

(1996) 08 KL CK 0041

High Court Of Kerala

Case No: Income Tax R. No. 24 of 1992

Agappa Child Centre

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: Aug. 8, 1996**Acts Referred:**

- Income Tax Act, 1961 - Section 11, 13(2), 13(3)

Citation: (1997) 137 CTR 295 : (1997) 226 ITR 221 : (1997) 226 ITR 211 : (1997) 92 TAXMAN 327**Hon'ble Judges:** V.V. Kamat, J; P.A. Mohammed, J**Bench:** Division Bench**Advocate:** P. Balachandran and George George K, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

V.V. Kamat, J.

1. The Income Tax Appellate Tribunal, Cochin Bench, by the order of reference expects our answer to the following three questions :

" 1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in holding that the property of the trust was used for the benefit of a prohibited person mentioned in Section 13(3) and hence the exemption to the trust was to be denied ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the refrigerator purchased by the trust and kept in the house of the trustee prior to the completion was a user of the trustee without payment of adequate rent or other compensation ?

3. Whether there was material for the Appellate Tribunal to come to the conclusion that merely because the refrigerator was kept in the house of the trustee, the provisions of Section 13(2)(b) became applicable, and are not the findings vitiated by

non-consideration of the evidence ?"

2. The assessee is a public charitable trust on the basis of the declaration of the trust by the deed dated July 25, 1979. The assessment year is 1980-81 and in regard thereto, the assessee-trust has been held not to be entitled to the protection of Section 11 of the Income Tax Act, 1961. This is because, if the provisions of Section 13(2)(b) and Section 13(3) of the Income Tax Act, 1961, are applied, it is enacted, that Section 11 of the Act would not apply in cases considered thereunder.

3. It is elementary that the statutory provisions of Section 11 of the Act enact non-inclusion of the total income of the previous year of the property held in trust, for charitable or religious purposes.

4. Section 13 takes into consideration the statutory situations which take out the benefit of Section 11 in regard to the total income. Section 13 also creates situations of exception as regards benefits of Section 12 of the Act. Section 12 of the Act exempts contributions received by the trust created wholly for charitable or religious purposes or even by an institution established wholly for such purposes. Therefore, the statutory provision of Section 13 deals with situations operating as situations of exclusion of the benefits of Section 11 or Section 12 to that extent.

5. The factual matrix would take us to consider the limits of governance and effect of the provisions of Section 13(2)(b) read with Section 13(3) of the Income Tax Act, 1961.

6. Before spreading over the question of applicability of the above statutory provisions, the necessary limited factual matrix and the resume of the manner in which the three authorities answered the questions would be inevitable.

7. It is seen clearly that the assessee-public charitable trust purchased a refrigerator for its own purpose and that too before the completion of the trust buildings. This was for an amount of Rs. 5,445 and the assessee-public charitable trust kept the said refrigerator at the residential house of Sri K.M. Joseph, the managing trustee thereof at Kottayam. Before the Income Tax Officer, A-Ward, Alwaye, the assessee-trust contended that the refrigerator was purchased in the interest of the trust inasmuch as to cater to the needs of the donors who are Swedish citizens.

8. In paragraph 5 of the order, the Income Tax Officer considered the provisions of Section 13(2)(b) of the Act in application to the above factual position. It needs to be mentioned that before any of the authorities and also before us the statutory provisions of Section 13(2) of the Act was not even contended or canvassed. In other words, the position that the chief trustee, in the language of the statutory provision of Section 13(3) of the Act, would be a person of a prohibited category in the matter of his connection with the other provisions of Section 13 of the Act is beyond dispute of any character.

9. It would be appropriate to reproduce the said reasoning of the Income Tax Officer hereunder :

" The trust had purchased a refrigerator for Rs. 5,445. The trust had not commenced any of its operations. It was also noticed that the refrigerator was used in the residential house of Sri K.M. Joseph, managing trustee, at Kottayam. As the trustee was enjoying the user of the property of the trust, provisions of Section 13(2)(b) are attracted. The trust was required to clarify this position. It was stated that the fridge was purchased in the interest of the trust inasmuch as to cater to the needs of the donors who are Swedish citizens. However, the trust had not adduced any proof to prove the visit of the donors. Moreover, the donors staying in the house of the trustee is only a very remote possibility. It is also stated that the office of the trust was for some time functioning in the house of the trustee. This is also not true. Even if this is true, refrigerator is not an essential item required in an office. From the facts of the case it is clear that the fridge was purchased for the use of the managing trustee and he was using it. The provisions of Section 13(2)(b) are attracted."

10. Similarly, even the first appellate authority--the Commissioner of Income Tax (Appeals), Calicut, has observed (see paragraphs 15 and 14 of the order) that the refrigerator was kept by the managing trustee only as a custodian and was shifted to the premises of the orphanage for the benefits of the inmates and ultimately found its destination. The first appellate authority found that these facts would not show that the conduct of the trustee is such that it would attract the provisions of Section 13(2)(b) of the Act. This short reasoning in paragraph 14 is reproduced hereinbelow :

" The first incident was the custody of the refrigerator by the managing trustee at the relevant time. It is stated that the refrigerator has since been shifted to the premises of the orphanage for the benefit of the inmates and it was kept by the managing trustee only as a custodian for a short period. In view of the fact that the refrigerator has found its destination to the orphanage where it should be, I do not think a charge can be levelled about the conduct of the trustee so as to attract the provisions of Section 13(2)(b)."

11. The Income Tax Appellate Tribunal, in addition, considered the contents of letter dated April 19, 1983, of the asses see-public trust addressed to the Income Tax Officer. In the said letter reproduced in the order of the Tribunal a contention is taken that the situation would not lead to the inference that Section 13(2)(b) is attracted because a suspicion, however strong it might be, will not be a substitute for evidence that the refrigerator was purchased for the use of the managing trustee. The Tribunal considered the language of the provision in the context. It is observed "we fail to understand as to why, when the building of the trust was not ready, the refrigerator had to be purchased at all". Considering the provisions of Section 13(2)(b) of the Act which is a deeming provision, the Tribunal held that the

refrigerator was used for the benefit of a prohibited person mentioned in Section 13(3) of the Act and the consequences would naturally follow.

12. In our judgment, the factual findings, if considered in terms of the legal requirements of Section 13 of the Act, would inevitably lead to the conclusion that the assessee would be deprived of the benefit of the provisions of Section 11 or Section 12 of the Act so as to exclude from the total income of the previous year in regard thereto. Reading the statutory provisions of Section 13 of the Act as a whole, the legislative intent floats on the surface of the record that it is only the total income of the trust that would satisfy the requirements of Section 13, that would be entitled to have the benefit of Section 11 or Section 12 of the Act.

13. A perusal of the said statutory provisions of Section 13 would make this abundantly clear. Section 13(1) of the Act deals with certain situations. If any part of the income of the property of the trust in question does not enure for the benefit of the public, the benefits of Section 11 or Section 12 are denied. If in the matter of a charitable trust or institution, any income is found to have been used for the benefit of any particular religious community or caste, the benefits of Section 11 are withdrawn. Again, if it is found that unless the business is carried on in the course of the actual carrying out of the primary purpose of the trust or institution, the benefit gets withdrawn in a similar way. If the spirit of Section 13(1) of the Act also is taken into consideration as an aid in the process, it would be abundantly clear that the legislative intent of offering benefits of Section 11 of the Act requires passing of a rigorous litmus test available in the statutory provisions of Section 13 of the Act. Apart from the direct instances provided for in Section 13(1) of the Act, Section 13(2) of the Act additionally deals with situations which are in common parlance understood as "deeming situations".

14. Section 13(2) of the Act statutorily provides that the income or the property of the trust or institution or any part of such income or property shall be deemed to have been used or applied for the benefit of a person referred to in Sub-section (3). If we consider these deeming situations, firstly, it would appear that the deeming situations cover the income or the property of the trust, and both to be covered by the deeming situations.

15. The first instance is provided by Section 13(2)(a) of the Act. It relates to the income or property of the trust lent to any person who falls in the category of Section 13(3) of the Act and that too for any period during the previous year. If the lending is without adequate security or adequate interest or both in regard thereto, it would obviously mean that the legislative intent seeks to protect the extension of exemption u/s 11 or Section 12 being extended to trust's lending income or property thereof without adequate protection. It is the income and property both belonging to the trust under consideration.

16. Section 13(2)(b) of the Act which we are required to consider would need reproduction for our judgment. It is as follows :

" 13. (2) Without prejudice to the generality of the provisions of Clause (c) of Sub-section (1), the income or the property of the trust or institution or any part of such income or property shall, for the purposes of that clause, be deemed to have been used or applied for the benefit of a person referred to in Sub-section (3),

(b) if any land, building or other property of the trust or institution is, or continues to be, made available for the use of any person referred to in Sub-section (3), for any period during the previous year without charging adequate rent or other compensation ;"

17. Reading the said provision it would be seen that the legislative emphasis is on availability for the use of any person referred to in Sub-section (3) and that too for any period during the previous year in question without charging adequate rent or compensation. There is no dispute that the chief trustee is one of such prohibited persons as could be understood from Section 13(3) of the Act. There is also no dispute that the refrigerator remained with the said prohibited person and there was no question of even a thought on the part of the assessee, a public charitable trust, to charge adequate rent or other compensation with regard to the deeming use of the said refrigerator, may be for any period because the duration of the period is not placed on record. If any property is made available for the use, it is covered by the deeming provision.

18. Although it would be found from the orders of the three authorities with regard to its conspicuousness by absence, learned counsel sought to raise a contention with regard to the interpretation of Section 13(2)(b) of the Act. Learned counsel contended that the words "any land, building or other property of the trust or institution" would have to be required to be understood in the generic sense. In other words, learned counsel submitted that the reading of Clause (b) would show that the clause would cover immovable property and not all property in the context of the canon of interpretation in regard thereto. Learned counsel submitted that it applies to land, building or other property of the trust, meaning thereby that the term "other property" would carry the continuous meaning of the term land, building to understand the legislative intent that the term "other property" would have to be understood as immovable property of the trust. We have already stated that this contention is not available even by a whisper. Learned counsel contended that the term "land, building or other property of the trust" would have to be understood that the provision is relatable to availability for the use of immovable property alone and not an article like a refrigerator. Learned counsel submitted that the provision came to be inserted with effect from April 1, 1971, spelling out certain situations denying the benefits of Section 11 of the Act. Learned counsel submitted that the statutory provision relates to certain situations. He contended that lending of monies constitute the corpus or income of the trust without adequate protection

in regard thereto would deprive the trust of the benefit if it is lending by the trust. He also submitted that the use of the immovable property by any of the interested persons, if it is made available, would also deprive it of the benefit of Section 11. Then he submitted that excessive payment or unreasonable payment of salary or other compensation, out of the trust's resources would also forfeit the claim for the benefits of Section 11 of the Act. Similarly, making the services of the trust available to the interested person without adequate compensation, so to say free, would also meet the same consequences. Similar is the situation of purchasing of security, shares and other property to the interested person for grossly inadequate consideration would also meet the same consequence. The consequence of a sale of trust property in turn to any interested person would also bear the same character. Learned counsel submitted that any such transaction presenting a situation of the diversion of any substantial portion of income or corpus of the trust would have the same result. Learned counsel placed for our consideration one more situation in the arena presented by him. It relates to the investment of the funds of the trust in any of the concerns of the interested persons. Learned counsel contended that the "funds of the trust" is a question whether the funds would include uninvested cash as well as shares, stocks, Government securities and property of every kind belonging to the trust. Although learned counsel urged that the Central Board has its own approach in the matter of inclusion, the situation would hold in the process of understanding the language of the statutory provision of Clause (b) under consideration. It is not possible to understand and appreciate the submission favourably to learned counsel. In fact, several aspects placed by learned counsel would show that the statutory emphasis of Section 13(2) of the Act would be found with reference to the deeming situations of user and application for the benefit of a person covered by Section 13(3) of the Act. Section 13(2) emphasises care and caution as regards the persons understood in Section 13(3) of the Act and also as regards various deeming situations spelt out in the various clauses. In fact, if Section 13(2) is taken into consideration, it is the income from the property of the trust either as a whole or as a part thereof that is sought to be protected and taken out from the availability of the benefit of Section 11 or Section 12 of the Act. We have already considered Section 13(2)(a) dealing with the income or property of the trust. Section 13(2)(c) relates to the payments by way of salary, allowance or otherwise paid out of the resources of the trust or the institution for services rendered, if found in excess of reasonableness. Section 13(2)(c) relates to the services without adequate remuneration or compensation. Section 13(2)(e) relates to the situation of purchase of property by or on behalf of the trust for consideration which is more than adequate. Section 13(2)(f) relates to the sale by or on behalf of the trust of any shares, security or other property of the trust. Similarly, Section 13(2)(g) relates to the diversion of the income of the property or the trust and, lastly, Section 13(2)(h) relates to the investment of the funds of the trust in any concern of a person contemplated in Section 13(3) of the Act.

19. Thus, a bare reading of all the clauses would show that Clause (a) has an emphasis on lending, Clause (b) has an emphasis on the user if made available by any person characterised u/s 13(3). Clause (c) has an emphasis on payment in excess of reasonableness. Clause (d) has an emphasis on services without adequate remuneration or compensation. Clause (e) in its turn has an emphasis on the purchase of shares, security or other property ; the purchase of property obviously movable or immovable by or on behalf of the trust for inadequate consideration. Similarly, Clause (f) has an emphasis on the sale of shares, security or other property for consideration which is grossly inadequate. Clause (g) also has an emphasis on the diversion of the property of the trust to any person covered by Section 13(3) and finally Clause (h) protects investment.

20. Therefore, if all the clauses are analysed, the word "property" will have to be understood as having been used again in its own generic sense to include "movable and immovable property" and therefore in the context of various provisions of Section 13(2) of the Act, it is not possible to understand the term "any land, building or other property of the trust", especially the term "other property" to be required to be understood in the same sense of the term "land and building" meaning property as immovable and not including movable in the context of the situation. Various provisions of Section 13(2) would make it abundantly clear that the provision seeks to protect the trust and its benefit of exemption u/s 11 from everything which could be understood in terms of the affairs of the trust. It protects the income, it protects the sale and purchase, it protects the user, it also protects various other aspects discussed hereinbefore. In the light of the above manifestation of various statutory provisions, it is not possible to understand that the terms "land, building and other property of the trust" would go to show that the provisions of Section 13(2)(b) will have to be understood to be relatable to immovable property only and would not therefore seek to cover the refrigerator in question.

21. Therefore, even though the said aspect has not been considered because it was not argued before any of the three authorities, considering it to be a question of law and public importance, we have devoted this much in regard to the contention that Section 13(2)(b) would have to be understood as relating to immovable property only and not movable property. This is even in spite of the position of the contention not having been taken up earlier. It is a contention of law and it must be answered and we have answered it.

22. For the above reasons, we confirm the order of the Tribunal. We answer question No. 1 in the affirmative, i.e., in favour of the Revenue and against the assessee. We answer question No. 2 in the affirmative, against the assessee and in favour of the Revenue. We also answer question No. 3 affirmatively, that there was material--against the assessee and in favour of the Revenue.

23. A copy of this judgment under the seal of the court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.