A COMMISSIONER OF INCOME TAX, KANPUR

v.

KAMLA TOWN TRUST

NOVEMBER 16, 1995

B [B.P. JEEVAN REDDY AND S.B. MAJMUDAR , JJ.]

Income Tax Act, 1961—Section 11 r/ws 2(15)—Public Charitable Trust—Creation of—Basic requirements—Provision for construction of houses for 'workmen in general'—Whether constitutes a charitable object.

C

Indian Evidence Act, 1872—Sections 43 and 11—Order granting rectification of instrument of trust—Judgment in personam—Binding on parties to rectified instrument—Order relevant in income tax proceedings.

Specific Relief Act, 1963—Section 26—Trust Deed—Not a contract—It D *would be covered by expression 'other instrument in writing—Proceedings for rectification of instrument of trust—Jurisdiction of Civil Court.*

Interpretation of Statutes—Trust Deed—For finding out real intention of settler—One has to go by express words of Deed.

E **The assessee was a trust created by a trust deed dated 27-10-1941 executed between a company and the trustee. The trust was created with a view to construct a settlement or colony for their workmen together with amenities in the shape of hospitals, schools, temples, mosques etc. The company made an application to the Improvement Trust for demising to** F **it two tracts of land at concessional rates. Both these plots were demised to the company at concessional rates for the welfare of workmen. The company transferred both the plots by the said trust to the trustee for effectuating its object of settling these plots upon the charitable trust. Later on the settler company filed a suit u/s 31 of the Specific Relief Act, 1877 for rectification of the Trust Deed so as to bring it in conformity with** G **its real intention to create a public charitable trust. The company alleged that the operative part of the Trust Deed was found to be less comprehensive than what was intended by the parties thereto; that through a misunderstanding on the part of the draftsman and through a mutual mistake the Deed of Trust did not truly express their intention and it was** H **doubtful whether the Trust Deed on a strict construction thereof might not**

exclude from its benefits the rest of the public apart from the employees of the company and residents of the said settlement. The Civil Judge by his judgment dated 18.8.1945 ordered the Deed of Trust to be rectified as prayed for in the plaint. The Deed of Trust of 1941 as rectified in 1945 became a subject matter of interpretation by the Appellate Income Tax Tribunal and High Court. The High Court held the rectification decree passed by Civil Court to be valid and further held that it was not possible for the Income Tax Officer to question the validity of the rectification on the ground that conditions for grant of rectification did not in fact exist and that the objects of the Trust Deed as rectified in 1945 did not create a public charitable trust and it being mixture of charitable and non-charitable objects, could not be treated to be creating a public charitable Trust.

The Settler Company filed another suit in the year 1954 for further rectification of the Trust Deed while pleading that the real intention of the Settler Company was to create a public charitable trust for the benefit of the public in the city of Kanpur and the surrounding areas particularly, the members of the working class including the workmen employed in the plaintiff company; that the trustees had, in fact, been giving the benefit of the trust to the members of the public and no part of the trust moneys had, at any time, been used for a non- charitable or non-religious object or purpose; that Deed of Trust even as rectified was less comprehensive than what was intended by the parties thereto at the time when instructions were given and, therefore, the rectification sought for be allowed so as to bring it in conformity with the real intention of the parties. The Civil Judge in 1955 decreed the suit. By the second rectification decree certain rectification were made in the Preamble of the Trust Deed.

The Income Tax Officer issued notices u/s 34 of the Income Tax Act, 1922 and section 148 of the Income Tax Act, 1961, for the relevant assessment years 1949-50 to 1965-66 to the assessee- trust alleging that the income had escaped assessment for the relevant years. The assessee filed 'NIL' returns of the assessment years 1949-50 to 1965-66 alleging that it was a public charitable trust and therefore, its income was exempt from income tax. The Income Tax Officer rejected this contention holding that the trust was a public trust for the benefit of the employees only and was not at all exempt from tax; that the trust was originally created for the benefit of the settler company and the objects of the trust could not be

A altered subsequently unless the trust was revoked for which there was no power under the Deed and that a trust for the benefit of its employees and members of the staff is not a charitable trust. On appeal, the Appellate Assistant Commissioner dismissed all the appeals of the respondent. In appeals before the Income Tax Appellate Tribunal, the Tribunal dismissed B respondent's appeals for assessment years 1949-50 to 1955-56 but allowed appeals for assessment years 1956-57 to 1965-66 while holding that the income derived from the trust property by the assessee will be exempt only within the limits permissible u/s 11(1) (a) of the 1961 Act to the extent to which the income so accumulated was not in excess of 25% of the income from trust property or Rs. 10,000 which ever was higher, after the 1961 Act C came into force. Both the Revenue and the assessee sought reference of the question u/s 256 (1) of the 1961 Act. The tribunal granted reference applications and referred the question for opinion of the High Court. The Division Bench of the High Court answered all the referred questions in favour of the assessee and against the revenue. Hence these appeals by D special leave.

The appellant contended that the second rectification in the year 1955 as decreed by the Civil Court was without jurisdiction as in substance a new Trust Deed was sought to be substituted, which was beyond the powers of the Civil Court; that the condition precedent for invoking the E jurisdiction of the Civil Court U/s 26 of the Specific Relief Act, 1963, that there should be mutual mistake on the part of parties to the document was absent in the facts of the present case and consequently the Civil Court had no jurisdiction to grant such rectification; that the rectification decree was in personam and not in rem to which revenue was not a party F and, therefore, it was not binding on the Income Tax authorities; that even if Rectification Order of 1955 was validly made, it would operate only prospectively, and could not have restrospective effect; that even after the rectification of 1955 the Trust Deed as rectified did not create any public charitable trust entitling the respondent assessee to claim income tax exemption; and that the entire Trust Deed as originally executed and as G twice rectified in 1945 and 1955 were merely a colourable device on the part of the main trustee which should not be countenanced.

The respondent-assessee submitted that even for the assessment years 1949-50 to 1955-56, wherein the rectified Trust Deed of 1945 was H holding the field, it was a trust for public charitable purposes and conse-

quently even apart from the retrospective effect of the rectification in 1955, the respondent was entitled to claim exemption from payment of income tax for these relevant assessment years and that workmen in general and in particular of the company were also a part and parcel of public and it could not be said that they were not members of the general public residing in Kanpur and that the correct connotation of the term 2 'workmen in general' had to be judged in the light of economic and social conditions that prevailed in 1945 when the deed was rectified.

Disposing of the matter, this Court

HELD : 1. For assessment years 1949-50 to 1955-56 the assessee would not be entitled to get the benefit of section 4(3) (i) of the Income Tax Act, 1922 and income derived by it from its properties would not get exemption from income tax. [343-G; 344-A]

When any property is settled for charitable purposes for catering to the needs of a class of public which is poor and needy, any preference given to poor and needy workmen of the settler company would not necessarily detract from the charitable object underlying such bequest or settlement. The basic fact must remain that the settlement is made in favour of a well earmarked class of needy and poor persons who may form a part of the general public and for whom such charitable bequest or endowment is made, and the preferred class of beneficiaries must form a part and parcel of that very general earmarked class. The provision for construction of houses for 'workmen in general' as found in Clause 2(b) (1) of 1945 rectified Deed did constitute a charitable object. However, the term 'workmen in general' is too general and vague. There is an obligation cast on the trustee to construct these residential quarters, chawls or buildings in particular for the workmen, staff and other employees of the company or other allied concerns under the management of and in which the directors of the company may for the time being be interested and for their respective families and dependents. The words 'in particular' represented a scheme of priority for workmen of the settler Company and not a scheme of preference. The trustee were bound under an obligation to construct residential quarters etc. first for the workmen or employees of the settler company or its concerns. They had no choice in the matter. They could not in their discretion select an outside workmen as recipient of the benefit under the scheme of the Trust Deed. In effect the general class of

A beneficiaries constituted by the words 'workmen in general' gets whittled down and circumscribed by the words 'in particular for workmen of the company etc.'. Thus in substance it becomes a trust for the benefit of a well defined smaller class of beneficiaries, namely, employees or workmen of the company and its allied concerns and it fails to meet the requirement
B of a genuine or public or charitable trust. Once such an obligation is cast on the trustees the public character of the endowment gets whittled down and in substance becomes the settlement for an identified group of persons.

Though residential quarters, chawls or buildings were to be con-
C structed for the workmen in general and who, might be a well defined class of workmen residing in Kanpur and who might be poor and needy in the light of their socio-economic conditions as prevailed in 1945 when the clause was drafted, the second part of this clause laid down in clearest terms that in particular the quarters were to be constructed for the
D workmen staff and other employees of the company and of its allied concerns. No discretion was left with the trustee and on the contrary they were enjoined, called upon and under an obligation to construct these quarters, chawls and buildings necessarily for the workmen, staff and other employees of the company and its allies. It was also easy to visualise that other employees of the company may include even affluent employees
E who may not necessarily constitute an object of charity. Once this conclusion flows from the wordings of the clause, it becomes clear that reference to workmen in general becomes illusory and the settlement can be said to be substance meant only for catering to the needs of a well defined group of persons, namely, workmen, staff and other employees of
F the company and its allied concerns and in that case the object clause in question would fall short of creating any public charitable trust.

The terms 'workmen in general' when read in the context socio-economic situation prevailing in 1945 in this country and when also considered in the context of construction of residential quarters, chawls
G or buildings in Kanpur may partake the character of a well defined class of workmen in Kanpur city who may be poor and needy, still as the trustees are enjoined to construct residential quarters, chawls or buildings in particular for the workmen, staff and other employees of the company it follows that other employees of the company who are the beneficiaries may
H not necessarily be poor or needy or affluent. Therefore, it must be held

that rectified clause 2(b)(i) of 1945 deed fell short of projecting an object of a public charitable nature and it could not be said that under the rectified deed of 1945 the trust properties were held by respondent-trust wholly for religious or charitable purposes. Rest of the sub-clauses of clause 2(b) did refer to charitable objects but as one of the objects was not of a public charitable nature it could not be held that the entire trust was wholly for religious or charitable purposes. A B

CIT. Bombay v. *Walchand Diamond Jubilee Trust*, (1958) 34 ITR 228 (Bom), approved. [337-H; 338-B-E; G-H; 339-A-B; 340-C-H; 342-G-H;343-A]

2. For the assessment years 1956-57 to 1961-62 the income derived by the respondent-assessee from trust properties during these years will get exempted u/s 4(3) (i) of 1922 Act as the 1955 rectified Trust Deed was having objects of wholly charitable nature. [344-B] C

2.1. In order to find out whether the relevant clauses of a trust deed create a public charitable trust or not one has to go by the express words employed by the Trust Deed. For finding out the real intention of the settler , the words used in the Deed would be the real vehicle of thought of the settler expressing his intention in cold print. This would be must more so when such recitals in the Trust Deed are not challenged on the ground that they are a camouflage or a result of a colourable device. On the express language of clause 2(b) (i) of the 1955 rectified deed, the object were specific and charitable in nature. The beneficiaries were also clearly indicated. There was also no ambiguity about the trustee or the trust properties. Thus all the basic requirement for creation of a public charitable trust did exist on the express language of the relevant sub- clauses of clause (2) of 1955 rectified deed. [328-C-H] D E F

2.2. For the assessment years 1962-63 to 1965-66 the income derived from trust properties by the respondent trust will be entitled to exemption from income tax u/s 11 of the Income Tax Act, 1961 subject to the compliance with the conditions laid down therein as even during this period the rectified Trust Deed of 1955 will be treated to have held the field. [344-C] G

3. Even a workmen who was not an employee of the settler company could in appropriate case seek direction under section 92, Code of Civil Procedure from competent Civil Court against the trustees to act according to the object of the trust and give benefit to such an applicant H

A beneficiary if the circumstances so permitted and the income of the trust was sufficient to cater to his needs. If at all the trustees diverted the benefit to the beneficiaries other than the workmen of the company itself it would give a cause of action to the original vendor, namely, the Town Improvement Trust, which had taken no steps in all these years or made any grievance about the same and secondly as provided by the indentures B themselves all that would result on account of any alleged breach of the conditions of the indentures on the part of trustees would be that they would be liable to pay additional quantified amount to the original vendor and the concessional rate of consideration for the grant in that eventuality, may stand withdrawn. But it would not amount to any breach of trust on C the part of the trustees if such benefit is conferred on outside workmen who fell within the clearly earmarked class of beneficiaries as per objects clause 2(b)(i). On the contrary, the trustee not only would not be alleged to be guilty of any breach of trust but can be said to have acted according to the objects of the trust. [329-E-F; 330-D-F]

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4. A Trust Deed is not a contract in the strict sense of the term but it would be covered by the expression 'other instrument in writing' as found in section 26 of the Specific Relief Act, 1963. Therefore, competent Civil Court which was approached by the Settler Company for rectification of the instrument of Trust, was having requisite jurisdiction to entertain each E proceedings. Section 26 could be effectively invoked for rectification of instrument of trust. [316-H; 317; G-H]

Trustee of H.E.H. the Nizam's Pilgrimage Money Trust v. *Commissioner of Wealth Tax*, (1988) 171 ITR 323, distinguished.

F

4.1. The Settler Company had clearly indicated in the rectification proceedings that the real intention of the settler to create a public charitable trust was not clearly brought out on the wordings of the original Trust Deed and, therefore, the need to rectify the instrument, as neither the Settler Company nor the trustees who assumed the legal ownership of G the property settled in trust would have agreed to the transaction in question if it had purported not to create a public charitable trust. It was this mutual mistake on the part of both the parties that required rectification of the instrument to make, what was latent intention a patent one. Even that apart it was strictly not open to the Revenue which was not a H party to the instrument to take up such a contention about non-fulfulment

of condition precedent as it would be a fact in issue before the competent Court which was called upon to rectify the instrument by either of the parties to the instrument. Absence of such a condition would at the most make the order erroneous and which can be challenged by either of the parties to the proceedings but it will have no impact on the jurisdiction of the Civil Court to pass such an order however erroneous it may appear to be to the Revenue. At the highest such an error would remain in the realm of error in the exercise of jurisdiction and not an error depriving jurisdiction to the competent Court to entertain such rectification proceedings.

When such rectified Trust Deed is pressed in service before the Income-tax authorities in assessment years the Income- Tax Officer will have to interpret such rectified instrument for finding out its correct legal effect. But it will not be open to the Income-tax Officer to refuse to look at such rectified instrument of trust and to insist that the trustees of the trust should ignore the said rectified objects and should stick to the instrument as it existed prior to its rectification. The Income- tax officer will have to take the instrument as it exists in its actual amended form when it is pressed in service for framing the assessment concerning the relevant assessment year in which such rectified instrument holds tne field.

[318-D-H; 321-E-G]

Jagdamba Charity Trust v. *CIT, Delhi (Central)*, (1981) 128 ITR 377 (Delhi) and *Laxminarain Lath Trust* v. *CIT,* (1988) 170 I.T.R. 375 (Raj), affirmed.

5. Order of rectification of instrument trust is not a judgment in *rem*. It would be a judgment in personam binding on the parties to the rectified instrument, namely the settler on the one hand and the trustees on the other as well as on the ultimate beneficiaries. A rectified Trust Deed pursuant to the order of the Court would make the rectification order relevant under the provisions of section 11 of the Indian Evidence Act, as the fact in issue in an enquiry before the Income-tax Officer would be whether on the basis of the rectified Trust instrument the assessee-trust was entitled to get its income exempted from tax under the relevant provisions of the Income-tax Act. In such proceedings, therefore, the order granting rectification of such instrument of trust would certainly remain relevant. It will be for the income-tax officer to consider the real scope and ambit of the Trust Deed as presented to him in rectified form with a view to finding out whether on the basis of such a rectified instrument the assessee trust had earned

A **exemption from payment of income tax. Therefore, though the rectification order of the Civil Court are not judgments in *rem* they are relevant in assessment proceedings before the income-tax officer and will have to be given effect to for whatever they are worth. [321-H; 322-A; D-H]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1741-57
B (NT) of 1977.

From the Judgment and Order Dated 20.2.75 of the Allahabad High Court in I.T.R. No. 18/73 and 715 of 1972.

Dr. V. Gouri Shankar, S. Rajappa and S.N. Terdol for the Appellant.
C

M.L. Verma, M.M. Kshatriya, Ms. Arun Banerjee and Vivek Sood for the Respondent.

The Judgment of the Court was delivered by

D **S.B. MAJMUDAR, J.** In this group of 17 appeals by special leave, the Commissioner of Income Tax, Kanpur has brought in challenge the judgment and order dated 20th February 1975 of the Allahabad High Court in Income Tax References Nos. 18 of 1973 and 715 of 1972. Respondent - Kamla Town Trust - is the common respondent in all these appeals.
E As common questions of law and fact are involved between the very same parties in all these appeals, the appeals were heard together and are being disposed of by this common judgment.

The common respondent, Kamla Town Trust, was assessed to income tax for the relevant assessment years 1949-50 to 1965-66. These
F assessment orders gave rise to hierarchy of appeals under the Income Tax Act which ultimately culminated into 17 income tax appeals by the assessee before the Income Tax Appellate Tribunal. Allahabad Bench, Allahabad. The common question in the appeals before the Tribunal was whether for the relevant assessment years the respondent-assessee was entitled to
G exemption from payment of income tax as per the provisions of Section 4(3)(i) of the Income-tax Act. 1922 (hereinafter referred to as the '1922 Act'), and under section 11 read with section 2(15) of the Income-tax Act, 1961 (hereinafter referred to as the '1961 Act') in so far as they applied to the relevant assessment years. The Income Tax Appellant Tribunal dismissed respondent-assessee's appeals for assessment years 1949-50 to 1955-
H 56 but it allowed respondent-assessee's appeals for assessment years

1956-57 to 1965-66 subject to the rider that the income derived from the trust property by the assessee will be exempt only within the limit permissible under section 11(1)(a) of the 1961 Act to the extent to which the income so accumulated is not in excess of 25% of the income from trust property of Rs. 10,000 whichever is higher, after the 1961 Act came into force. In other words the rider applied to the assessments for the year 1962-63 to 1965-66. As both the Revenue and the assessee were partly aggrieved by the aforesaid common order of the Tribunal, they sought reference of the questions, ventilating their grievances under Section 256(1) of the 1961 Act. The Tribunal accordingly granted these reference applications under section 256(1) and referred the following questions for opinion of the High Court. At the instance of the respondent-assessee two questions were referred for the opinion of the High Court :

> "(1) Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the assessee was not a public charitable trust and its income was not exempt under Section 4(3)(i) of the Income Tax Act, 1922, for the assessment years 1949-50 to 1955-56?
>
> (2) Whether on the facts and in the circumstances of the case the Tribunal was legally correct in holding that the second rectification decree dated 10th May 1955, in suit no 163 of 1954 operates prospectively from the assessment year 1956-57 and does not have the effect of rectifying the deed of trust dated 27th October, 1941, as from the date of its execution."

While at the instance of Revenue the Tribunal referred five questions as under :

> "(a) Whether on the facts and in the circumstances of the case the Tribunal was right in holding by following the decision of the Allahabad High Court in the case of *M/s. J.K. Hosiery Factory* v. *Commissioner of Income Tax,* 81 I.T.R. 557 that even the unamended clause 3(19) of the Memorandum of Association of the settler company viz., *M/s. J.K. Cotton Spinning & Weaving Mills Co. Ltd.*, empowered the company to create a public charitable trust and the insertion of sub-section (22) in clause 3 of the Memorandum of Association by the company was a matter of abundant caution?

A (b) Whether on the facts and in the circumstances of the case, it is open to the Revenue to take the objection in these proceedings that the second rectification suit no. 163 of 1954 was barred by section 11 and Order 2, rule 2 of the Code of Civil Procedure.?

B (c) Whether on the facts and in the circumstances of the case, the Tribunal was legally correct in holding that the objects and activities of the trust fell within the first limb of the definition of charitable purpose in section 2(15) of the new Act and the residuary clause thereof is not attracted for the assessment years 1962-63 to 1965-66?

C (d) Whether on the interpretation of the various clauses of the trust deed even as amended by the second rectification decree dated 10.5.1955, the trust is void for uncertainty and was not a public charitable trust?

D (e) Whether on the facts and in the circumstances of the case the Income Tax Officer was entitled to go behind the Civil Court decree dated 10.5.1955 in suit No. 163 of 1954 and adjudge the validity of the rectification?"

E The Division Bench of the High Court after hearing the rival contentions canvassed by the parties answered all the referred questions in favour of the respondent-assessee and against the Revenue. It is under these circumstances that the Revenue through Commissioner of Income Tax, Kanpur having obtained special leave to appeal has preferred these 17 appeals. It may be noted at the outset that though the Revenue lost on all the F referred seven questions before the High Court, in the present proceedings at the stage of final hearing Dr. Gauri Shankar, learned senior counsel for the appellant-Commissioner of Income Tax highlighted the grievance of the Revenue centering round the answers of the High Court on some of the referred questions. The grievance highlighted on behalf of the Revenue G by Dr. Gauri shankar centered round the answers of the High Court to Questions Nos. 1 and 2 referred on behalf of the assessee-respondent as well as answers of the High Court on Questions Nos. (d) and (e) referred on behalf of the Revenue.

Before proceeding to deal with the main submissions canvassed by H learned senior counsel for the Revenue centering round the answers of the

High Court on the aforesaid questions and the rival contentions canvassed by learned senior counsel Shri Verma for the respondent-assessee in support of these answers, it will be apposite to have a look at the relevant background facts leading to the present proceedings.

Background facts

The assessee is a trust created by a trust deed dated 27.10.1941 executed between *M/s. J.K. Spinning & Weaving Mills Co. Ltd., Kanpur* (hereinafter called 'the company') of the one part and Sir Padampat Singhania, Lala Kailashpat Sinhgania and Lala Laxmipat Sinhgania (hereinafter called 'the trustees') of the other part. The company was registered under the provisions of the Indian Companies Act 7 of 1913 with its registered office at Cawnpore in U.P. The objects of the trust deed in its original form show that it was created with a view to construct a settlement or colony for their workmen together with amenities in the shape of hospitals, schools, temples, mosques, recreation places and for such other works directly concerning the amenities of workmen. The company made an application to the Improvement Trust, Kanpur for demising to it two tracts of land in Kanpur at concessional rates. The Improvement Trust demised one plot of land to the company for constructing the colony with an extra plot of land for the purpose of constructing a Water Pump Station by an indenture dated 19.10.1936 for a consideration of Rs. 43,700. Another plot of land was demised by the Improvement Trust to the company by an indenture dated 2.2.1938 for a consideration of Rs. 26,300 for constructing an office for the said settlement. Both these plots were demised to the company at concessional rates for the welfare of workmen. The company transferred both the plots by the said trust deed of 27.10.1941 to the trustees for effectuating its object of settling these plots upon the charitable trust thereinafter mentioned in the deed.

We will deal with the relevant recitals in the Trust Deed, in details, at an appropriate stage in latter part of this judgment. Suffice it to state at this juncture that one of the objects of the trust, as mentioned in paragraph 2(b) of the Trust Deed of 1941 was as under :

> "To erect, establish, equip, furnish, fit, maintain and repair on the said two plots of land, and any land that may hereafter be acquired by the Trust.

A (1) residential quarters, chawls or buildings *for the workmen and staff and* other employees of the Company or other allied concerns under the management or in which the Directors of the Company may for the time being be interested and for their respective families and dependents and for such other skilled and unskilled workmen craftsmen traders merchants technical or professional men whom the trustees may permit to reside or work in the said two plots *with a view to supply their needs and requirements or to render them services or to cater to their wants comforts conveniences and amenities.*"

Later on the Settlor Company filed a suit being suit No. 40 of 1945 in the Court of Civil and Sessions Judge, Kanpur under section 31 of the Specific Relief Act, 1877 for rectification of the Trust Deed so as to bring it in conformity with its real intention to create a public charitable trust. It was alleged in the plaint that having regard to its Memorandum of Association, the settlor Company intended to settle the properties mentioned in the Trust Deed and transfer them to the trustees for the purposes of creating a public charitable trust including the benefits of its own employees, but the operative part of the Trust Deed was found to be less comprehensive than what was intended by the parties thereto at the time when instructions were given for preparing a draft of the same and when they executed the Deed of Trust. The Settlor Company further alleged that through a misunderstanding on the part of the draftsman and through a mutual mistake the Deed of Trust did not truly express their intention. It was asserted that the real intention of the parties was to create a public charitable trust, but the Company was advised that it was doubtful whether the Trust Deed on a strict construction thereof might not exclude from its benefits the rest of the public apart from the employees of the company and residents of the said settlement. In order to give effect to the said intention the company submitted that certain amendments by way of rectification of the deed should be made in the Object Clause 2 of the Trust Deed. The learned Civil Judge by his judgment dated 18th August 1945 ordered the Deed of Trust to be rectified as prayed for in the Plaint. We will refer to the relevant rectified paragraphs of the Trust deed as per the aforesaid order of the Civil Court a little later.

The Deed of Trust of 1941 as rectified in 1945 became a subject matter of interpretation by the Appellate Income Tax Tribunal and High

Court of Allahabad in the case of *J.K. Hosiery Factory* v. *Commissioner of Income Tax, U.P.*, (1971) 81 I.T.R. 557. In the said partnership the respondent-assessee trust happened to be a partner. The High Court held the rectification decree passed by Civil Court to be valid and further held that it was not possible for the Income Tax Officer to question the validity of the rectification on the ground that conditions for grant of rectification did not in fact exist. However, it was further held that the objects of the Trust Deed as rectified in 1945 did not create a public charitable trust and on an analysis of the object clause 2(b)(i) of the Trust Deed held that it being a mixture of charitable and non-charitable objects, could not be treated to be creating a public charitable trust.

In the meanwhile the Settlor Company had filed another suit being suit No. 163 of 1954 in the Court of First Civil Judge, Kanpur for further rectification of the Trust Deed. It was reiterated in the plaint that the real intention of the Settlor Company was to create a public charitable trust for the benefit of the public in the city of Kanpur and the surrounding areas particularly, the members of the working class including the workmen employed in the plaintiff company, but in their capacity as members of the working class. The intention, it was repeated, was to create the said trust wholly and exclusively for charitable objects and purposes. It was alleged that the trustees had, in fact, been giving the benefit of the trust to the members of the public and no part of the trust moneys had, at any time, been used for a non-charitable or non-religious object or purpose. It was contended that the said Deed of Trust even as rectified was less comprehensive than what was intended by the parties thereto at the time when instructions were given for preparing a draft of the same and when they executed it and the Settlor Company was advised that it did not truly express the intention of the parties. It was prayed that the rectifications sought for be allowed so as to bring it in conformity with the real intention of the parties. In the said suit besides the trustees two persons interested in the trust were impleaded as defendants in their representative capacity after the service of a public notice under Order 1 Rule 8 of the Code of Civil Procedure. The Civil Judge, Kanpur by judgment and decree dated 10.5.1955 decreed the suit. By the second rectification decree certain rectifications were made in the Preamble of the Trust Deed and in paragraphs 1 and 2 of the Trust Deed. At an appropriate stage in latter part of these judgment we will deal with these rectified clauses inserted in the Trust Deed in 1955.

A The jurisdictional Income Tax Officer issued notices under section 34 of 1922 Act and section 148 of 1961 Act for the relevant assessment years to the assessee-trust alleging that the income had escaped assessment for the relevant years. In response to the said notices the assessee filed 'NIL' return for all the assessment years under reference. The contention of the trust before the Income Tax Officer was that it was a public B charitable trust and, therefore, its income was exempt from income tax. The Income Tax Officer rejected this contention as discussed in his earlier assessment order for the assessment year 1948-49. He stated that in the earlier assessment order, he had come to a clear conclusion that the trust was a private trust for the benefit of the employees only and was not at all C exempt from tax. With regard to the rectifications made by the decrees of the Civil Court, the Income Tax Officer held that the trust was originally created for the benefit of the settlor company and the objects of the trust could not be altered subsequently unless the trust was revoked for which there was no power under the Deed. The income from it was, therefore, D assessed to tax. He relied on the decision of the Calcutta High Court in *re. Mercantile Bank of India (Agency) Ltd.*, (1942) 10 I.T.R. 512 and held that a trust for the benefits of its employees and members of the staff is not a charitable trust.

Respondent-assessee preferred appeals to the Appellant Assistant E Commissioner. The Appellate Assistant Commissioner dismissed all the appeals of the respondent. It is under these circumstances that the respondent-assessee approached the Income Tax Appellate Tribunal as noted earlier. The assessee partly succeeded while the Revenue also succeeded in part before the Income Tax Tribunal and that is how seven questions F came to be referred to the High Court under section 256(1) by the Tribunal, two at the instance of the assessee and five at the instance of the Revenue and which came to be wholly decided in favour of the respondent-assessee as already noted earlier.

Rival Contentions

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Learned senior counsel Dr. Gauri Shankar raised the following contentions in support of these appeals :

(1) The second rectification in the year 1955 as decreed by the Civil Court was without jurisdiction as in substance by the so-called H rectification a new Trust Deed was sought to be substituted, which

was beyond the powers of the Civil Court. A

(2) The condition precedent for invoking the jurisdiction of the Civil Court under section 26 of the Specific Relief Act of 1963 or under section 31 of the earlier Act that there should be mutual mistake on the part of parties to the document was absent in the facts of the present case and consequently the Civil Court had no jurisdiction to grant such rectification. B

(3) The rectification decree was in personam and not in *rem* to which Revenue was not a party and, therefore, it was not binding on the Income Tax Authorities. C

(4) Even assuming that Rectification Order of 1955 was validly made, it would operate only prospectively and could not have any retrospective effect. This submission was made for challenging the answer to Question No. 2 posed for consideration of the High Court at the instance of the respondent-assessee. D

(5) Even after the rectification of 1955 the Trust Deed as rectified did not create any public charitable trust entitling the respondent-assessee to claim income tax exemption under the relevant provisions of 1922 Act as well as 1961 Act as applicable to the concerned assessment years. E

(6) The entire Trust Deed as originally executed and as twice rectified in 1945 and 1955 was merely a colourable device on the part of the three main trustees Singhania brother who held partnership interest in the firm of J.K. Hosiery Factory but went out as partners of the said partnership and entered by the back door assuming the garb of the trustees of respondent- trust which became a partner in the same partnership firm claiming income tax exemption. Consequently such a colourable device on the part of the respondent should not be countenanced. F G

Shri Verma, learned senior counsel for the respondent-assessee on the other hand combatted the aforesaid contentions of learned senior counsel for the Revenue and submitted that even for the assessment years 1949-50 to 1955-56 wherein the rectified Trust Deed of 1945 prior to its further rectification in 1955 was holding the field, it was a trust for public H

A charitable purposes and consequently even apart from the retrospective effect of the rectification in 1955, the respondent-assessee was entitled to claim exemption from payment of income tax for these relevant years. However, so far as the answer to Question No. 2 referred for the opinion of the High Court at the instance of the respondent-assessee was concerned, Shri Verma fairly stated that he was not supporting the said answer and that he was conceding that 1955 rectification of the Trust Deed had only prospective effect.

Shri Gauri Shankar, learned senior counsel for the Revenue in Rejoinder submitted that 1945 rectification did not create a public charitable trust. He, however, fairly stated that as there was no clear indication from the judgment of the High Court about any colourable device on the part of the assessee or its trustees underlying the creation of trust he was not pressing that point any further.

In the light of the aforesaid rival contentions the battle lines are clearly drawn between the contesting parties wherein the first five contentions canvassed on behalf of the Revenue by Dr. Gauri Shankar will have to be examined and the sixth and the last contention which arises for consideration in the light of the additional contention of learned senior counsel Shri Verma for the respondent, namely, whether the rectification of 1945 created a public charitable trust or not, will also fall for determination.

We shall now deal with the aforesaid six contentions canvassed for our consideration seriatim :

Contention No. 1

So far as jurisdiction of the Civil Court to grant rectification of the Trust Deed is concerned the relevant provision is found in section 26 of the Specific Relief Act, 1963 which had succeeded the prior Specific Relief Act of 1877. Under the earlier Act an analogous provisions was found in section 31 of the Act. As per these provisions a suit could be filed before competent Civil Court for rectification of an instrument when through fraud or a mutual mistake of the parties a contract or other instrument in writing does not express their real intention. It is obvious that a Trust Deed is not a contract in the strict sense of the term but it would certainly be covered by the expression 'other instrument in writing'. It could, therefore,

not be urged with any emphasis that competent Civil Court which was approached by the Settlor Company for rectification of the instrument of trust, was not having requisite jurisdiction to entertain such proceedings. However, Dr. Gauri Shankar learned senior counsel for the Revenue pitched his faith on a decision of the Andhra Pradesh High Court in the case of *Trustees of H.E.H. the Nizam's Pilgrimage Money Trust* v. *Commissioner of Wealth-Tax*, (1988) 171 I.T.R. 323. In that case the trustees of H.E.H. Nizam's Pilgrimage Money Trust had applied to the Chief Judge, City Civil Court, Hyderabad, under section 34 of the Indian Trusts Act, 1882 seeking his opinion, advice and directions with respect to the utilisation of the income of the trust found in terms of the resolution. By the said resolution the trustees contrary to the objects of the trust had resolved to utilise the income of the trust fund for charitable purposes in India when the settlor had clearly laid down in the Trust Deed that the trust fund and unspent accumulations, if any, were to be utilised for religious or charitable objects at Hedjaz and/or Iraq. It was, therefore, held that the resolution of the trustees was invalid and the order of the Chief Judge permitting the trustees to spend the trust income in India was equally inoperative and without jurisdiction. It was also held that the Trust Act Applied only to private trusts and not to public trusts. And that after the death of the Settlor, the trust had become a public trust. Moreover, section 34 of the Trust Act provided only for a summary enquiry and order with respect to management or administration of the trust property other than questions of detail, difficulty or importance. We fail to appreciate how the aforesaid decision can be of any assistance to the learned senior counsel for the Revenue in the present case. On the facts of the case before Andhra Pradesh High Court the City Civil Court, Hyderabad, had no jurisdiction under section 34 of the Trust Act to bring about any changes in the objects of trust which had become a public trust. On the facts of the present case section 31 of 1877 Act (Specific Relief Act) or the corresponding provisions of section 26 of 1963 Act could be effectively invoked for rectification of the instrument of trust. Such a Court does not suffer from any inherent lack of jurisdiction, like the City Civil Court in the Andhra Pradesh case which had no such jurisdiction under section 34 of the Indian Trusts Act. The first contention must, therefore, be rejected.

Contention No. 2

So far as this contention is concerned it was vehemently contended

A by learned senior counsel for the Revenue that Civil Court will get jurisdiction to entertain rectification proceedings provided any of the two conditions precedent are satisfied, namely, (i) through fraud; or (ii) by mutual mistake of parties the instrument in writing does not express real intention of parties. So far as fraud is concerned it is not the case of anyone
B that either party to the instrument had committed any fraud. In fact the learned senior counsel went to the extent of submitting that there are no two parties in an instrument of trust. It is difficult to agree. Settlor is one party to the trust who settles his property in trust for the benefit of others who become beneficiaries and the legal ownership of the property is transferred to the trustees. Thus not only there are more than one party to
C the instrument of trust but in fact there would at least be two main parties, namely, the settlor on the one hand and the trustees on the other and also there will be the beneficiaries who would be indirectly third parties to the instrument though not being direct parties thereto. Thus it would be almost a tripartite transaction. Dr. Gauri Shankar than submitted that even if it is
D so, no mutual mistake was alleged in the rectification proceedings. Even this contention cannot be accepted. The Settlor Company had clearly indicated in the rectification proceedings that the real intention of the settlor to create a public charitable trust was not clearly brought out on the wordings of the original Trust Deed and, therefore, the need to rectify
E the instrument, as neither the Settlor Company nor the trustees who assumed the legal ownership of the property settled in trust would have agreed to the transaction in question if it had purported not to create a public charitable trust. It was this mutual mistake on the part of both the parties that required rectification of the instrument to make, what was
F latent intention a patent one. Even that apart it is strictly not open to the Revenue which is not a party to the instrument to take up such a contention about non-fulfilment of condition precedent as it would be a fact in issue before the competent Court which was called upon to rectify the instrument by either of the parties to the instrument. Absence of such a condition would at the most make the order erroneous and which can be challenged
G by either of the parties to the proceedings but it will have no impact on the jurisdiction of the Civil Court to pass such an order however erroneous it may appear to be to the Revenue. At the highest such an error would remain in the realm of error in the exercise of Jurisdiction and not an error depriving jurisdiction to the competent Court to entertain such rectification
H proceedings. In this connection it is profitable to have a look at the decision

of Delhi Court in the case of *Jagdamba Charity Trust* v. *Commissioner of Income-Tax, Delhi (Central)*, (1981) 128 I.T.R. 377. In that case Deed of Trust was got rectified by the parties from the Civil Court. These proceedings had to be initiated in the light of judgment of the High Court which had held that due to provisions in certain clauses of the Trust Deed the trust was non-charitable and the trust was not entitled to exemption under Income-Tax Act and that since the decision had created some doubts regarding the validity of some clauses of the deed it was necessary that the deed should be rectified. The Civil Court granted a decree and directed that the Trust Deed be rectified. The question was whether such rectification order of the Civil Court was binding on the Income Tax Department when the assessee-trust armed with such rectification order claimed exemption from income tax under section 11 of the 1961 Act. S. Ranganathan, J., as he then was, speaking for the Delhi High Court took the view that the word 'instrument' used in section 26 of the Specific Relief Act has a very wide meaning and includes every document by which any right or liability is, or is purported to be created, transferred, limited, extended, extinguished or recorded. There is no reason to exclude a Trust Deed from its purview. A Trust Deed is a document which sets out the terms of an understanding between the author of the trust and the trustees. Though in form, the trustees are not signatories to the instrument as drawn up, they are parties to the instrument in a real sense for it is on the terms of the instrument that they accept office and proceed to administer the trust. The law obliges them to act upon the terms of the Trust Deed and they cannot commit a breach thereof. If a gift deed, sale deed or promissory note could be within the terms of the section, there is no reason why a Trust Deed cannot be rectified under section 26. It was further held that since there was an order of Civil Court binding on the author and the trustee, they could administer the trust only in terms of the amendment directed by the Court. The trustees were and must be deemed, from the beginning, to have been under a legal obligation to hold the properties only for the object and with the powers set out in the Trust Deed as amended. Therefore, whatever might be the correctness or otherwise of the order passed by the Civil Court under section 26 of the Specific Relief Act, 1963, it was not open to the income-tax Officer to say that the trustees could administer the trust in accordance with the original deed and that the claim for exemption had to be dealt with on the basis of the original deed. Nor was it open to the Income-tax Officer to say that in the relevant accounting year, the trustees

A held the property subject to the terms of the original and not the amended deed. In our view the aforesaid decision of the Delhi High Court lays down the correct legal position in connection with proceedings for rectification of instruments like trust deeds, initiated before competent Civil Courts under the relevant provisions of the Specific Relief Act.

B

In the case of *Laxminarain Lath Trust* v. *Commissioner of Income-tax*, (1988) 170 I.T.R. 375 a Division Bench of Rajasthan High Court speaking through S.C. Agrawal, J., as he then was, had to consider the question whether any rectification of the Trust Deed which changed character of the private trust into public charitable trust could be relied upon before C the Income Tax Authorities for claiming exemption under section 11 of the Income-tax Act, 1961 by the assessee-trust. In that case the original Trust Deed executed in August 1948 did not bring out the real intention of the settlor to create a public charitable trust on account of certain sub-clauses of object Clause No. 2. It was, therefore, felt necessary to rectify the D mistake in the original settlement deed so as to put on record the true intention of the settlor and of the trust created by him. It was held by the Rajasthan High Court that it was permissible for the settlor to clarify his intention in creating the trust under the original settlement deed by executing the supplementary deed. Even in the original deed, a discretion had been conferred on the trustees to apply the income of the trust in rendering E aid to persons belonging to the L family and it was permissible for the trustees not to apply the income of the trust for the said object and is fact the income of the trust had never been applied for that object. It could not be said that the beneficiaries under clause 2(vi), namely, persons belonging to the family of L, had an enforceable right to the application of F the income of the assessee for the object mentioned in clause 2(vi), and in these circumstances their consent was not necessary before altering the terms of the Trust Deed. In any case although the supplementary deed was executed in May 1958, none of the persons belonging to the family of L had challenged the validity of the same in a Court of law. After the execution of the supplementary deed, it was not open to the trustees to G apply the funds of the assessee for non-charitable purposes. The assessee-trust had acquired the status of a trust wholly for charitable and religious purposes after the amendment of the Trust Deed in May 1958. It was entitled to exemption under section 11 of the Income-tax Act, 1961. The doctrine of *cy pres* was also invoked in the said case by observing that in H respect of charities the Courts apply the doctrine of *cy pres* which envisages

that if a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed and the law will substitute another mode *cy pres*, i.e., as nearly as possible to the mode specified by the donor. The said doctrine is applied on the principle that the Court would lean in favour of charity and where a general charitable goal is projected and particular objects and modes are indicated, the Court, acting to fulfil the broader benevolence of the donor and to avert the frustration of the good to the community, reconstructs, as nearly as may be, the charitable intent and makes viable what otherwise may die. The aforesaid decision of the Rajasthan High Court also takes a view which is almost parallel to the view taken by the Delhi High Court though the binding nature of the rectification order of the Civil Court on the Income Tax Officer is not highlighted as no such occasion arose for Rajasthan High Court to pronounce on the same on the facts of that case. However, the fact remains that after due rectification of the original Trust Deed either by the settlor himself by executing a supplementary deed or by getting it rectified through competent Civil Court under the relevant provisions of the Specific Relief Act, the trustees would be bound to carry out the amended and rectified objects of the trust and if they fail to do so they would be guilty of breach of trust for which even proper proceedings can be initiated against them under section 92 of the Code of Civil Procedure. For all these reasons, therefore, it must be held that when such rectified Trust Deed is pressed in service before the Income-tax authorities in assessment proceedings concerning the relevant assessment years the Income-tax Officer will have to interpret such rectified instrument for finding out its correct legal effect. But it will not be open to the Income-tax Officer to refuse to look at such rectified instrument of trust and to insist that the trustees of the trust should ignore the said rectified objects and should stick to the instrument as it existed prior to its rectification. The Income-tax officer will have to take the instrument as it exists in its actual amended form when it is pressed in service for framing the assessment concerning the relevant assessment year in such rectified instrument holds the field. The second contention, therefore, fails and is rejected.

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Contention No. 3

So far as this contention is concerned Dr: Gauri Shankar, learned senior counsel for the Revenue was right when he contended that order of rectification by a Civil Court is not a judgment in *rem*. It would be a H

A judgment in personam binding on the parties to the rectified instrument, namely, the settlor on the one hand and the trustees on the other as well as on the ultimate beneficiaries. It is also true that section 41 of the Indian Evidence Act cannot apply to such rectification order as under the Said provision only judgments and orders passed in exercise of probate, B matrimonial admirality or insolvency jurisdiction would have the character of judgments in *rem*. Similarly section 42 of the Indian Evidence Act also could not make them relevant in any enquiry or proceedings unless they relate to matters of a public nature relevant to the enquiry. However it is section 43 of the Evidence Act which would squarely get attracted in such C cases. Said section lays down that judgments, orders or decrees other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of this Act. Section 40 deals with 'previous judgments relevant to bar a second suit or trial'. That obviously cannot have D any application. But a rectified Trust deed pursuant to the order of the Court would certainly make the rectification order relevant under the provisions of section 11 of the Indian Evidence Act, as the fact in issue in an enquiry before the Income-tax Officer would be whether on the basis of the rectified trust instrument the assessee trust is entitled to get its income exempted from tax under the relevant provisions of the Income-tax E Act. In such proceedings, therefore, the order granting rectification of such instrument of trust would certainly remain relevant. Consequently it cannot be said that such rectification orders passed by Civil Courts permitting rectifications of trust deeds under the relevant provisions of the Specific Relief Act could not be relied upon by the assessee-trust in assessment F proceedings before the Income-tax Officer even though the Revenue or the Income-tax officer was not a party to such rectification proceedings. It will be for the Income-tax Officer to consider the real scope and ambit of the Trust Deed as presented to him in rectified from with a view to finding out whether on the basis of such a rectified instrument the assessee trust had G earned exemption from payment of income tax under the relevant provisions holding the field in the concerned assessment years. The third contention is, therefore, decided by answering that though the rectification orders of the Civil Court are not judgments in rem they are relevant in assessment proceedings before the Income-tax Officer and will have to be H given effect to for whatever they are worth.

Contention No. 4

So far as this contention is concerned learned senior counsel for the Revenue is spared his pains as learned senior counsel for respondent-assessee fairly stated in the light of the debate that took place in the Court that he was not supporting the answer given by the High Court in favour of assessee on question No. 2 referred for the opinion of the High Court at the instance of the assessee-trust. In short he submitted that he would treat 1955 rectification of the instrument of trust as creating almost a new trust or substituting the new for the old and, therefore, he would not press that such rectification of 1955 would have any retrospective effect. In view of the fair stand taken by the learned senior counsel for the respondent-assessee, this contention will have to be decided in favour of the Revenue and against the assessee by holding that rectification brought about by the order of the Civil Court in 1955, namely, the second rectification had no retrospective effect and would operate prospectively from the date on which such rectification saw the light of the day and would cover assessment years 1956-57 onward upto assessment years 1965-66 and would not look back on the previous assessment years from 1949-50 to 1955-56. In other words the decision of the Tribunal on referred question No. 2 will remain operative and that contrary answer of the High Court on this question would stand rejected.

Contention No. 5

Having cleared the Revenue's stand in connection with the Trust Deed in question for the assessment years 1949-50 to 1955-56 as aforesaid, Dr. Gauri Shankar, learned senior counsel for the Revenue set his sails on the subsequent assessment years 1956-57 onwards wherein the Trust Deed as rectified in 1955 held the field. He submitted that even after the rectification of 1955 the situation had not at all improved for the respondent-trust and it remained private trust and not a public charitable trust. So far as this contention is concerned it was vehemently opposed by learned senior counsel for respondent-assessee, Shri Verma. In fact this has remained now the real bone of contention between the warring parties.

In order to resolve this controversy it will be profitable to have a close look at the relevant provisions of the Trust Deed of 1941 as amended in 1955 pursuant to the second rectification order of the Civil Court. The said Trust Deed as amended in 1955 is found at Annexure 'J' to the Paper

A Book Volume II. Leaving aside the introductory recitals, the relevant operative recitals in the Trust Deed read as under :

"1. That in exercise of the power reserved to it under the Memorandum of Association and for effectuating its object of establishing a trust or settlement for public religious or charitable purposes including trusts or settlements for relief of property, education medical relief and advancement of any other object of general public utility of religious or charitable nature, the Company doth hereby grant convey and assure upto the Trustees the said plot of land situate at Cawnpore and numbered as 1 in Block H Factory Workmen Area containing by admeasurement 43.70 (forty three decimal point seventy) acres more or less and more clearly delineated and shown on the plan annexed to the said Indenture bearing date the 19th day of October 1936 and thereon marked red as also the said plot of land situate at Cawnpore and numbered as 2 in Block H Factory Workmen Area containing by admeasurement 26.30 (twenty six decimal point thirty) acres more or less and more clearly delineated and shown on the plan annexed to the said Indenture dated the 2nd day of February 1938 and thereon marked red 'together with all way' wells waters water courses sewers ditches drains trees shrubs liberties easements profits privileges and appurtenances whatsoever to the said plots of land respectively belonging or in any wise appertaining with the same or any part thereof now or at any time heretofore usually held occupied or enjoyed therewith and all the state right title interest claim and demand whatsoever at law or in equity of it was the company into or upon the said two plots of land and every part thereof 'to have and to hold the said' two plots of land hereby conveyed granted or assured or expressed so to be and every part thereof unto and to the use of the Trustees forever to be by them held upon the trusts and with the subject to the powers provisions agreements and declarations in respect thereof hereinafter appearing and contained.

2. The Trustees do hereby declare that they shall hold and stand possessed of the said two plots of land upon the trusts following namely :

(a) To manage the said two plots of land (hereinafter called "the Trust Properties" which term shall include any security or securities or investments of any kind whatsoever into which the same or any part thereof may be converted and varied from time to time and such as may be acquired by the Trustees or come to their hands by virtue of these presents or by operation of law or otherwise however in relation to these trusts as also all donations funds or endowments either in the shape of cash shares securities or other movable or immovable properties which may be given to the Trustees by any person whosoever for the benefit of the Trusts hereby created) and to collect and recover the rents profits and other income thereof and to pay thereout the expenses of collection of such income and the rates taxes assessments and other outgoings in respect of any properties that may at any time be comprised in the Trust properties including the premia for insurance of any such property against loss or damage by fire or lightning or civil commotion airraids and other risks or losses or damages as the Trustees may in their absolute discretion think proper (but so that nothing herein contained shall impose any obligation on the Trustees to insure any of the premises comprised in the Trust properties which they do not wish to do so) as also to pay the expenses of painting or whitewashing the buildings and structures that may be created on the said Trust Properties and of effecting all repairs additions and alternations thereto as well as to all plant and machinery which may be lying thereon or affixed thereto.

(b) To erect, establish, equip, furnish, fit maintain and repair on the said two plots of land any other land that may hereafter be acquired by the Trustees on behalf of the Trust.

(i) residential quarters, chawls or buildings *for the workmen in the town of Kanpur and the surrounding areas and extensions* and for their respective families and dependents and for such other skilled and unskilled workmen craftsmen traders merchants technical or professional men whom the Trustees may permit to reside or work in the said two plots proved that the benefit in this clause shall be granted only to those persons

A who on account of poverty are in need of help and really deserve help.

(ii) Public schools, pathshalas, colleges, libraries public halls, hostels or boarding houses.

B (iii) Hospitals dispensaries, museum places or recreation, instruction, swimming baths, lakes, parks, playgrounds, temples, mosques, churches, a market or markets and such other works and institutions of general public utility.

C (iv) such other works , building and installations as the Trustees may in their discretion think fit to provide for the advancement of any other similar object of general public utility.

(c) To erect, establish, equip, furnish fit maintain and repair on the second of the aforesaid two plots a temple, a hospital with D all necessary quarters for housing its staff, an office or offices for the management and administration of the Colony or Settlement to be established on the said two plots and quarters for the office staff and a water pumping station and similar other works.

E (d) To charge such rent or fees for the use and occupation of any of the said premises as the Trustees may in their discretion from time to time think fit.

(e) To use and spend the income of the Trusts properties or the F corpus of any funds or donations given or endowed for the benefit of these trusts for the objects herein mentioned."

A mere look at the aforesaid objects of the trust which remained operative and kicking after the second rectification of 1955 shows that each of the objects mentioned in clauses (b), (c), (d), and (e) of object Clause 2 clearly G partakes the character of a charitable disposition meant for the benefit of a well demarcated mass of humanity. There is no much dispute on this aspect, so far as paras 2(a) and (b)(ii) to (iv), (c), (d), and (e) are concerned. However learned senior counsel for the Revenue vehemently submitted that leaving aside the objects mentioned in para 2(b), sub-paras H (ii), (iii) and (iv), so far as sub-para (i) of clause (b) of para 2 is concerned,

at least that object does not create a public charitable trust as the object mentioned therein namely constructing residential quarters, chawls or buildings for the workmen in the town of Kanpur and surrounding areas was a very vague object. It was next contended that though the object is so widely worded, it in substance is meant to benefit only the workmen of the company if the entire history of the trust from 1941 onwards is minutely scrutinised. It was submitted by Dr. Gauri Shankar that initially when the two pieces of land were obtained on concessional rates from the Improvement Trust, Kanpur in 1941 by indentures of 19.10.1936 and 2.2.1938 respectively, they were meant to be utilised for the construction of colonies of workmen of the Settlor Company itself. That the original Trust Deed 1941 without latter rectifications of 1945 and 1955 clearly indicated that the beneficiaries were only the employees of the Settlor Company and there was no whisper about the benefit to humanity at large or to members of the general public. Thus it was clearly a private trust. That through by rectification of 1945 the term 'workmen in general' was introduced for indicating the clause of beneficiaries, in substance the benefit was reserved to the workmen of the Settlor Company itself, and that even after 1955 rectification, the words 'workmen in general' in Kanpur and surrounding areas and extensions remained a mere camouflage. It is not possible to agree with the aforesaid submissions of the learned senior counsel Dr. Gauri Shankar, for the Revenue. The reasons are obvious. It cannot be said that the indicated beneficiaries, namely, the workmen in the town of Kanpur and surrounding areas and extensions are so vague as to make the object of the trust inoperative or otios. Workmen in town of Kanpur and the surrounding areas and extensions formed a clearly earmarked class or category of members of general public and they were certainly a part and parcel of the general public. It is also not possible to countenance the submission that the words 'surrounding areas and extensions of Kanpur town' introduced vagueness, in the identification of beneficiaries. Surrounding areas and extension would naturally include those areas which are on the periphery of Kanpur town, and which are adjacent to Kanpur town. They would not obviously include any areas which are geographically far removed from and situated at long distance from Kanpur town and which could not be said to be in the vicinity of the Kanpur town. The words 'surrounding areas and extensions of Kanpur town' indicate proximity of such areas with the Kanpur town and have a clear nexus with the

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A geographical boundary of Kanpur town. It is also easy to visualise that the trustees will have to make available the benefit of the clause only to those workmen in the town of Kanpur and surrounding areas and extensions and to their respective families and dependents who on account of poverty are in need of help and really deserve help. Any provision made for a poor B class of public well earmarked as recipient of such benefits would certainly make the object of such bounty a charitable one. In fact Dr. Gauri Shankar fairly started that if one only goes by the verbiage of the clause as found in 1955 rectified deed then it would appear to be a public charitable trust. But he submitted that we have to X-ray the clause and try to find out as C to who are the real beneficiaries of the said trust. It is difficult to countenance even this submission. In order to find out whether the relevant clauses of a trust deed create a public charitable trust or not we have to go by the express words employed by the Trust Deed. In our view for finding out the real intention of the settlor, the words used in the Deed would be the real vehicle of though of the settlor expressing his intention D in cold print. This would be much more so when such recitals in the Trust Deed are not challenged on the ground that they are a comouflage or a result of a colourable device. As we have noted earlier, contention regarding colourable device was not pressed by Dr. Gauri Shankar for the Revenue and rightly so as it did not arise out of the judgment under appeal. E On the other hand , on the express language of clause 2(b)(i) of the 1955 rectified deed, it cannot be said that it does not create a public charitable trust. On the contrary it becomes clear on a close reading of relevant provisions of this clause that the objects are specific and charitable in nature. The beneficiaries are also clearly indicated. There is also no F ambiguity about the trustees or the trust properties. Thus all the basic requirements for creation of a public charitable trust do exist on the express language of the relevant sub-clauses of clause (2) of 1955 rectified deed. Dr. Gauri Shankar, learned senior counsel for the Revenue then submitted in any case absolute discretion is vested in the trustees under the Trust Deed to utilise the trust income for the benefit of any of the G sub-classes of workmen in the town of Kanpur and they were likely to divert the entire benefit to their own workmen. To say the least it is merely a discretion left to the trustees and not an obligation of the trustees that they must necessarily spend the income of the trust for the workmen of the settlor company itself and not for the benefit of any other outside worker. H We shall deal with this aspect in greater details when we will refer to

Contention No. 6 canvassed by learned senior counsel for the assessee trust that even apart from the rectification of 1955 the earlier rectification of 1945 did create a public charitable trust. However so far as the second rectification of 1955 is concerned it has clearly indicated that only a discretion is vested in the trustees to utilise the trust income for benefit of poor workmen in the town of Kanpur and in the surrounding areas and extensions and that may include even poor and needy workmen of the settlor company itself. In this connection Shri Verma also rightly invited our attention to section 92 of the Code of Civil Procedure and clause (i), sub- clause (b)(iv) whereby trustees in their discretion could provide for advancement of other similar objects of general public utility. Relying on a series on decisions of this Court in *Commissioner of Income-Tax, Madras* v. *Andhra Chamber of Commerce*, (1965) 55 ITR 722; *Ahmedabad Rana Caste Association* v. *Commissioner of Income-tax, Gujarat*, (1971) 82 ITR 704; *Abdul Sathar Haji Moosa Sait Dharmastapanam* v. *Commissioner of Agricultural Income-Tax, Kerala*, (1973) 91 ITR 5; *Sole Trustee, Loka Sikshana Trust* v. *Commissioner of Income-Tax, Mysore*, (1975) 101 ITR 234; *Yogiraj Charity Trust* v. *Commissioner of Income-Tax, New Delhi*, (1976) 103 ITR 777 and *Commissioner of Income-Tax, Madras Etc. Etc.* v. *Andhra Chamber of Commerce Etc. Etc.*, (1981) 130 ITR 184 it was submitted that objects of general public utility would clearly indicate that they are meant for public benefit and would create a public charitable trust. That in the light of the objects of the trust as rectified in 1955 even a workmen who is not an employee of the settlor company could in appropriate case seek direction under section 92, Code of Civil Procedure, from competent Civil Court against the trustees to act according to the object of the trust and give benefit of such an applicant beneficiary if the circumstances so permit and the income of the trust is sufficient to cater to his needs.

When confronted with these very widely worded objects of the trust. Dr. Gauri Shankar, learned senior counsel for the revenue mounted his attack in the light of clause 30 of the Trust Deed as rectified in 1955 which reads as under :

> "30. The Trust premises shall be held by the Trustees hereof subject to the terms and provisions of the said two indentures bearing date the 19th day of October 1936 and 2nd February 1938 and the Trustees shall accordingly duly and faithfully observe perform and comply with all the terms and provisions thereof and all such other

A terms provisions rules and regulations which the said Cawnpore Improvement Trust may from time to time impose upon them or require them to observe perform and comply with or such as may from time to time be mutually agreed upon between the Cawnpore Improvement Trust and the Trustees consistently with the powers reserved by the said Cawnpore Improvement Trust in that behalf under the said two Indentures."

It is no doubt true that the trustees are enjoined to utilise the trust properties subject to the terms and provisions of the indentures dated 19th October 1936 and 2nd February 1938 which require the trustees to utilise the trust property for the benefit of settlor company's own workmen. But as rightly submitted by Shri Verma learned senior counsel for the assessee-trust, the said clause would not detract from the public charitable nature of the trust as projected by the relevant operative parts of the object clause to which we have made detailed reference earlier. Shri Verma was also right when he contended that if at all the trustees diverted the benefit to the beneficiaries other than the workmen of the company itself it would give a cause of action to the original vendor, namely, the Town Improvement Trust, which had taken no steps in all these years or made any grievance about the same and secondly as provided by the indentures themselves all that would result on account of any alleged breach of the conditions of the indentures on the part of trustees would be that they would be liable to pay additional quantified amount to the original vendor and the concessional rate of consideration for the grant in that eventuality, may stand withdrawn. But it would not amount to any breach of trust on the part of the trustees if such benefit is conferred on outside workmen who fell within the clearly earmarked class of beneficiaries as per object clause 2(b)(i). On the contrary, the trustees not only would not be alleged to be guilty of any breach of trust but can be said to have acted according to the object of the trust.

Dr. Gauri Shankar, learned senior counsel for the Revenue next contended that as observed by the Appellate Assistant Commissioner in connection with assessment year 1948-49 not a pie of the income of the trust was utilised during the relevant years by the trust for the benefit of outside workmen and almost nothing was spent on charity. He particularly invited our attention to the following observations as found in Annexure F-2 in Volume II of the Paper Book which contains the order of the

Appellate Assistant Commissioner of Income Tax, Range II, Kanpur, for assessment year 1948-49. In paragraph 13 of the judgment the learned Appellate Assistant Commissioner has observed as under :

> 13. The appreciation of the real nature of the trust would not be completed without referring to its balance sheets and the income and expenditure accounts right from the year of inception of the trust upto the date. I have gone through the income and expenditure accounts of the various years and I find that not a single paisa was even spent by the trust for charity. The balance sheet of the trust shows that all its funds were mostly employed by the various companies and firms of J.K. Group to whom huge advances were made from time to time. A certain portion of the trust funds was no doubt employed in the construction, maintenance and repairs of quarters which were let out to the employees of J.K. Cotton Spg. & Wvg. Mills Co. Ltd. and to other allied concerns like J.K. Jute Mills Company, J.K. Hosiery Factory, J.K. Iron & Steel Co. Ltd. and J.K. Cotton Manufacturers Ltd. but all the surplus funds available to the trust were either given over to the various concerns of J.K. Group for the advancement of their business or advanced to J.K. Charitable Trust. From the day to day working of the trust also it is thus quite clear that it ensured for no charitable purposes."

Now it must be at once noted that the said observations are made in connection with the assessment proceedings for 1948- 49. They would be governed by the Trust Deed as rectified by the first rectification in 1945. Consequently these observations cannot apply to the interpretation of an entirely different set of recitals found in the rectified deed of 1955. Even that apart Shri Verma, learned senior counsel for the assessee has invited our attention to various documents which are on record in volume I of the paper book at pages 21, 28 176, 179, 183 and 184 to indicate that in fact benefit of the income from the trust was made available not only to workmen of the company but to outside workmen also who resided within Kanpur town. It was also submitted that the aforesaid documents clearly showed that the rent recovered from the workmen who occupied these 160 cottages put up by the settlor company on the trust land was minimal and was highly subsidised as compared to the market rent. That water and electricity were given free to the beneficiaries and a part of the land was also made available to the Municipality to establish a primary school. It

A was also contended that the income tax appellate tribunal itself had noted in the common judgment from which the references arose, that Appellate Assistant Commissioner had himself conceded that no exorbitant rents were charged from the tenants who occupied the residential quarters in question and in fact the average rent recovered showed that the rents were
B only nominal. Shri Verma also submitted that the Income tax Tribunal had noted the contention on behalf of the assessee that as regards rent charged it was pointed out that the average rent realised from 160 cottages was Rs. 7660 per annum from 1947-48 to 1964-65. That amenities of water and electricity were provided free and even the schools were free. In other words rent including service and electricity charges work out to less than
C Rs. 16 per mensem for the accommodation whose fair market rate in an industrial city like Kanpur would be over Rs. 150 per mensem. This according to assessee's counsel shows that cottages were given to poor employees at concessional rent. In our view these contentions on behalf of the assessee are well supported on the evidence on record. It cannot,
D therefore, be urged that the trustees had indulged in any profit making while employing the income of the trust on the beneficial objects of the Trust Deed and in discharging the obligations with which they were charged under the said Trust Deed. In fact in fairness it must be stated that Dr. Gauri Shankar did not also pursue this aspect any further. Before parting with the discussion on this aspect we may also mention that at page
E 410 of the paper book Vol. II a list of tenants not working in J.K. Group of Mills but who are living in Kamla Town Trust quarters, was furnished by the respondent- assessee before the Income Tax Tribunal along with the affidavit of one Shri R.B. Somnath, Engineer of the respondent-trust. This also showed that the beneficiaries of the trust income and properties are
F not only the workmen of the settlor company but also outside workmen who are residing in Kanpur town being a part and parcel of the general public. It must, therefore, be held that the rectified Trust Deed of 1955 did create a public charitable trust as rightly held by the High Court. Contention No. 5, therefore, stands rejected.

G *Contention No. 6*

So far as this contention is concerned it is canvassed for the first time before us by Shri Verma, learned senior counsel for the assessee trust for supporting the ultimate answer given by the High Court on question No. 1
H referred for the opinion of the High Court at the instance of the assessee.

Shri Verma submitted that leaving aside 1955 second rectification even the original Trust Deed of 1941 as rectified in 1945 did create a public charitable trust. The main plank of his argument was based on the following premises :

1. Workmen in general and in particular of the company are also a part and parcel of public and it cannot be said that they are not members of the general public residing in Kanpur.

2. We have to judge the correct connotation of the term 'workmen in general' in the light of economic and social conditions that prevailed in 1945 when the deed was rectified.

According to Shri Verma, construction of residential quarters, chawls or buildings for the workmen in general and in particular for the workmen, staff and other employees of the company or other allied concerns under the management of or in which the Directors of the company may for the time being be interested and for their respective families and dependents and for such other skilled and unskilled workmen craftsmen traders, merchants, technical or professional men whom the trustees may permit to reside or work in the said two plots with a view to supply their needs and requirements or to render them services or to cater to their wants, comforts, conveniences and amenities, as enjoined by clause 2(b)(i) of the Trust Deed as rectified in 1945 would indicate a well defined class out of general members of the public in Kanpur city. It is trite to note that workmen as a class would consist of poor and needy persons and it cannot be said that they would be representing an affluent class of society or public who would not be in need of a roof over their head for themselves as well as for their dependents. Consequently, implicit in the said provision is the object of charity for these poor and well defined class of needy persons constituting a part and parcel of the general public residing in Kanpur.

On this premises it was submitted that even the 1945 deed did create a public charitable trust. It was also contended that the Tribunal and the High Court had wrongly taken the view that because of the earlier judgment of the Allahabad High Court in *J.K. Hosiery Factory* (supra), the Trust Deed as rectified in 1945 could not be said to have created a valid public charitable trust. That in the proceedings before the Allahabad High Court in the said case respondent-trust was not a party. The assessment was of the partnership. Even otherwise the said decision could not be binding on

A parties in the present assessment proceedings pertaining to entirely different years and for entirely different assessee. Shri Verma relying on a series of decisions of different Courts including this Court submitted that if the Trust Deed provides a charitable object for the benefit of a class of public and also gives preference to a smaller class of public which may consist of even the workmen of the settlor company or even the poor and needy relatives of the settlor himself the public charitable nature of the trust does not get whittled down or effaced. On the other hand Dr. Gauri Shankar for the Revenue relying upon number of other judgments including the judgment of Chancery Division of English Court submitted that workmen by themselves cannot be treated to be a poor class of citizens for whom any benefit given under the Trust Deed would necessarily make it a public charitable object and if the trustees under the deed are under an obligation to provide the benefit of the trust properties to the employees of the settlor company itself the company by giving such benefit would in turn be exonerating itself from its otherwise contractual obligation or even statutory obligation of providing welfare facilities and residential facilities to its own workmen who because of these facilities would work more efficiently for the company. Thus there would be *quid pro quo* between the settlor on the one hand and the beneficiaries, namely, the workmen and employees of the company on the other. That such a provision would detract from real public charitable nature of the endowment. In the light of the aforesaid rival contentions on this issue we shall now proceed to examine this moot question.

Before we deal with these rival submissions, it will be profitable to have a look at the relevant recitals in the rectified Trust Deed of 1945. Clause 2(b)(i) of the Deed of Trust after the said rectification dated 18.8.1945 laid down amongst others, the following object :

> "To erect, establish, equip, furnish, fit, maintain and repair on the said two plots of land and any other land that may hereafter be acquired by the Trustees on behalf of the Trust.
>
> (i) residential quarters, chawls or buildings for the *workmen in general* and *in particular for the workmen staff and other employees of the company* or other allied concerns under the management of or in which the Directors of the company may for the time being be interested and for their respective families and dependents and

for such other skilled and unskilled workmen craftsmen traders merchants technical or professional men whom the trustees may permit to reside or work in the said two plots with a view to supply their needs and requirements or to render them services or to cater to their wants comforts conveniences and amenities."

Shri Verma submitted that if workmen in general represent a poor and needy class of persons who are a part and parcel of the general public residing in Kanpur, as residential quarters, chawls or buildings had to be constructed in Kanpur, then even if a preference is given to similarly needy and poor workmen staff members or the other employees of the company it could not be said that only because of such preference the charitable aspect of the endowment would get frustrated or would become a private trust. In order to support his contention Shri Verma invited our attention to a decision of this Court in the case of *Trustees of the Charity Fund* v. *Commissioner of Income-Tax, Bombay*, (1959) 36 I.T.R. 513. In that case, the clause in the Deed of Trust provided for grant of relief and benefit to the poor and indigent members of Jewish community or any other community of Bombay or other parts of India or of the world and preference was to be given to the poor and indigent relations or members of the family of the settlor Sir Sassoon David. It was held that despite such preference the trust would remain a public charitable trust. Relying on sub-clauses (a) to (f) of clause 13 of the Deed of Trust it was held that the deed constituted a valid public charitable trust and as the relations or members of Sir Sassoon David did not figure as direct recipients of any benefit under sub-clauses (b) to (f) and the circumstance that in selecting the beneficiaries under sub-clause (a) preference had to be given under the provisos to the relations or members of the family of Sir Sassoon David could not affect that public charitable trust, the income from the properties came within the scope of section 4(3)(i) of the Income Tax Act and were exempt. Reliance was also placed on number of other decisions of various High Courts which obviously fell in line with the aforesaid decision of this Court and which had taken the view that if the main benefit of the settled property in trust had to go to charity, if the trustees were permitted to give preference to poor relations of the settlors the trust would remain a public charitable trust. In this connection our attention was invited to the decisions of Gujarat High Court in *Commissioner of Income-Tax* v. *Moosa Haji Ahmed and others*, (1964) 52 ITR 147, Calcutta High Court in *Commissioner of Income-Tax, Calcutta* v. *Board of Mutwallis to the Wakf Estate,*

A *Ebrahim Solaiman Saleji*, (1968) 69 ITR 758 and three decisions of Bombay High Court in *Commissioner of Income-Tax, Bombay City II* v. *Trustees of Seth Meghji Mathuradas Charity Trust*, (1959) 37 ITR 419; *Commissioner of Wealth-Tax, Bombay City II* v. *Trustees of the J.P. Pardiwala Charity Trust*, (1965) 58 ITR 46 and *Commissioner of Income-Tax, Bombay City III* v. *D.D. Deshpande*, (1976) 102 ITR 390.

B

On the other hand Dr. Gauri Shankar, learned senior counsel for the Revenue submitted that as the benefit is made available under the Trust Deed to workmen in general and in particular to the workmen staff and other employees of the company it cannot necessarily be held that these C workmen must be poor and needy as no such words are found in the clause. He submitted that any Trust Deed conferring benefit on an identified group of persons like workmen or employees of the company would make the trust a private trust and not a public charitable trust. In support of this contention he heavily relied upon decision of the Madras High Court in D Sakthi Charities v. *Commissioner of Income- Tax, Madras*, (1984) 149 ITR 624. In that case it was held agreeing with the view of the Tribunal that as the Trust Deed provided for conferring benefit only on the employees of M/s Sakthi Sugar Ltd. and the relatives of the deceased employees, the said benefits could not be available to the members of the general public not connected with M/s Sakthi Sugar Ltd. Consequently all these clauses were E not charitable in nature. Our attention was also invited by Dr. Gauri Shankar to two decisions of the Chancery Division of the High Court of Justice in England in *Trustees of the William Vernon & Sons, Ltd. Employees Fund* v. *Commissioners of Inland Revenue*, 36 Tax Cases (Chancery Division) 484 and in *Ashworth* v. *Drummond,* 1914 (2) Chancery F Division 90. In *Trustees of the William Vernon* (supra) the question was whether a bequest under the will directing 20% of the received moneys to be paid to some organisation or charity at the discretion of the executors for the benefit of employees of the firm would constitute a public charitable endowment. It was held that the objects of the scheme were not charitable only. Justice Upjohn at page 495 of the Report observed as under :

G

> "Thirty years ago it was not always appreciated that in order to constitute a valid charitable trust it must be a public trust, and that if a trust is limited to the employees of a company the personal nexus constituted by that common employment does not satisfy the H necessary test of the character of publicity. That is now well

established, and it was established in a line of authorities after the last war culminating in *Oppenheim* v. *Tobacco Securities Co. Ltd.* in the House of Lords in 1951. Therefore, it is common ground that the scheme does not constitute valid charitable trust....."

In Re *Drummond* (supra) it was held that work people in question could not be regarded as poor people within the statute of Elizabeth. In our view the aforesaid decisions of English Chancery Courts cannot *ipso facto* be made applicable to workmen residing in this country and who had to face entirely different socio-economic conditions, espacially in 1945, when the rectified object of the Trust Deed saw the light of the day. While interpreting the word 'workmen in general' as employed in 1945 rectified Trust Deed, we have to sit in settlor's arm chair with a view to visualising what was meant by the Settlor Company when it used these terms in 1945, keeping in view the then prevalent socio-economic conditions in this country. It is easy to visualise that workmen who were to toil for their existence would necessarily represent a class of needy persons requiring a shelter over their head, when the settlor company in 1945 contemplated to construct residential quarters, chawls or buildings for workmen it necessarily meant to provide these facilities for a needy class of persons who could legitimately be presumed to be a class of down-trodden persons suffering from penury and want. The socio-economic situation prevailing in England treating workmen as not necessarily poor, cannot almost automatically be imported and applied for judging the economic status of working class in India especially in 1945 when even the definition of 'workmen' under the Industrial Disputes Act, 1947 had also still to see the light of the day. We, therefore, cannot agree with the general proposition canvassed by Dr. Gauri Shankar for the Revenue that any provision made for the benefit of workmen in general would not necessarily be a provisions for needy or poor class of citizens who may be forming part of the general public.

Shri Verma, learned senior counsel for respondent-assessee was also right when he submitted, relying upon decision of this Court in *Trustees of the Charity Fund* (supra) and other decisions of the High Courts to which we have made a reference earlier, that when any property is settled for charitable purposes for catering to the needs of a class of public which is poor and needy, any preference given to poor and needy workmen of the Settlor Company would not necessarily detract from the charitable object

A underlying such bequest or settlement. It is trite to observe that if settlor's poor relatives can legitimately be the recipients of charitable benefits under a public charitable trust, then if such preference is given to poor workmen of the settlor company who are not even related to the settlor, they would stand at least on an equal if not a better footing and in no eventuality on a worse footing, it judging the public charitable nature of the settlement in their favour. However, the basic fact must remain that the settlement is made in favour of a well earmarked class of needy and poor persons who may form a part of the general public and for whom such charitable bequest or endowment is made, and the preferred class of beneficiaries must form a part and parcel of that very general earmarked class. It must, therefore, be held that the provision for construction of houses for workmen in general' as found in clause 2(b)(i) of 1945 rectified Deed, so far as it went, did constitute a charitable object.

However, this conclusion of ours does not end the controversy centering round the aforesaid clause. There are two clear hurdles in the way of Shri Verma for the respondent which militate against his submission that the said clause when read as a whole does create a public charitable trust in favour of workmen in general. The first hurdle is that the term 'workmen in general' as employed in the clause is too general and vague but even assuming that in the context of the residential quarters, chawls or buildings to be constructed for them on the lands situated at Kanpur which are settled in trust by the Settlor Company, it would refer to workmen in Kanpur town, even then the more substantial hurdle in the way of the respondent is projected by the fact that there is an obligation cast on the trustees to construct these residential quarters, chawls or buildings in particular for the workmen, staff and other employees of the company or other allied concerns under the management of and in which the directors of the company may for the time being be interested and for their respective families and dependents. In the light of the words 'in particular' as found in this clause, Dr. Gauri Shankar, learned senior counsel for Revenue rightly submitted, that they represent a scheme of priority for workmen of the Settlor Company and not a scheme of preference. In other words the trustees are bound under an obligation to construct residential quarters etc. first for the workmen or employees of the Settlor Company or its allied concerns. They have no choice in the matter. They cannot in their discretion select an outside workman as recipient of the benefit under the scheme of the Trust Deed. In effect the general class of beneficiaries

constituted by the words 'workmen in general' gets whittled down and circumscribed by the words 'in particular for workmen of the company etc.'. Thus in substance it becomes a trust for the benefit of a well defined smaller class of beneficiaries, namely, employees or workmen of the company and its allied concerns and it fails to meet the requirement of a genuine or public or charitable trust. We are in agreement with this submission of Dr. Gauri Shankar. Once such an obligation is cast on the trustees the public character of the endowment gets whittled down and in substance becomes the settlement for an identified group of persons. In this connection we may profitably refer to a Division Bench judgment of the Bombay High Court in the case of *Commissioner of Income-Tax, Bombay City II* v. *Walchand Diamond Jubilee Trust*, (1958) 34 ITR 228 wherein Chagla, C.J., spoke for the Bench. In that case the question was whether the provision made in the Trust Deed to utilise the accumulated income of the property of the trust on charitable objects like giving scholarships to deserving students or giving medical reliefs of the nature and kind such as starting maternity homes etc., or giving monetary help to the poor and needy persons and for providing relief to the poor and distressed in time of famine would get adversely affected and would cease to be a charitable object if preference was to be given to such persons as are eligible under the aforesaid provisions who are at the time or have in the past been employees of Premier construction Co. Ltd. and of the associated companies and their relatives and dependents as the trustees may in their discretion think expedient and proper. In this connection the following pertinent observations were made by Chief Justice Chagla at page 236 of the Report :

> "..... Now, undoubtedly, we would have taken a different view of this trust if there was an obligation upon the trustees to prefer the employees. In other words, if the other members of the public were postponed to the employees of the Premier Construction Co. Ltd., then, looking to the other provisions of the deed, we might easily have taken the view that the main purpose of the trust was to benefit the employees and the charity to the public was merely illusory. But there is no obligation cast upon the trustees by this proviso to prefer the employees of the Premier Construction Co. Ltd. It is for the trustees to exercise their discretion. In the first place, they have to utilise the income for carrying out the four objects, and any member of the public who comes within these

A four objects would be qualified to receive the bounty of the settlor. If a member of the public also happens to be an employee of the Premier Construction Co. Ltd., it is open to the trustees to give him preference. Therefore, the trustees would not be guilty of committing any breach of trust if they selected for the bounty of the settlor such members of the public as did not fall in the B category of employees of the Premier Construction Co. Ltd. That is the real test which we have got to apply. We must not assume that the trustees will exercise their discretion dishonestly or improperly. The test is whether the exercise of the discretion of the trustees is so fettered that they are bound to select particular C persons in preference to others. That is clearly not the case here..."

In our view aforesaid is the correct test evolved by the High Court. Applying the said test to the clause in question we find that though residential quarters, chawls or buildings are to be constructed for the D workmen in general and who, as we have already shown earlier, may be a well defined class of workmen residing in Kanpur and who may be poor and needy in the light of their socio-economic conditions as prevailed in 1945 when the clause was drafted, once we turn to the second part of this clause which lays down in clearest terms that in particular the quarters are to be constructed for the workmen staff and other employees of the E company and of its allied concerns, it becomes clear that no discretion is left with the trustees and on the contrary they are enjoined, called upon and under an obligation to construct these quarters, chawls and buildings necessarily for the workmen, staff and other employees of the company and its allies. It is also easy to visualise that other employees of the company F may include even affluent employees who may not necessarily constitute an object of charity. Once this conclusion flows from the wordings of the clause, it becomes clear that reference to workmen in general becomes illusory and the settlement can be said to be in substance meant only for catering to the needs of a well defined group of persons, namely, workmen, staff and other employees of the company and its allied concerns and in G that case on the aforesaid ratio of the decision of the Bombay High Court, which we approve, the object clause in question would fall short of creating any public charitable trust. In this connection we may also refer to two decisions, one of Calcutta High Court and another of Allahabad High Court, to which our attention was drawn by Dr. Gauri Shankar for the H Revenue. In the case of *Mercantile Bank of India (Agency), Ltd.*, (supra) a

Division Bench of the Calcutta High Court speaking through Derbyshire, C.J., held that in order to constitute a valid charitable trust it should be for the benefit of the public or the specified section of it. A fluctuating body of private individuals such as the present and future officers and members of the staff and other employees of a Company could not be a part of the general public or of any section of the public and therefore the income of the trust fund was not exempt from the payment of income-tax under section 4(3)(i). It was further observed that Andrew Yule & Co. Ltd., and their subsidiary concerns for whose employees benefit was conferred under the deed employed a large number of persons. The trust was for the benefit of the past, present and future officers, members of the staff and other employees of those concerns. Anyone from the Secretary or some other highly paid member of the staff down to the lowest menial may be included within the benefit of this fund. Necessitious circumstances might include the case of a superior employee earning some thousands of rupees per month, who owning to some misfortune-say the burning down of his house, or the loss of his property - might find himself suddenly in necessitious circumstances, and in need of money to replace his lost property. The learned Judge could see no reason why the administrators of the fund should not be in a position to make a grant to such a person to make up his loss. It might be a most desirable thing to do and the administrators might justly think that they had used some of the funds to the best advantage. But such use cannot be said to be for the relief of poverty. Even if (as had been argued) the administrators are bound to use this fund solely "to relief persons suffering from indigence, ill-health or other necessitious circumstances," it was impossible to say that the fund is - to use the words of the section - "property held in trust wholly for charitable purposes." A Division Bench of the Allahabad High Court in the case of *J.K. Hosiery Factory* (supra) had an occasion to consider the very same clause of the rectified deed of 1945. It is of course true that the said decision was rendered in assessment proceedings of the firm wherein respondent-assessee was a partner and not in the assessment proceedings of the respondent firm itself. Still the interpretation placed on the very same Trust Deed as rectified in 1945 in proceedings to which respondent-assessee was a party in another capacity cannot be said to be totally irrelevant. H.N. Seth, J., speaking for the Division Bench made the following observations in this connection :

"We are doubtful whether the construction of residential colony

A for workmen in general can be regarded as an object of public charity. While enabling the trustees to construct residential quarters, etc., for the benefit of the workmen in general, the settlor made it clear that such buildings were not to be constructed for the benefit of the public in general. The expression "workmen in B general" does not fix a definite class of public which is intended to be benefited under the deed. What types of employees or workers can be said to be covered by this expression is not at all clear. Moreover, the precise language used by the settlor is "to erect ..... residential quarters, etc, for the workmen in general and C in particular for the workmen, staff and other employees of the company or other allied concerns under the management of.....". This shows that the expression "workmen in general" was not intended to mean merely poor labourers. The expression was intended to cover even such classes of persons who might be D employed in any concerned in any capacity whatsoever and who may be drawing high salaries. Making a provisions for constructing residential quarters, etc. for the benefit of the employees irrespective of whether they are poor or not, can hardly be said to be a charitable object or a work of general public utility."

E As we have discussed earlier the term 'workmen in general' when read in the context socio-economic situation prevailing in 1945 in this country and when also considered in the context of construction of residential quarters, chawls or buildings in Kanpur may partake the character of a well defined class of workmen in Kanpur city who may be poor and needy, still as the F trustees are enjoined to construct residential quarters, chawls or buildings in particular for the workmen, staff and other employees of the company it follows that other employees of the company who are the beneficiaries may not necessarily be poor or needy or affluent. We, therefore, concur with the second part of the reasoning of Allahabad High Court in the aforesaid judgment though we are not in a position to subscribe to the G general proposition that construction of residential colonies for workmen in general cannot by itself be regarded as an object of public charity. As a result of the aforesaid discussion therefore, it must be held that rectified clause 2(b)(i) of 1945 deed fell short of projecting an object of a public charitable nature and it could not be said that under the rectified deed of H 1945 the trust properties were held by respondent-trust wholly for religious

or charitable purposes. It is of course true that rest of the sub-clauses of clause 2(b) did refer to charitable objects but as one of the objects was not of a public charitable nature it could not be held that the entire trust was wholly for religious or charitable purposes.

Now is left the consideration of one submission of Shri Verma, learned senior counsel for the Respondent who relied upon Explanation to sub-section (3) of section 4 of 1922 Act which read as under :

> "In this sub-section 'charitable purpose' includes relief of the poor, education, medical relief and advancement of any other object of general public utility, but nothing contained in clause (i) or clause (ii) shall operate to exempt from the provisions of this Act that part of the income from property held under a trust or other legal obligation for private religious purposes which does not ensure for the benefit of the public."

In our view the said Explanation cannot be of any avail to the respondent-assessee so far as the rectified deed of 1945 is concerned. The emphasis in the Explanation is on charitable objects of general public utility like relief of poor, education, medical relief and advancement of any other object of general public utility. Once it is held that clause 2(b)(i) of 1945 rectification deed imposed an obligation on the trustees to utilise the trust property for the benefit of the settlor company's own workmen and employees, it would cease to be projecting an object of providing relief to poor workmen only. Nor would it advance any other object of general public utility but would be confined to the utility of a well defined class of employees and workmen of the settlor company and its allied concerns only. For all these reasons, therefore, it is not possible to accept the submission of Shri Verma, learned senior counsel for respondent-assessee based on this Explanation. This contention, therefore, stands rejected.

Conclusions

The aforesaid decisions on the contentions canvassed on behalf of the rival contesting parties by their learned senior advocates, yield the following result :

(i) For assessment years 1949-50 to 1955-56 the respondent- assessee would not be entitled to get the benefit of section 4(3) (i) of the 1922 Act

A and income derived by it from its properties would not get exemption from income tax under the said provision.

(ii) For the assessment years 1956-57 to 1961-62 the income derived by the respondent-assessee from trust properties during these years will get exempted under section 4(3)(i) of 1922 Act as the 1955 rectified Trust
B Deed is held by us to be having objects of wholly charitable nature.

(iii) For the assessment years 1962-63 to 1965-66 the income derived from trust properties by the respondent-trust will be entitled to exemption from income tax under section 11 of the 1961 Act subject to the compliance
C with the conditions laid down therein as even during this period the rectified Trust Deed of 1955 as interpreted by us will be treated to have held the field.

Final Order

D In the light of the aforesaid discussion and the conclusion to which we have reached the questions referred for opinion of the High Court will stand answered as under :

Question referred at the instance of the assessee in ITR No. 18/73

E *Question No. 1*

Answered in the affirmative in favour of the Revenue and against the assessee.

F *Question 2*

Answered in the affirmative in favour of the Revenue and against the assessee as the answer of the High Court on this question was not supported by the learned counsel for the respondent.

G *Question referred at the instance of Revenue in ITR No. 715/72*

Question No. (a)

Answered in the affirmative in favour of the assessee and against the Revenue as answer of the High Court was not challenged before us by
H learned counsel for the Revenue.

Question No. (b) A

Answered in the negative in favour of the assessee and against the Revenue as the answer of the High Court was not challenged by learned counsel for the appellant-revenue.

Question No. (c) B

Answered in the affirmative in favour of the assessee and against the Revenue as the answer of the High Court was not challenged by learned counsel for the Revenue.

Question No. (d) C

Answered in the negative in favour of the assessee and against the Revenue.

Question No. (e)

D

Answered in the negative in a favour of the assessee and against the Revenue.

In the result, out of these 17 appeals filed by the Revenue seven appeals pertaining to assessment years 1949-50 to 1955-56 will stand allowed while Revenue's remaining ten appeals pertaining to assessment E years 1956-57 to 1965-66 will stand dismissed. In the facts and circumstances of the case there will be no order as to costs in these appeals.

R.A. Appeals disposed of.

A COMMISSIONER OF INCOME TAX LUDHIANA

v.

SHRI OM PRAKASH

NOVEMBER 16, 1995

B [B.P. JEEVAN REDDY AND SUHAS C. SEN, JJ.]

Income Tax Act, 1961 :

Section 64(1)—Computation of total income of individual—Partnership firm—Comprising of assessee (husband) and wife as partners—Minor children admitted to benefits of partnership—Assessee (husband) being partner not as individual but as Karta of H.U.F.—Income accruing to wife and minor children—Not includible in the total income of assessee or H.U.F.

C

A conflict of opinion among the High Courts on the meaning and interpretation of clause (i) and (ii) of sub-section (1) of section 64 (as they stood prior to 1st April, 1976) of the Income Tax, 1961 fell for resolution in this batch of appeals.

D

On behalf of the appellant - revenue it was contended that even though the husband/father is a partner in a firm as the Karta of the H.U.F., he does not cease to be an individual and section 64(1) of the Act is applicable.

E

On behalf of the respondent - assessee it was contended that since the husband/father was a partner in a firm not as an individual but as the Karta of the H.U.F. Section 64(1) of the Act is not attracted.

F

Disposing of the appeals, this Court

HELD : 1. Where a person is a partner in a Partnership firm not in his individual capacity but as the Karta of the H.U.F., neither the income accruing to his wife on account of her being a partner in the same partnership firm nor the income accruing to his minor children on account of their being admitted to the benefits of such partnership firm, can be included in the total income of such person - neither in his individual assessment nor in the assessment of the H.U.F. [360-C]

G

H **2. It may not be quite apt to say that *vis-a-vis* the member of the**

H.U.F., the Karta is still an individual and, therefore, such income of wife and minor children should be included in the income of the Karta derived as Karta. Nor such income of the wife and/or minor children should be included in the individual assessment of the Karta. It also ignores the clear language employed in clauses (i) and (ii). In each of these two clauses, the expression "such individuals" occurs twice. Firstly, the "individual" must be a partner in a firm and the wife and/or minor children of such individual must also be deriving income from such partnership firm (either on account of her membership) or on account of being admitted to the benefits of partnership, as the case may be. [358-E-H]

3.1. The opening words of section 64 (1) of the Income Tax Act,1961 are "in computing the total income of any individual".Then it proceeds to say that in the total income of such individual shall be included the income of his spouse arising from the membership of such spouse in the partnership firm in which such individual is the partner. It proceeds further and says that the income arising to the minor children of such individual who are admitted to the benefits of partnership wherein such individual is a partner shall also be included in the total income of such individual. [357-E-F]

3.2. So far as other partners in the partnership firm are concerned, they are not really concerned in what capacity a particular person is a partner, i.e., whether as an individual, as a Karta, as a trustee or otherwise. To them, he is an individual, a person. This aspect however becomes relevant as between the partner and those whom he represents in the partnership firm. To wit, where a person is a partner as the Karta of a H.U.F., the capacity in which he is a partner in the partnership firm is relevant as between him and the other members of the H.U.F. For, the income the Karta receives as a partner is not his individual income; it is the income of the H.U.F. and he receives it on behalf of the H.U.F. It is for this reason that the income of the wife and minor children arising from their membership/admission to the benefits of partnership firm, is held not includible in the income of the H.U.F. since the total income of H.U.F. is not the total income of the individual (husband or father, as the case may be). [358-A-C]

3.3. For Section 64(1) to get attracted, it is necessary that the husband/father should be a partner in a partnership firm as an individual i.e., in his individual capacity. It is not attracted where he is a partner as the

A **Karta of H.U.F. to which such wife and/or minor children belong. [358-D]**

L. Hirday Narain **v.** *Income Tax Officer*, **A. Ward, Bareilly, 78 ITR 26,** *Commissioner of Income Tax* **v.** *Harbhajanlal*, **204 ITR 361 and** *Commissioner of Income Tax, Gujarat* **v.** *Jayantilal Premchand Shah*, **211 ITR 111, relied on.**

B

Commissioner of Income Tax **v.** *Sankaraiah*, **113 ITR 313 and** *Arunachalam* **v.** *Commissioner of Income Tax*, **151 ITR 172, approved.**

Sahu Govind Prasad **v.** *Commissioner of Income Tax*, **144 ITR 851 and** *Commissioner of Income Tax* **v.** *Shri Manakram*, **183 ITR 382, held**
C **inapplicable.**

Balaji **v.** *Income Tax Officer Special Investigation Circle*, **[1962] 2 SCR 983 and** *Commissioner of Income Tax* **v.** *Sodra Devi*, **32 ITR 615, referred to.**

D

4. It is made clear that clauses (i) and (ii) of sub- section (1) of section 64, as they stood before April 1, 1976, have been merely interpreted. The facts of the individual cases have not been gone into. That is a matter for the authorities under the Act to enquire into and pronounce upon. [360-B]

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4234 (NT) of 1983 Etc. Etc.

From the Judgment and Order dated 29.10.80 of the Punjab & Haryana High Court in S.T.R. No. 153 of 1979.

F Dr. V. Gauri Shankar, Rajappa and S.N. Terdol for the appellants.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. A conflict of opinion among the High
G Courts on the meaning and interpretation of clauses (i) and (ii) of sub-section (1) of Section 64 (as they stood prior to 1st April, 1976) of the Income Tax Act, 1961 falls for resolution in this batch of appeals. Prior to April 1,, 1976 the said clauses along with the explanation read thus:

"(1). In computing the total income of any individual, there shall
H be included all such income as arises directly or indirectly

(i) to the spouse of such individual from the membership of the spouse in a firm carrying on a business in which such individual is a partner;

(ii) to a minor child of such individual from the admission of the minor to the benefits of partnership in a firm in which such individual is a partner;

Explanation : For the purpose of clause (i) the individual, in computing whose total income the income referred to in that clause is to be included, shall be the husband or wife whose total income (excluding the income referred to in that clause) is greater; and, for the purpose of clause (ii), where both the parents are members of the firm in which the minor child is a partner, the income of the minor child from the partnership shall be included in the income of that parent whose total income (excluding the income referred to in that clause) is greater, and where any such income is once included in the total income of either spouse or parent, any such income arising in any succeeding year shall not be included in the total income of the other spouse or parent unless the Income-tax Officer is satisfied, after giving that spouse or parent an opportunity of being heard, that it is necessary so to do".

We may made it clear, at the outset, that whatever we say hereinafter is relevant only to the aforesaid provisions contained in clauses (i) and (ii) of Section 64(1), i.e., to clauses (i) and (ii) as they obtained prior to April 1, 1976.

The sub-section opens with the words "in computing the total income of any *individual*", and provides for inclusion of the income arising directly or indirectly to persons specified in the sub-section, in the situation specified therein, in the total income of such individual. Clause (i) says that where the spouse of an individual is the member of a firm wherein the individual is a partner, the income of such spouse shall be included in the income of that individual. The Explanation contained in sub-section (i) says that among the spouses, the income of the spouse with lesser income shall be included in the income of the spouse having larger income. It does not matter whether the individual in whose income the income of the spouse is included is husband or wife. Clause (ii) says that if the minor child of such individual is admitted to the benefits of the partnership firm, in which

such individual is a partner, the income arising to such minor child shall be included in the income of such individual. The Explanation clarifies that where both the mother and father of a minor child are partners in the firm to benefits of which such minor child is admitted), the income of the minor child shall be included in the income of that parent whose total income (excluding the income referred to in clause (ii)) is greater.

No difficulty arises where the individual is a partner in the firm as an individual. In such a case, the income arising to his/her spouse from the membership of such partnership will be included in the income of that individual. Similarly where the partner of a minor child is a partner in his/her individual capacity, the income arising to the minor from his admission to the benefits of such partnership will be included in the income of that individual. Difficulty has arisen in a limited category of cases - and these are such cases - where the husband/father is a partner is a firm as the Karta of an Hindu Undivided Family (H.U.F.) and this is the only question considered in this Judgment. In such cases, the plea is that the husband/father is a partner in the firm not as an individual but as the representative of the H.U.F. and, therefore, clauses (i) and (ii) have no application.' Indeed, three lines of thought have emerged regarding the meaning and purport of clauses (i) and (ii). They are : (a) since the husband/father is a partner not as an individual but as the Karta of the H.U.F. i.e., as the representative of the H.U.F., clauses (i) and (ii) of sub-section (1) are not at all attracted; in such a case the income of the wife or the minor child, as the case may be, cannot be included in the individual income of the husband/father under the said clauses; (b) clauses (i) and (ii) of sub-section (1) operate and apply even where the "individual" happens to be the Karta of the H.U.F. In such a case, all that the clauses mean is that the income of the wife or the minor child, as the case may be has to be included in the income of the H.U.F. (c) even though the husband/father is a partner in a firm as the Karta of H.U.F., he does not cease to be an individual, which means that the income arising to the wife from the membership of such partnership firm - or the income arising to his minor child from being admitted to the benefits of such partnership firm - has to be included in the individual assessment of such husband/father. In other words, though the income of the wife/minor children cannot be included in the total income of the H.U.F., it has to be included in the individual assessment of such husband/father. It does not matter that such husband/ father has no separate individual income of his own; even

in such a case, a separate assessment has to be made upon him as an individual, in which assessment the income of the wife and the child arising on the aforesaid account has to be included.

We must immediately say that of the three lines of thought aforesaid, the second line of thought is foreclosed and is no longer available in view of the decisions of this Court in *L. Hirday Narain* v. *Income Tax Officer, A. Ward, Bareilly*, 78 I.T.R. 26, *Commissioner of Income-tax* v. *Harbhajanlal*, 204 I.T.R. 361 and *Commissioner of Income-tax, Gujarat* v. *Jayanthilal Premchand Shah*, 211 I.T.R. III. We may briefly refer to the ratio of each of these three decisions.

In *Hirday Narain*, the assessee, Hirday Narain, and his five sons were members of H.U.F. His accounting year relevant to the Assessment year 1951-52 was the year commencing on October 1, 1949 and ending with September 30, 1950. During the said accounting year, two events occurred. On November 19, 1949 there was a partition between Hirday Narain and his five sons and on April 8, 1950 another son was born to Hirday Narain. Over-ruling the objections of the assessee, the Income tax Officer made an assessment for the entire year in the status of H.U.F. On appeal, the Appellate Assistant Commissioner treated the sum of Rs. 18,520 as being the income of the former H.U.F. for the period October 1, 1949 to November 18, 1949 and directed its exclusion from the assessment. Pursuant to the directions of the Appellate Assistant Commissioner, the Income-tax Officer made two assessments - one assessing the sum of Rs. 18,520 as the income of the former H.U.F. for the period October 1, 1949 to November 18, 1949 and the other assessing the income of Rs. 1,06,156 for the remaining period as the income of the smaller H.U.F., applying, at the same time, Section 16(3)(a) (ii) of the Indian Income Tax Act, 1922. Hirday Narain then made an application for rectification under Section 35 of the 1922 Act claiming that in the matter of his assessment in the status of H.U.F., Section 16(3)(a)(ii) cannot be invoked. The Income-tax Officer accepted the plea but declined to give relief on another ground. The assessee thereupon approached the High Court under Article 226 which matter was ultimately carried to this Court, Shah, J., speaking for the Bench (comprising himself and Hegde, J.) held that inasmuch as a son was born to Hirday Narain after the partition on November 19, 1949 and before the end of the accounting year, he could not have been assessed as an individual for the period November 19, 1949 to September 30, 1950 and that

A he ought to have been assessed in the status of H.U.F. Once this is so, the learned Judge held, "Section 16(3)(a)(ii) plainly did not apply and the income of the minor children of Hirday Narain could not be included in the income of Hirday Narain assessed as a H.U.F. It may be mentioned that Section 16(3)(a)(ii) considered in the said judgment is in *pari mateira* with clause (ii) of Section 64(1) (before it was amended with effect from April I, 1976).

In *Harbhajanlal*, the question again was whether the income arising to the minor children from their being admitted to the benefits of a partnership firm could be included in the income of their father who was a partner in that partnership firm as the Karta of the H.U.F. Following the decision *Hirday Narain*, this Court (B.P. Jeevan Reddy, and S.P. Bharucha, JJ.) held that such inclusion was not permissible. No further contention was raised or considered in the said decision.

In *Jayanthilal Premchand Shah*, a Three-Judge Bench comprising S.P. Bharucha, S.C. Sen and K.S. Paripoornan, JJ. held that the income of the minors arising on account of their being admitted to the benefits of a partnership firm cannot be included in the total income of their father who was a partner of the said firm as the Karta of the H.U.F. The aforesaid decisions are binding upon us. In this view of the matter, only two alternatives survive, i.e. (a) and (c) mentioned above, and we have to see which one is the correct one.

A majority of the High Courts have adopted the first line of thought aforesaid. The High Courts taking this view are Andhra Pradesh, Gujarat, Punjab and Haryana, Delhi, Karnataka, Bombay, Madhya Pradesh, Kerala, Guwahati and Rajasthan. It is not necessary to refer to the reasoning of all these decisions. It would suffice to note the reasoning of two decisions, viz., *Commissioner of Income-Tax* v. *Sanka Sankaraiah* 113 I.T.R. 313, a decision of the Andhra Pradesh High Court, the first one to take this view and that of the Full Bench of the Karnataka High Court in *Arunachalam* v. *Commissioner of Income-tax*, 151 I.T.R. 172. In *Sanka Sankaraiah* it was held :

> "This Section (64(1)) applies only to the computation of total income of an individual. The expression 'individual' does not comprehend in its meaning the 'Karta' of a joint family. If it were the intention of the legislature that the expression 'individual' used

in Section 64 should also take in a Hindu undivided family, then it would have used the expression 'person' so as to include a Hindu undivided family and not the words 'spouse of such individual in clause (i)' or the words' 'a minor child of such individual in clause (iii)' or the words either spouse or parent' in the Explanation. This section aims at putting an end to the attempts of an individual to avoid or reduce the incidence of tax by transferring the assets to a spouse or minor child. Under this section, the husband's share of the profits of a firm, where husband and wife are both partners could be assessed in the wife's hands or vice versa, depending upon the fact whose total income is greater. The income of the minor child admitted to the benefits of the partnership is similarly to be included in the income of that parent whose total income is greater".

It is not necessary to state all the facts of the case except the following; the assessee, Sanka Sankaraiah, effected a partition between himself and his two minor sons by way of a Partial partition. The Tribunal accepted his plea that even after the said partial partition effected on April 9, 1967, the assessee constituted a smaller H.U.F., comprising himself, his wife and his minor daughter. The assessee and his wife constituted a partnership, to the benefits of which the two minor sons were admitted. The income received by the wife and the income received by the minor sons from the partnership firm was sought to be included in the individual income of the assessee which was objected to by him, whereupon the following question was referred for the opinion of the High Court :

"Whether, on the facts and in the circumstances of the case, the share incomes derived by the assessee's wife and minor children could be considered in the hands of the assessee- individual under section 64 of the Income-Tax Act, 1961?"

It is on those facts that the observations aforesaid were made by the High Court.

In *Arunachalam*, K. Jagannatha Shetty, J. (as he then was), speaking for the Full Bench of the Karnataka High Court pointed out, in the first instance, what, in his opinion, is the essential difference in tax liability between the Karta-partner and other partners of a firm and then proceeded to hold that the income accruing to wife/minor child cannot be

A included in the individual assessner/of the husband/father in such a situation. This decision considers cases of two different assessees. In the case of one assessee, his minor sons were admitted to the benefits of partnership of which he was a member as the Karta of his H.U.F. The other was a case where the Commissioner directed, under Section 263 of the Income Tax Act, 1961, that the share income of the wife and the minor sons of the B assessee be included in the total income of the assessee who was a partner in that firm as the Karta of H.U.F. The Full Bench held that the share income of the wife/minor children cannot be included in the individual assessment of the husband/father, for the reason that he is a partner not in his individual capacity but as the Karta of the H.U.F., i.e., in a repre- C sentative capacity.

The High Courts which have adopted the third line of though are Allahabad, Madras, Madhya Pradesh and Orissa. We may refer to the reasoning of the Full Bench of the Allahabad high Court in *Sahu Govind Prasad* v. *Commissioner of Income- tax*, 144 I.T.R. 851. The Full Bench D holds that where the Karta of a H.U.F. is a partner in the firm wherein his wife is also a partner and/or to the benefits of which his minor children are admitted, the income accruing to wife/minor children has to be included in the individual assessment of the husband/father though such income cannot be included in the income of the H.U.F. i.e., in the share income E received by the husband/father as the Karta of the H.U.F. The ratio of the Full Bench is to be found in the following observations :

> "A partner, being an individual, has a dual capacity - representative and personal. He may be a representative i.e., a Karta qua others F i.e., other than partners. But with his partners he functions in his personal capacity. The relationship between the partner-karta and the other partners is personal. He does not act with the other partners in his representative capacity. This position does not, and cannot change when the other partner is related to him as his wife or minor children. To repeat, Section 64 requires an individual and G his wife and/or minor children to be partners of each other. That is enough. Their other relationships *inter se* are not relevant. The fact that he is also the karta, guardian or trustee of benamidar, etc., is immaterial.

H An HUF is itself an assessable entity of unit. The income

earned by the karta is taxed in the hands of the HUF. No part of such income is computed in his individual assessment. When Section 64 speaks of 'computation of the total income of any individual', it ex hypothesis excludes from such computation, income which is assessable in the hands of the HUF. Section 64 does not deal with the share income of the karta from the firm. It is confined to the clubbing together of the share income of the spouse or minor children of the individual from the firm, with such other income of that individual status. It is thus clear that the share income of the karta from the partnership firm is not exigible to tax a second time under section 64.

In our opinion, the phrase 'in which such individual is a partner' occurring in Section 64 includes a human being who may be the karta of an HUF. This is what was held by this Court in *Madho Prasad's* case (1978) 112 ITR 492. With respect we agree with that decision".

In *Commissioner of Income-tax* v. *Shri Manakram*, 183 I.T.R. 382, the Madhya Pradesh High Court has pointed out that for including the income of the wife/minor children in the individual assessment of the husband/father under Section 64(1), it is not necessary that the husband/father should have separate individual income of his own. Even if he has no separate individual income, still the income of the wife/minor children has to be included by making a separate assessment on the husband/father in his individual capacity.

While the learned counsel for the Revenue commends to us the view taken by Allahabad High Court *et al* (what may be called the third line of thought), the learned counsel for the assessees etspouse the first line of thought accepted by the Andhra Pradesh, Karnataka and other High Courts mentioned above.

In the Indian Income Tax Act, 1922, as originally enacted, there was no provision like the one concerned herein. Section 16(3) providing for the same was introduced only in the year 1937. The constitutional validity of this provision was questioned in *Balaji* v. *Income-Tax Officer, Special Investigation Circle*, [1962] 2 SCR 983. It would be appropriate to refer to some of the reasons given by the Constitution Bench while upholding the

A validity. Subba Rao, J., speaking for the Court, observed, in the first instance, that the beneficial provision made in the Income-tax for distributing the profit made by the partnership firm among its partners also provided an effective device to evade taxation. "A husband or a father could nominally take his wife or his minor sons in partnership with him so
B that tax burden be lightened,..... This device enables an assessee to secure the entire income of the business but at the same time to evade income-tax which he would have otherwise been liable to pay." The learned Judge pointed out that said provisions was made pursuant to the recommendations made by the Income-tax Inquiry Commission, 1936 as a measure of plugging the loopholes in the Act. Inasmuch as the validity of
C the provision was questioned on the ground of violation of Article 14, the learned Judge examined the principles underlying the said Article and held that the provision which included the income derived by wife and or minor children alone in the income of the husband/father while not including the income of others does not suffer from discrimination. The learned Judge
D observed that the argument based upon violation of Article 14 ignores the object of the Legislation, viz., to prevent evasion of tax. Learned Judge observed: "A similar device would not ordinarily be resorted to by individuals by entering into partnership with persons other than those mentioned in the sub-section, as it would involve a risk of the third-party
E turning round and asserting his own rights. The Legislature, therefore, selected for the purpose of classification only that group of persons who in fact are used as a clock to perpetrate fraud on taxation." The learned Judge then dealt with the argument that there might be a genuine partnership between an individual and his wife and that such a situation is not
F saved by the said provision. He held : "In demarcating a group, the net was cast a little wider, but it was necessary, as any further sub-classification as genuine and non-genuine partnerships might defeat the purpose of the Act..... There is a greater scope for fraudulent evasion by constituting fictitious partnership along with one's wife and minor children than in a case of separate income of the spouses derived from different sources.....
G When the Legislature of this country, which is assumed to known the conditions of the people and their requirements, with the awareness of this particular widespread fraudulent device in the matter of evasion of taxes, made a law to prevent the said fraud, it is difficult for this Court in the absence of any counter-balancing circumstances to hold, on the analogy
H drawn from American decisions, that the need for such a law is not in

existence." The learned Judge also rejected the attack upon the constitutionality of the said provision based on Article 19(1)(g) holding that it constituted a reasonable restriction which was found necessary "to prevent the prevalent abuse, namely, evasion of tax by an individual doing business under a partnership nominally entered with his wife or minor children." The learned Judge added finally, "This mode of taxation may be a little hard on a husband or a father in the case of genuine partnership with wife or minor children, but that is offset, to a large extent, by the beneficent results that flow therefrom to the public, namely, the prevention of evasion of income-tax, and also by the fact that, by and large, the additional payment of tax made on the income of the wife or the minor children will ultimately be borne by them in the final accounting between them."

While enacting Section 64 of the Income-tax Act, 1961 the Parliament kept in view the decision of this Court in *Commissioner of Income Tax* v. *Sodra Devi*, 32 I.T.R. 615 and the report of the Direct Taxes Administration Committee 1958-59. Section 64 basically carried forward the idea in sub-section 3 of Section 16 of the Indian Income-Tax Act, 1922, no doubt, with certain modifications. One constant, however, remained, viz, the provisions contained in clauses (i) and (ii) of Section 64(1) were confined only to the partnership income. Now, what are the ingredients of the section? The opening words are "in computing the total income of any individual". Then it proceeds to say that in the total income of such individual shall be included the income of his spouse arising from the membership of such spouse in the partnership firm in which such individual is the partner. It proceeds further and says that the income arising to the minor children of such individual who are admitted to the benefits of partnership wherein such individual is a partner shall also be included in the total income of such individual. Now an individual can be a partner in a partnership first in his individual capacity or in the capacity of the Karta of a H.U.F. or, for that matter, in any other capacity, e.g., as a trustee. There may be a firm comprising an individual and his wife, to which their minor children are admitted. There can also be a firm comprising two or more individuals wherein the wife/wives of one or more of the partners are partners. The minor children of one or more of the partners may also have been admitted to the benefits of the partnership firm. In fact, there can be any number of situations where the wife is also a partner along with her husband in a partnership firm or where the minor children of an individual

A are admitted to the benefits of a partnership firm wherein that individual is a partner. So far as other partners in the partnership firm are concerned, they are not really concerned in what capacity a particular person is a partner, i.e., whether as an individual, as a karta, as a trustee or otherwise. To them, he is an individual, a person. This aspect however becomes B relevant as between the partner and those whom he represents in the partnership firm. To wit, where a person is a partner as the karta of a H.U.F., the capacity in which he is a partner in the partnership firm is relevant as between him and the other members of the H.U.F. For, the income the Karta receives as a partner is not his individual income; it is the income of the H.U.F. and he received it on behalf of the H.U.F. It is C for this reason that the income of the wife and minor children arising from their membership/admission to the benefits of partnership firm, is held not includible in the income of the H.U.F. since the total income of H.U.F. is not the total income of the individual (husband or father, as the case may be). For Section 64(1) to get attracted, it is necessary that the hus- D band/father should be a partner in a partnership firm as an individual, i.e., in his individual capacity. It is not attracted where he is a partner as the Karta H.U.F. to which such wife and/or minor children belong. This in the holding of the decisions of this Court in *Hirday Narain, Harbhajanlal* and *Jayantilal Premchand Shah*. It may not be quite apt to say that *vis-a-vis* the E members of the H.U.F., the karta is still an individual and, therefore, such income of wife and minor children should be included in the income of the karta derived as karta. Nor are we satisfied that such income of the wife and/or minor children should be included in the individual assessment of the karta. Indeed, the argument is that even if the karta has no individual F income of his own, even then the said income of the wife and children should be included in the husband/father's individual assessment by making such a separate assessment. This argument ignores the fact that the husband/father is a partner in the partnership firm not in his individual capacity but as the karta. It also ignores the clear language employed in clauses (i) and (ii). In each of these two clauses, clauses, the expression G "such individual" occurs twice. Firstly, the "individual" must be a partner in a firm and the wife and/or minor children of *such individual* must also be deriving income from such partnership firm (either on account of her membership or on account of being admitted to the benefits of partnership, as the case may be). For the purposes of clauses (i) and (ii), it is not his H capacity *vis-a-vis* other partners of the firm that is relevant but his capacity

vis-a-vis his wife and/or minor children. If this basic fact is ignored, anomalous results may follow as indicated by the Andhra Pradesh High Court in *Sanka Sankaraiah*.

The learned counsel for the Revenue says that if the above view is taken by this Court, the very objective underlying the said clauses - and emphasised in eloquent terms in *Balalji* - would be defeated. The result would be, learned counsel says, the income of, say the minor children arising from their being admitted to the benefits of a partnership firm can neither be included in the H.U.F.'s income nor can it be included in the individual assessment of the father in a case where the father is partner in the firm as the karta of that H.U.F. This confers an undue - and an unfair - advantage to Hindus among whom alone the concept of Hindu undivided family obtains. While members of other communities, among whom the concept of H.U.F. does not obtain, would be directly in the path of the said provisions, the Hindus would be escaping the rigour of the said provisions through the device of H.U.F., says the learned counsel. There is certainly a fair amount of force in this submission but this is an argument really against the very concept, and the permissibility of such concept, in the Income Tax Act. We are not unaware of the criticism that very often H.U.F. is being used to deny the state the tax legitimately due to it. But that is a larger question which does not arise in these cases. As a matter of fact, wherever the Parliament has thought it fit, it has intervened to checkmate the evil, e.g., sub-section (2) of Section 4 of the Gift-Tax Act inserted by Finance (No.2) Act, 1971 and sub-section (1A) of Section 4 of Wealth Tax Act inserted by the very same Finance Act. Similarly, sub-section (2) was introduced in Section 64 by the Finance Act, 1979 with effect from April 1, 1980. Then Explanation 3 was added by the Taxation Laws (Amendment) Act, 1975 with effect from April 1, 1976, but clauses (i) and (ii) in sub-section (1) remained untouched (except for the deletion of the words "of which such individual is a partner" in clause (iii) corresponding to clause (ii) until they were deleted by Finance Act, 1992 w.e.f. April 1, 1993 and insertion of sub-section (1A) - with which aspects we are not concerned herein. Suffice it to say that on the language employed in the sub-section and the clauses concerned herein, the view taken by it may possible be the only view possible. Majority of High Courts too have accepted this view. It cannot also be said that the view taken by us militates in any manner against the ratio of *Balaji* nor does it tend to defeat the

A object of the provisions as explained in the said decision.

We must make it clear that we have merely interpreted clauses (i) and (ii) of sub-section (1) of Section 64, as they stood before April 1, 1976. We have not gone into the facts of the individual cases before us. That is a matter for the authorities under the Act to enquire into and pronounce
B upon.

For the above reasons, we hold that where a person is a partner in a partnership firm not in his individual capacity but as the karta of the H.U.F., neither the income accruing to his wife on account of her being a partner in the same partnership firm *nor* the income accruing to his minor
C children on account of their being admitted to the benefits of such partnership firm, can be included in the total income of such person - neither in his individual assessment nor in the assessment of the H.U.F. Our holding is confined to the above situation alone.

D All the appeals are disposed of with the aforesaid enunciation of legal position. The Income-tax Tribunal or the other concerned authorities under the Act, as the case may be, shall pass orders in each of these individual cases in accordance with the above legal position.

No costs.

V.S.S. Appeals disposed of.