

Mohd. Ishaq vs Commissioner Of Income-Tax on 7 November, 1950

Equivalent citations: AIR1951ALL512, [1951]19ITR70(ALL), AIR 1951 ALLAHABAD 512

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. This is a reference under Section 66 (1), Income-tax Act, in which the following questions have been referred to us :

"Q. 1. Whether, in the circumstances of the case, the income of the wife and children of the assessee arising from the Waqf-alal-aulad created by him on 28-10-1941 under the Muslim Waqf Validating Act of 1913 can be included in the total income of the assessee under the provisions of Section 16 (3) (b)?

Q. 2. Whether under the Waqf created on 28-10-1941 by the assessee under the Musalman Waqf Validating Act, 1913, the assets have been transferred to 'God' or to the Mutwalli holding possession of such assets ?

Q. 3. Whether the word 'Person' as used in the last sentence of Section 16 (3) includes such an entity as 'God'?

Q. 4. Whether the transfer of assets as contemplated by Section 16 (3) (b) includes the transfer of assets to the human agency through whom the management of the Waqf is carried on ? "

2. Nadir Ali Shah and Muhammad Ishaq of Meerut City executed a registered deed of waqf on 28-10-1941. Under the deed of waqf, the income of the property shown in the schedule was dedicated for the benefit of the wife and children of the executants. The Income-tax Officer held that the income, which arose from the assets transferred by this deed of waqf for the benefit of the wife and minor children of the executants of the deed, was liable to be assessed as the income of the executants themselves under Section 16 (3) (b), Income-tax Act and consequently assessed as such. The appeals by the assessee to the Appellate Assistant Commissioner of Income-tax and the

Income-tax Appellate Tribunal failed. Consequently, on his application the above questions were referred to this Court by the Income-tax Appellate Tribunal Allahabad Bench.

3. We take up the second question first as the answer to the first question depends on the answer that is given to the remaining three questions. The Income-tax Appellate Tribunal, in their appellate order, held that "Mutwalli, although not a trustee in the sense of English Law, undoubtedly is put in possession of the property and is entitled to realise and receive the income from the trust property. The income is, therefore, not of God but, for the purposes of the Act, is the income of the Mutwalli. If construed in this way, it must be taken that the transferee of a Waqf, at least for the purposes of this sub-clause, is the Mutwalli. This would result in the position of the Mutwalli being similar to that of a trustee properly so called."

This view taken by the Income-tax Appellate Tribunal has been strenuously contested on behalf of the assessee. We feel ourselves unable to agree with the view taken by the Tribunal. The position of a Mutwalli under the Musalman Waqf Validating Act can, in no circumstances, be compared with that of a trustee. In the case of a trust, the ownership in the property vests in the trustees though this vesting is for the benefit of others. It is a well-settled principle of Muslim law that in the case of a waqf no rights in the property vest in the mutwalli. He merely acts as a manager on behalf of the waqf. The property actually vests in God Almighty. In *Vidya Varuthi v. Balusami Ayyar*, 48 I. A. 302: (A. I. R. (9) 1922 P. C. 123) it was held by their Lordships of the Judicial Committee that "Neither the sajjadanashin nor the Mutawalli has any right in the property belonging to the waqf; the property is not vested in him and he is not a 'trustee' in the technical sense,"

In the same case their Lordships further proceeded to hold that "Neither under the Hindu Law nor in the Muhammadan system is any property 'conveyed' to a shebait or a Mutawalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution, he holds as manager with certain beneficial interests regulated by custom and usage. Under the Mohammedan law, the moment a waqf is created, all rights of property pass out of the wakif, and vest in God Almighty. The curator, whether called mutwalli or 'sajjadana-shin' or by any other name, is merely a manager. He is certainly not a trustee' as understood in the English system."

In the light of this well settled principle of Mohammedan law, it is not at all possible to hold, for purposes of the Income-tax Act or any other law, that the property which is subject to a waqf vests in the mutwalli and not in God Almighty. Our answer to the second question, therefore, is that under the waqf created on 28-10-1941 by the assessee under the Musalman Waqf Validating Act, 1913, the assets have been transferred to 'God and not to the mutwalli holding possession of such assets.

4. The third question framed by the Tribunal raises a very difficult question of interpretation. Section 16 (3) (b), Income-tax Act runs as follows:

"16 (3) (b). In computing the total income of any individual for the purpose of assessment, there shall be included so much of the income of any person or

association of persons as arises from assets transferred, otherwise than for adequate consideration to the person or association, by such individual for the benefit of Ms wife or a minor child or both."

The contention on behalf of the assessee is that before this sub-section can be made applicable, it must be held that this deed of waqf embodied a transfer in favour of a "person" and, under the concept of waqf under the Mohammedan law, it cannot be held that there has been a transfer in favour of a "person". As has been held by us in dealing with the first question, the transfer in the case of a Muslim Waqf has the effect of vesting the property in God Almighty and not in the mutwalli or the sajjadana-shin. It is argued that God Almighty cannot and should not be deemed to be a person, as any such interpretation would be against the principles of Mohammedan law. In this connection, our attention was drawn to the remarks of their Lordships of the Privy Council in "The Mosque known as Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, 1940 A. L. J. 522 : (A. I. R. (27) 1940 P. C. 116). That case is, however, not applicable to the facts of the case before us. In that case, the main question that had to be considered by their Lordships of the Privy Council related to the legal status of a Muslim Institution, viz. a mosque. Their Lordships, while considering the question of applicability of Article 144, Indian Limitation Act, remarked as follows:

"It is not necessary in the present case to decide whether in any circumstances or for any purpose a Muslim institution can be regarded in law as a 'juristic person'. The recognition of an artificial person is not to be justified merely as a ready means of making enactments--well or ill expressed--work conveniently. It does not seem to be required merely to give an extended meaning to the word 'person' as it appears in the Punjab Pre-emption Act, 1905, or in the definition of gift contained in Section 122, T. P. Act. It is far from clear that it is required in order that property may be devoted effectively to charitable purposes without the appointment of a trustee in the sense of the English Law. It would seem more reasonable to uphold a gift, if made directly to a mosque and not by way of waqf, as having been made to the mutwalli than to do so by inventing artificial person in addition to the mutwalli (and to God in whom the ownership of the mosque is placed by the theory of the law)... At best the institution is but a caput mortuum, and some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be "taken as deciding that a 'juristic personality' may be extended for any purpose to Muslim institutions generally or to mosques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case and hold that suits cannot competently be brought by or against such institutions as artificial persons in the British Indian Courts.

The property now in question having been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than 12 years, the right of the mutwalli to possession for the purposes of the waqf came to an end under Article 144, Limitation Act and the title derived under the dedication from the settlor or wakif became extinct under Section 28. The property was no longer, for any of the purposes of

British Indian Courts, 'a property of God by the advantage of it resulting of his creatures'."

It will thus be seen that in that case what their Lordships considered was whether a Muslim institution could or could not be considered to be a juristic personality. There was no question before them as to whether the transferee under a deed of waqf, when not an institution, could or could not be deemed to be a juristic person. That was a case of a gift made directly to a mosque which had not been made by way of waqf. Their Lordships held that in such a case if property was held adversely to the waqf for a period of more than 12 years, the right of the mutwalli to recover possession, for purposes of the waqf, ceased and consequently the title derived under the waqf became extinct under Section 28. Thus the waqf itself was held to be a legal entity which possessed a title in the property and that title was held to be subject to extinction under Section 28, Limitation Act, just as a title of any other juristic person.

5. Salmond in his Jurisprudence, 10th Edn., chap. 15, Section 116, has remarked :

"A legal person is any subject-matter other than a human being to which the law attributes personality.

The law, in creating legal persons, always does so by personifying some real thing. There is, indeed, no theoretical necessity for this, since the law might, if it so pleased, attribute the quality of personality to a purely imaginary being, and yet attain the ends for which this fictitious extension of personality is devised. Personification, however, conduces so greatly to simplicity of thought and speech, that its aid is invariably accepted. The thing personified may be termed the corpus of the legal person so created; it is the body into which the law infuses the animus of a fictitious personality.....

Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, all fall within two classes, namely, corporations and trade unions.....

The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses--a charitable fund, for example, or a trust estate, or the property of a dead man or of a bankrupt. Here, also, English law prefers the process of incorporation. If it chooses to personify at all, it personifies, not the fund or the estate, but the body of persons who administer it. Yet the other way is equally possible, and may be equally expedient. The choice of the corpus into which the law shall breathe the breath of a legal personality is a matter of form rather than of substance, lucid and compendious expression rather than of legal principle."

These principles of English Jurisprudence on which are based the principles of Indian Jurisprudence and which must be applied in interpreting the language of such laws as the Indian Income-tax Act, show that the word 'person' used in this Act is wide enough to cover all juristic

entities which may be capable of having property vested in them, of receiving property and of transferring property. In the case of a Muslim waqf governed by the provisions of the Musalman Waqf Validating Act, 1913, the waqf is capable of receiving and holding property; under special circumstances, it is also capable of transferring its property. All these actions of the waqf are committed through the agency of the mutwalli of the waqf, but this makes no difference at all. The fact remains that God Almighty as a transferee of the property conveyed by means of a deed of waqf has the right to receive gifts of property, to realise the income of the property and apply it to the purposes of the waqf, to enter into deeds of exchange of property in the interest of the waqf and even to sell it under special circumstances. Of course, all these acts can only be done through the agency of a mutwalli or sajjadanashin. All the rights and powers of a person owning property are, therefore, exercisable by a transferee in whom the property vests under a deed of waqf. In these circumstances, we feel that it must be held that God Almighty in the capacity of a transferee receiving property under a deed of waqf is a juristic entity and is, therefore, a person as used in the last sentence of Section 16 (3) (b), Income-tax Act. We answer the third question accordingly.

6. In view of our answers to the second and third questions, question 4 does not arise and we, therefore, decline to answer it.

7. In view of our answer to question 3, question 1 must also be answered in the affirmative. Under the waqf-alal-aulad created by the assessee on 28-10-1941 under the Musalman Waqf Validating Act, 1913, there was a transfer of the assessee's property in favour of a person who held a part of the income of the property for the benefit of the wife and children of the assessee and this part of the income can, therefore, be included in the total income of the assessee under the provisions of Section 16 (3) (b), Income-tax Act. We answer the first question accordingly.

8. The assessee shall pay the costs to the Commissioner of Income-tax which we fix at Rs. 400.