta and Deoghar.

3. The deed directs that the management of the trust should vest in a Board of Trustees; the trustees, previously mentioned, should form the original board; the settlor reserved the power in her absolute discretion to remove any trustee for the reasons stated in the deed and to fill any vacancy in the board; after her death any vacancy to be filled by the trustees from among the persons or sects therein mentioned; the settlor to be the first sebaith and after her death or retirement a person therein named to succeed her and thereafter the sebaith should be the Jugal Mandir Sebaith; the general manage, ment conduct and transaction of business of the trusts and exercise of the functions of the trustees, sebaith, committee and officers and servants and employees should be in accordance with the rules in Schedule A to the deed; the settlor during her lifetime, and the trustees after her death, should be at liberty to add to, make, vary and repeal all or any of such rules as they might think fit in relation to any matter within the scope of their authority; the pronamis and perquisites offered to the deities and image should form part of the trust estate and neither the shebaith nor any one else should have interest or claim in or over the same; during the lifetime of the settlor, her decision at a meeting of the Board of Trustees should prevail and action taken concerning the administration of the trusts according to her decision.

4. The rules, in Schedule A, inter alia, provide that the temple committee should consist of the Jugal Mandir Sebaith and six pious Hindu residents of Deoghar, appointed by the trustees; subject to the supreme control of the trustees, the temple committee and sebaith should act in consultation in the matters of detail and daily worship and Bhoge; the remuneration to be paid to the sebaith, (except the settlor), trustees and the temple committee and the minimum staff (about 83 persons) of the temple, to be as therein specified. Schedule B to the deed provides for the daily Bhoge of the deities and image; daily food for 60 persons at noon and for 85 persons at night; the annual festivals to be celebrated, including free distribution of cold drinking water, molasses and grain at a festival during the month of Baisakh and free distribution of Bhoge to all present at a festival in the month of Kartick.

5. It is conceded by the Commissioner of income tax that the hospital and dispensary, when it comes into existence and operation, will be a public charitable trust and the part of the trust income devoted to it will be exempt from assessment to income tax. The rules in Schedule A provide that, during the settlor's lifetime, the hospital and dispensary should be located in a rented

house in Deoghar and after her death in Charunibas, the house where she has a right of residence. The year of assessment is 1939-40 in respect of the accounting year 1938-39. The trustees were assessed upon the whole income of the trust in the sum of Rs. 49,691 for an amount of Rs. 9061-9 0 tax. The Appellate Assistant Commissioner dismissed an appeal by the assessee against the assessment and, upon reference being made u/s 33, income tax Act, to the Commissioner, he refused to interfere expressing the opinion that the provisions of the trust are inconsistent with a trust of a public character, except with respect to the hospital, and he referred the following question for the opinion of this Court:

Whether on a proper construction of the deed of trust, so much of the income of the trust as is not applied for the purpose of constructing and maintaining the female hospital is exempt from tax under the provisions of Section 4(3), income tax Act?

6. It is not in dispute that "female hospital", in the question, includes the dispensary. The relevant provisions of Section 4(3) of the Act are:

Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:

(i) Any income derived from the 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.

In this sub-section "charitable purpose" includes relief of the poor and...the advancement of any other object of general public utility but nothing contained in Clause (i)...shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public.

7. The trustees contend that the entire trust is for public religious and charitable purposes and the whole income falls within Clause (i), Sub-section (3), Section 4. The Commissioner's contention is that it is no more than a private religious trust and the income does not enure for the public benefit, save with respect to that part of the income which will be devoted to the hospital and dispensary and to which the latter part of Clause (i) applies.

8. Since the construction of the temple was not completed, the deity and image were not installed and no daily seba and festival had been celebrated, by the conclusion of the accounting year, the question whether the trust is a public or private one must be ascertained from the provisions of the trust deed. Since no part of the income of the trust, during the accounting year 1938-39, was devoted to the hospital and dispensary and since it is conceded that that part of the income which will be devoted to those institutions, when utilised for those purposes, will fall within the exempting clause, the meaning and effect of the

trust deed needs to be considered solely with respect to the other trusts created by it. The burden is upon the assessee to establish that the income from the trust is exempt from taxation : vide the observations of Agarwala J., at p. 219 in *Commissioners of income tax, B. & O. v. Visweswar Singh* ("35) 22 AIR 1935 Pat. 342 (343).

9. Mr. N.C. Chatterjee, for the trustees, contended that the public nature of the entire trust is ascertained from the trust deed, in the following respects : 1. There is no dedication to a family deity. 2. No portion of the usufruct is reserved to the settlor or to her heirs or members of her family. 3. The family is divested of the sebaithship. 4. The majority of the trustees are not members of the settlor's family. 5. The management of the temple is in the hands of a public committee which includes six Hindu residents of Deoghar. 6. Daily distribution of food to 95 persons and of periodic refreshment at festivals is to be carried out by the temple committee. 7. No power is reserved in the deed to revoke or vary the objects of the trust but only the rules in Schedule A can be varied. 8. Pronamis become part of the trust estate. 9. The public must be informed of the trust property and the accretions thereto. 10. The land upon which the temple is erected has to be consecrated. 11. The public are the beneficiaries of the trust.

10. It is now convenient to deal with the features of the deed mentioned by Mr. Chatterjee. (1) The settlor's own deity, which she had established in her house, and the image of her own religious preceptor, are to be installed in the temple, which is the purpose of its erection, and the daily seba and festivals to be celebrated by expenditure out of the trust income appertain to that deity and image. The *nutmandir*, or entrance hall, to the temple, is in memory of the settlor's deceased son. Whilst, so far as the settlor is concerned, the perpetuation of the worship of her deity and image and of the memory of her son are pious in the extreme, they are not matters which command public interest. There is no provision in the deed by which members of the public have any right to worship in the temple. See also the observations with regard to, (1) *infra*. (2) The deed reserves to the settlor, during her lifetime, the right of residence in *Charunibas*, which forms part of the trust property, and in which, after her death, the hospital and dispensary will be located. In this respect, there is a reservation to the settlor of part of the usufruct. Further, the complete divestment, by the author of a trust, of any interest for himself or herself or for members of his or her family in the property over which a trust is created, does not thereby make trust a public one. (3) The settlor has reserved to herself the sebaithship during her lifetime and thereafter it becomes vested in persons who are strangers in blood. Even so, the object of the trust is clear, namely, to preserve the worship of the settlor's own deity and the image of her religious preceptor. (4, 5, 6, 7) The first trustees are the settlor, the adopted son of her deceased husband and three strangers in blood. Vacancies in the board of trustees are to be filled by the remaining trustees by appointing the senior lineal male descendant of the settlor's deceased husband, if one is available, and other persons from prescribed sects. But, the deed further provides, the settlor reserves to herself

the power in her absolute discretion to remove any one or more trustees for misconduct or other reason specified therein, and to fill all vacancies in the Board. This, naturally, will apply only during her lifetime. The deed also provides, in the rules contained in Schedule A, that the settlor shall be the first managing trustee until her death or retirement. Elsewhere the deed provides that during her lifetime the decision of the settlor at a meeting of the Board of Trustees shall prevail. The temple committee is comprised of the Jugal Mandir Sebaith, for the time being, (the holder of an office unconnected with the temple) and 6 pious Hindu residents of Deoghar appointed by the trustees, the committee being responsible for the distribution of Prosad and arrangement and management of periodical worship and ceremonies; but the committee's functions are subject to the supreme control of the trustees. Since the settlor's decision as a trustee prevails at a Board meeting and since the administration by the committee is subject to the trustees' supreme control, it follows that, during her lifetime, the settlor will effect entire control over the administration and direction of all matters relating to the temple, including worship, ceremonies and distribution of food, and her wishes and directions will have to be carried out to the same extent as they would have been if there had been no trust created, subject only to such restrictions which the trust imposes, e.g., expenditure and the number of persons to be fed. The feeding of the poor is incidental to the puja of a deity and provision in a deed of endowment for this to be carried out does not make a trust anything beyond a private one : vide *Prasaddas Pal Vs. Jagannath Pal and Others*, and the observation of Mitter J., at p. 183, who delivered the judgment of the Court. Also vide *Sathappayar v. Periasami* ('91) 14 Mad. 1 (5) with respect to a muth. After the settlor's death, the trustees, as a body, will have supreme control and will act by a majority but the discharge of the duties of the committee and the administration of the trust by the trustees will be solely for the purpose of carrying out the wishes and desires of the settlor with respect to the worship and celebration of festivals of her deity and the image of her preceptor. The deed provides that the settlor, during her lifetime, and the trustees, after death, shall be at liberty at any time to add to, make, vary and repeal all or any of the rules. These rules provide, inter alia, for the numbers, qualification, appointment and duties of the members of the temple committee. At any time, its function can be made abortive and have no effect. The incident that a trust is irrevocable does not make it a public one. (8) The deed provides that the pronamis and perquisites to be offered to the deities and image shall form part of the trust estate and neither the sebaith nor any one else shall have interest "or claim in or over the same. This provision does not indicate the creation of a trust in favour of the public but, on the contrary, it denies the right of any one, which must include any member of the public, having a right to the pronamis. In its terms, the deed negatives that benefit is conferred upon the public. (9) The meaning given to the deed of trust by Mr. Chatterjee to support this point rests, as he conceded, on nothing more than the provision for the naming of the Trust. This provision does not, in our view, bear the meaning for which he contended. No other term in the deed has been pointed out as

containing a requirement, express or implied, that the public must be given information regarding the trust property. (10, 11) The provisions in the deed relating to consecration and their effect do not appear to have been raised before the income tax Officer, the Appellate Assistant Commissioner and the Commissioner of income tax and no evidence referable to the ceremony of consecration was before them.

11. Nevertheless, considerable importance was sought to be laid upon these matters. The deed requires the trustees "to install" the deity and the image in the temple "in the manner enjoined by the Hindu Sastras and to celebrate within the temple land the founding or the consecration ceremony of the temple and the festival in connection therewith" The deed does not direct consecration of the land, which Mr. Chatterjee contended is the meaning and effect of the above provision, but consecration of the temple, which ceremony is to be celebrated within the land. He argued that the ceremony to consecrate the land is known as "Prosad Utsarga." This ceremony, and its effect, is explained in the Hindu Law of Endowments by the late Pandit Prannath Saraswati; at page 127 the learned author says. "The books of ritual contain a direction that before removing the image into the temple, the building itself should be formally given away to the God for whom it is intended. The Sankalpa, or formula of resolve, makes the deity himself the recipient of the gift," next follows the ritual of celebration and the text continues:

It is this ceremony which divests the proprietorship of the temple from the builder and vests it in the image?the utsarga is the relinquishment of the donee's right and the gift is completed by the acceptance corporeally made by the donee-the image-which is made to take bodily possession of the premises.

The Utsarga Prosad ceremony dedicates s temple to a deity, it does not consecrate the land upon which a temple is erected. It was next contended that upon the performance of the Prosad Utsarga ceremony, the temple becomes a public one and, consequently, the trusts created by the deed is for public charitable purposes. In support of this contention reference was made to a statement at p. 150 in the Edn. 2 of Mr. Ghosh's Law of Endowments which reads as follows: "The real criterion of a temple being a public one is the proof of performance of the ceremony known as Prosad Utsarga." The authority cited in the text book for this statement is *Gir Har Saroop v. Bhagwan Din* ("35) 22 AIR 1935 Oudh 96 in which one of the head. notes to the report contains language identical to that which I have quoted; reference to p. 105 of the judgment in that case shows that this was the evidence given by a witness, which testimony is recited in the judgment and, with respect to it, the judgment continues, it was admitted in that case there was no evidence the ceremony had been performed; there is no finding or expression of opinion in the judgment as to the correctness of the evidence given by the witness and the head note is not borne out by the judgment; there is, therefore, no authority supporting the statement in Mr. Ghosh's text book Mr. Chatterjee further argued that the provision in the deed

for consecration in itself shows the trust is intended to be a public religious trust. Consecration, he argued, is a ceremony restricted to the case of a deity whose worship is to be by the public; and, therefore, he contended, the mere inclusion in the deed of a provision for consecration differentiated the position from that which would exist if a mere private religious trust had been intended. For then, as when a Thakur is installed in a private house of a Hindu family, no consecration would, he suggested, be required. As to this, while it may well be the case, that for the installation of a Thakur in a private family house, no ceremony of consecration is needed, yet neither evidence; nor authority has been produced before us to show, that if a private deity is moved to a new temple specially built for his installation, a consecration ceremony of any nature cannot appropriately be resorted to. Moreover this aspect of the matter has been referred to in Saraswati's Hindu Law of Endowments (Tagore Law Lectures) at p. 77 in the following passage (dealing with consecration):

The consecration or pratishtha of the temple, after its construction is completed, forms the subject of separate provisions, although some of them merge on the one hand in the Vastuyaga and others in the ceremonies attending the consecration of the deity to whom the temple is to be dedicated. For secular purposes, the consecration corresponds to the ceremony of griha pravesha or "house entering." If the Vastuyaga has been performed at the beginning of the house (griharambha), it is not obligatory to repeat it at the time of the house-entrance (griha pravesha) ceremony. Varaha Mihira teisely describes the latter thus : "Amid the shouts of Brahmins the proprietor has to make his entrance into his newly-built house, it being strewn with great many flowers, adorned with archways, and decorated with water-pots filled, the gods being worshipped with incense, perfumes and oblations.

12. Some ceremony of consecration of a type referred to here would seem equally appropriate in respect of a temple for a deity whose worship is to be private as for one whose worship is to be by the public. We have not been informed of any principle of Hindu Law incompatible with this view. The English word "consecration" is used in the deed without mention of any particular type of Hindu religious ceremony. There is nothing to suggest that a type of consecration peculiar only to worship by the public is intended in the deed. In view of the other terms of the deed and a consideration of their meaning as a whole, we do not consider this provision for consecration carries the matter any further to show an intention to create a public religious trust. Reliance was also placed upon the observation of Sadasiva Aiyar J. at p. 10 in *Gopala Mooppanar v. Subramania* ("15) 2 AIR 1915 Mad. 363 (366) that "Temples were intended for the worship of people belonging to all the four castes without exception;" but that observation was made with respect to a temple which undoubtedly was a public one and it does not follow from it that all temples must, of necessity, bear that character. Mr. Chatterjee also referred to *Manohar Ganesh Tambekar v. Lakhmiram Govindram* ("88) 12 Bom. 247 in which the head-note states "A trust for a Hindu idol and temple is to be regarded in India as one created "for public

charitable purposes" within the meaning of Section 539, of the Code of Procedure (Act [10] x of 1877)" (Section 92 of the Code of 1908); in this report, too, the judgment does not bear out the head-note and a finding, to the effect stated in it, does not appear. Reference to one more decision is now opportune. In AIR 1934 48 (Nagpur) , Staples A.J.C. pointed out at p. 50 that, in that case, there was ample evidence to shew the temple in question had been all along used for public worship (that would be sufficient to establish it was a public temple); but the learned Additional Judicial Commissioner expressed the opinion, at p. 49, that, whilst a deed by which property was dedicated in favour of a deity did not expressly create a public trust, it certainly did not expressly declare the dedication was meant to be a family or private one, there was nothing in the deed repugnant to the idea that the trust should be to the benefit of the public and in such a case the deed should be interpreted in favour of ft public trust; in light of the evidence given the above opinion is obiter; if it were correct, then every temple would be a public one if the trust; deed did not expressly provide to the contrary even when the public were in no way concerned with it, had never worshipped in it and may have been denied access to it. With respect I am unable to subscribe to the correctness of the opinion of the learned Additional Judicial Commissioner. Assuming, however, that it is correct, in the present case there is, in my view, a repugnance in the trust deed to the trust being a public one. The language in the deed makes it clear that the hospital and the dispensary are for the benefit of the public; the dispensary is to be for all persons irrespective of their religion or creed and the hospital for Hindu women (a section of the public). With respect to the other trusts, including the daily feeding, periodical refreshment and free distribution of Bhoge, the deed does not use language by which, expressly or impliedly, those trusts are to be for the benefit of the public or of a section of it. If such was the settlor's intention, she could have used suitable language in the deed but it does not contain words by which such intention can be inferred. Since the public nature of the trust is made clear with respect to the hospital and dispensary but the deed is silent with regard to the temple and the other trusts, it can only be inferred that the settlor intended differently with respect to the hospital and dispensary and with respect to the other trusts and there was no intention that those other trusts should benefit the public and be public trusts.

13. There is no reference, in the deed, to the public or any particular, class or sect of it having a right to worship in the temple or even to have access to it. The distribution of the food and refreshment is not directed to be made to the public. The hospital and dispensary are to be located in a separate building from the temple, which incidentally is an additional indication that the public nature of the trust is to be confined to the purposes of those institutions. Thai main characteristic of a public temple is that it is intended for the use of the public at large or a specified class, who are entitled to the right of worshipping in it. No such intention or right is found in the trust deed. In Haji Mahammad Nabi Shirazi and Others Vs. Province of Bengal and Others, , in respect of a public temple,

Mitter J. observed at p. 228 that

the beneficial interest must be vested in an uncertain and fluctuating body of persons-either the public at large or some considerable portion of it answering a particular description.

The trust deed does not vest any beneficial interest either in the public at large or in a particular section of it.

14. The deed reflects that the settlor intended to provide, upon a generous scale, for the observance of the daily worship and celebration of festivals of her private deity, which she had established, and of the image of her religious preceptor. She also perpetuated the memory of her deceased son by erecting to him the nutmandir adjacent to the temple. The public has no interest in those objects. There is no grant in favour of the public to receive the food and other refreshment which is to be distributed or to have a right to worship in the temple or even to have access to it. The trust, which the settlor created with respect to the temple, its erection and all matters and things appertaining to it, is a private trust and is not one for public charitable purposes.

15. At the commencement of his opening on behalf of the trustees, Mr. Chatterjee stated, this reference originally came before the Chief Justice and Panckridge J. and after it had been argued for some time the learned Chief Justice suggested that the matters arising out of it should be discussed between the assesseees and the income tax authorities; and an adjournment was granted for that purpose. Mr. Chatterjee produced a deed which, he said, had now been executed by the settlor placing the question beyond doubt and making it clear the whole trust is for public charitable purposes. Dr. Gupta, for the Commissioner, objected to this deed being placed before us, contending that the reference must be decided upon the deed and the position which existed during the accounting year; the assessment for the year 1939-40 is the only matter arising for decision; any subsequent alteration by means of a later deed cannot affect that position; and the deed can only be operative from the date it was made. Agreeing with his submission, that the deed cannot have retrospective effect, we refused to allow it to be placed before us.

16. The burden is upon the assesseees to show that the income of which they are in receipt and in respect of which they are charged to tax u/s 3 of the Act, is exempted from taxation. They have failed to discharge this burden and in my opinion the question in this reference should be answered in the negative. There will be no order as to costs.

Ormond, J.

17. Having had the opportunity of seeing in writing before its delivery the judgment which has been delivered by my learned brother I need say no more than that I entirely agree and have nothing to add.