HIGH COURT OF KERALA

Bench: Dr. Justice A.K. Jayasankaran Nambiar & Mr. Justice Syam Kumar V.M.

Date of Decision: 3rd April 2024

I.T.A.No.48 of 2020 with Connected Cases

The Principal Commissioner of Income Tax, (Central), Kochi …Appellant

VERSUS

Gracy Babu, Adoor P.O, Pathanamthitta & Others …Respondent

Legislation and Rules:

Income Tax Act, 1961

Sections 132, 143(3), 153A, 153C, 194C, 55(2)

Sections of the Indian Trusts Act

Subject: Income tax appeals involving assessments related to the Carmel Educational Trust, focusing on remuneration for relinquishing trusteeship, compensation for construction, and donations received by another trust.

Headnotes:

Trustees' Compensation for Relinquishing Trusteeship - Amounts received by trustees of Carmel Educational Trust for relinquishing their trusteeship not considered capital receipts for tax purposes - These amounts treated as individual income and assessed under appropriate head - Trust deed does not authorize trustees to relinquish positions for consideration [Para 8].

Construction Work Compensation - Tribunal's findings on construction compensation to Gracy Babu and Jose Thomas upheld - Reliance on audited balance sheet of Believers Church and TDS payments made to Department [Para 12].

Donations to St. Thomas Education Trust - Donations received by St. Thomas Education Trust not treated as income for individual trustees - Tribunal's decision upheld [ITA No.6/2021, Para 13].

Decision: Appeals ITA Nos. 54/2020, 55/2020, 56/2020, 68/2020, and 6/2021 dismissed, favoring the assessee.

Appeals ITA Nos. 46/2020, 48/2020, 49/2020, and 51/2020 partly allowed by remand, except for remanded questions, answered against the revenue.

Appeal ITA No. 47/2020 allowed by remand.

Referred Cases:

- Sheikh Abdul Kayum and Others v. Mulla Alibhai and Others – AIR 1963 SC 309
- Cadell Weaving Mill Co. (P.) Ltd. (273 ITR 1)
- CIT v. B.C. Srinivasa Shetty [1981] 128 ITR

Representing Advocates:

For Appellant: Sri P.K. Ravindranatha Menon (Sr.), Sri Jose Joseph, SC for Income Tax

For Respondent: Sri Anil D. Nair (Sr.), Sri R. Sreejith, Smt. Telma Raju, Sri Sangeeth Joseph Jacob, Smt. Cristina Anna Paul, Sri P.K. Biju, Smt. Edathara Vineeta Krishnan

J U D G M E N T

Dr. A.K. Jayasankaran Nambiar, J.

As all these appeals filed by the Revenue arise out of a common order dated 30.09.2019 of the Income Tax Appellate Tribunal [hereinafter referred to as the 'Tribunal'], Cochin Bench, they are taken up for consideration together and disposed by this common judgment. For the sake of convenience, the details of the various appeals with reference to the assessee and the assessment year concerned, as also co-relating it to the appeals that were filed before the Tribunal, are provided in tabular form below:-

Sl. No.	ITA No.	Assessee	Assesssment Year	Appeal before the Income Tax Appellate Tribunal
1	I.T.A.No.48/2020	Smt.Gracy Babu	2009-10	I.T.A.No.208/2019
2	I.T.A.No.46/2020	Sri.Jose Thomas	2009-10	I.T.A.No.211/2019
3	I.T.A.No.47/2020	Smt.Reena Jose	2009-10	I.T.A.No.207/2019
4	I.T.A.No.49/2020	Smt.Gracy Babu	2010-11	I.T.A.No.209/2019
5	I.T.A.No.51/2020	Sri.Jose Thomas	2010-11	I.T.A.No.212/2019
6	I.T.A.No.54/2020	Smt.Gracy Babu	2011-12	I.T.A.No.239/2019
7	I.T.A.No.55/2020	Smt.Gracy Babu	2011-12	I.T.A.No.210/2019
8	I.T.A.No.56/2020	Sri.Jose Thomas	2011-12	I.T.A.No.213/2019

9	I.T.A.No.68/2020	Sri.Jose Thomas	2011-12	I.T.A.No.238/2019
10	I.T.A.No.6/2021	M/s.Carmel Educational Trust	2010-11	I.T.A.No.310/2019

2. The brief facts necessary for disposal of these appeals are as follows:

The Carmel Educational Trust, Adoor was constituted by a registered trust deed dated 14.08.2001. It is engaged in running educational institutions imparting education in the subjects of Engineering and Management. The 12 trustees of the Trust belong to three closely related family groups, and their details are as follows:

(1) Sri.Babu P. Thomas, his wife Smt.Gracy Babu and their two major sons.

(2) Sri.Jose Thomas, his wife Smt.Reena Jose and their major son and daughter.

(3) Sri.P.J.Paulose, his wife Smt.Lizzy Paulose and their two major daughters.

Due to difficulties in managing the College, and also due to the personal differences, the trustees decided to discontinue the business and entered into an agreement with the Believers Church on 10.03.2009, whereby, all the existing trustees resigned from their trusteeship and simultaneously, new trustees nominated by the Believers Church were inducted. The agreement between the parties also provided for payment of Rs.37.5 crores to the erstwhile trustees for settling their liabilities as well as completing certain construction activities that had been commenced by them prior to the agreement. The agreement also provided for sale of 55.15 acres of land belonging to some of the erstwhile trustees for a consideration of Rs.12.50 crores.

3. A search under Section 132 of the Income Tax Act[hereinafter referred to as the “I.T. Act”] was conducted at the residence of the Sri.Jose Thomas, Smt.Gracy Babu and Sri.P.J.Paulose on 04.03.2009 and certain documents were seized. An unsigned draft agreement dated 23.02.2009 was found which indicated that the amount envisaged for settlement of liability was Rs.43.50 crores and that the value of the rubber estate extending to 55.15 acres of land was Rs.6.50 crores. Certain other documents relating to fee

collection from students in excess of what was fixed by the Government, and investment details of trustees etc. were also seized, but those particulars are not of any concern to us in these appeals.

4. Assessments were completed under Section 143(3) readwith Section 153A for the assessment years 2003-04 to 2008-09 and under Section 143(3) for the assessment year 2009-10 in relation to the persons who were searched, namely, Gracy Babu, Jose Thomas and P.J. Paulose, who were the heads of the respective trustee families. No assessments in consequence to search were made in relation to other family members who were trustees by invoking provisions of Section 153C of the I.T. Act. Placing reliance on the seized documents, the Assessing Authority found that the erstwhile trustees had in fact received approximately Rs.37.5 crores towards consideration for relinquishing their trusteeship but they had camouflaged these receipts under different heads by showing the receipt of Rs.14.55 crores towards reimbursement of amounts paid by assessees for clearing outstanding debts and liabilities of the Trust as on the date of the agreement, and also for completing certain ongoing constructions that had been undertaken by them. An amount of Rs.12.5 crores was shown as received by way of consideration for sale of approximately 56 acres of rubber plantation to the Believers Church.

Re: I.T.A.Nos.46/2020, 47/2020, 48/2020, 49/2020, 51/2020:

5. In I.T.A.Nos.46/2020, 48/2020, 49/2020 and 51/2020, thefollowing substantial questions of law have been raised:

(i) Whether the trustees of a public charitable trust have a right to trusteeship and if they need to be compensated for relinquishing such right ?

(ii) Whether the trusteees are entitled to such benefits from the trustother than remuneration for services rendered by them ?

(iii) Whether the ITAT was right in law in deleting the addition of theamount received by the trustees as 'income from other sources', in the light of the view that no trustee is entitled for a right of trusteeship ?

(iv) Whether the trustees can modify the trust deed and signagreements, subsequent to search, as an afterthought, to suit their needs and use it to their advantage in the guise of tax planning and is not such a conduct one of absolute lack of trust ?

(v) Whether agreements signed subsequent to search have anysanctity, as it had been done as an afterthought to suit the needs of the delinquent assessees and to evade tax ?

(vi) Whether mere deduction of tax at source on an amount paid issufficient to establish that alleged service is rendered, in respect of the amount paid ?

(vii) Whether payment made to erstwhile trustees without servicesactually rendered by them, will fall outside the ambit of Sec.13 ?

(viii) Whether mere book addition in the asset side of the balance sheet is sufficient to prove that asset has actually come into being, even if the same is not substantiated by bills or vouchers?

6. In I.T.A.No.47/2020, the following substantial questions of law have been raised:

(i) Whether the trustees of a public charitable trust have a right to trusteeship and if they need to be compensated for relinquishing such right ?

(ii) Whether the trusteees are entitled to such benefits from the trustother than remuneration for services rendered by them ?

(iii) Whether the ITAT was right in law in deleting the addition of theamount received by the trustees as 'income from other sources', in the light of the view that no trustee is entitled for a right of trusteeship ?

(iv) Whether the trustees can modify the trust deed and signagreements, subsequent to search, as an afterthought, to suit their needs and use it to their advantage in the guise of tax planning and is not such a conduct one of absolute lack of trust ?

7. The additions to the income of the trustees by way of excess consideration received for the sale of the rubber plantation was made in

relation to Jose Thomas, Gracy Babu and Reena Jose for the assessment years 2009-10 [for all three] and 2010-11 [for Jose Thomas and Gracy Babu]. While the Assessing Authority and the First Appellate Authority had found that the excess sale consideration received by the said assessees was in fact amounts towards consideration paid by the Believers Church for their relinquishment of their trusteeship in the Carmel Educational Trust and was liable to be assessed in their hands, the Tribunal, in the order impugned in these appeals, found otherwise. The reasoning of the Tribunal is found in paragraphs 11.4 to 11.8, which read as follows:

"11.4 We have heard the rival submissions and perused the record. In the present case, there was unsigned Agreement dated 23/02/2009 wherein the sale consideration was shown at Rs.6.5 crores for sale of rubber plantation. Later as per registered agreement, royed deed, it was changed to Rs.12.5 crores. In other words, in draft the sales consideration was at Rs. 15 lakhs per acre. However, in the deed the sales consideration was shown at Rs 25,40,400/- per acre. Thus there was different of amount of Rs.15 lakhs per acre. This difference cannot be considered as a receipt for sale of agricultural property since a similar property was sold by trustees at around Rs.15 lakhs per acre. According to the Department, the assessee adopted colourable devices to receive the amount from Believers Church by way of inflating the value of rubber estate in the sale deed executed by the assesses since the sale of rubber plantation, being agricultural land is exempted from tax. The Ld..AR made an alternative argument that even ifit is presumed that the consideration was received from Believers Church which was for relinquishment of trusteeship in the Trust wherein these persons were trustees, it is exempted and not taxable in the hands of the trustees. In our opinion, there is merit in the argument of the Ld. AR that even if it is a capital receipt, it is to be treated as consideration for relinquishment of trusteeship in the Trust and the cost of acquisition is nil and hence, the gainis not taxable on its transfer. The assesses are life time trustees in Carmel Educational Trust which is a public charitable trust. This Trust was taken over by Believers Church, Thiruvalla vide agreement dated 23/02/2009 and by that agreement all the assets and liabilities of Carmel Educational Trust were transferred to Believers Church and the assesses ceased to be the trustees of Carmel Educational Trust. According to the CIT(A), the right of trusteeship is not legally enforceable right and it cannot be brought into the ambit of definition of "capital asset" and the consideration received on transfer cannot be treated as 'income from capital

gain'. The CIT(A) treated it as "income from other sources" so as to tax the same. This finding of the CIT(A) is not proper. The assesses herein were holding trusteeship in the Carmel Educational Trust which was relinquished in favour of trustees of Believers Church, and this right is nothing but a capital asset. Had the Carmel Educational Trust survived as it is, then they have the right to continue as a Trustee throughout their life time. Once it has ceased to exist and relinquished the right of trusteeship in favour of the new trustees in Believers Church, the consideration received for such relinquishment is nothing but a capital receipt and gain on such transaction cannot be considered as “income from other sources”.

11.5 The contention of the Ld. AR is that since there is no cost of acquisition, it is not possible to compute capital gain as section 55(2) of the I.T. Act does not include this kind of asset as capital asset. For better understanding, we will examine the provisions of section 55(2) of the I.T. Act.

S. 55 (2) For the purposes of sections 48 and 49, "cost of acquisition",-

(a) in relation to a capital asset, being goodwill of a business or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carnage permits or loom hours -

(i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price: and in any other case not being a case falling under sub-clauses (i) to (iv) of sub-section (1) of section 49shall be taken to be nil;

(aa) in a case where, by virtue of holding a capital asset, being a share or any other security, within the meaning of clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereafter in this clause referred to as the financial asset), the assessee-

(A) becomes entitled to subscribe to any additional financial asset; or

(B) is allotted any additional financial asset without any payment, then, subject to theprovisions of sub-clauses *(i)* and *(ii)* of clause (b) -

(i)in relation to the original financial asset, on the basis of which the assesseebecomes entitled to any additional financial asset, means the amount actually paid for acquiring the original financial asset;

(ii) in relation to any right to renounce the said entitlement to subscribe to thefinancial asset, when such right is renounced by the assessee in favour of any person, shall be taken to be *nil* in the case of such assessee;

(iii) in relation to the financial asset, to which the assessee has subscribed on the basisof the said entitlement, means the amount actually paid by him for acquiring such asset; and

(iiia) in relation to any financial asset purchased by any person in whose favour the right to subscribe to such asset has been renounced, means the aggregate of the amount of the purchase price paid by him to the person renouncing such right and the amount paid by him to the company or institution, as the case may be, for acquiring such financial asset;

(ab) in relation to a capital asset, being equity share or share allotted to a shareholder of a recognised stock exchange in India under a scheme for demutilisation or corporatisation approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), shall be the cost of acquisition of his original membership of the exchange:

Provided that the cost of a capital asset, being trading or clearing rights of the recognised stock exchange acquired by a shareholder who has been allotted equity share or shares under such scheme of demutualisation or corporatisation, shall be deemed to be nil;

(b) in relation to any other capital asset -

(i)where the capital asset become the property of the assessee before the 1" day ofApril, 1981, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1 st day of April, 1981, at the option of the assessee;

(ii) where the capital asset became the property of the assessee by any of the modesspecified in sub-section (1) of section 49, and the capital asset became the property of the previous owner before the 1 day of April, 1981, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1 day of April, 1981, at the option of the assessee;

(iii) where the capital asset became the property of the assessee on the distribution ofthe capital asset of a company on its liquidation and the

assessee has been assessed to income tax under the head "Capital gains" in respect of that asset under section 46, means the fair market value of the asset on the date of distribution;

(v) where the capital asset, being a share or a stock of a company, became theproperty of the assessee on -

(a) the consolidation and division of all or any of the share capital of the company into shares of larger amount** ** **"

11.6 A bare reading thereof would indicate how the legislature contemplatesthat come chargeable under head "capital gains" has to be computed. The mode of computation is laid down by section 48, whereas by section 49, the cost with reference to certain modes of acquisition has been set out. For the purposes of both sections, the legislature has devised the scheme in section 55 and subsection (2) thereof clarifies that for the purposes of sections 48 and 49. "cost of acquisition" in on to a capital asset, being goodwill of a business or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours has to be computed. In this case, the assessee stated that nothing of these things would cover the relinquishment of trusteeship and in the absence of a specific provision, the income shall be taken as Nil.

11.7 In the case of Cadell Weaving Mill Co. (P.) Ltd. (273 ITR 1), the argumentbefore the Supreme Court was arising out of the return of income of the assessee. The amount received by the asessee on surrender of tenancy right, whether liable to capital gains under section 45 of the Income Tax Act, 1961 was involved in that appeal before the Supreme Court. There was a lease agreement entered into in the year 1959 for 50 years, under which, the annual rent was paid by the Lessee to the Lessor. The lease would have continued till 2009. However, during the relevant previous year i.e. in March, 1986, the Assessee surrendered tenancy rights prematurely and received a sum of 35 lacs. That sum was credited to the reserve and surplus account, which was disallowed by the Assessing Officer, holding that it was income from other sources. The assessee appealed to the Commissioner, who came to the conclusion that the assessee was liable to pay tax on capital gains on the amount of Rs.35 lacs after deducting an amount of Rs.7 lacs as cost of acquisition. The Department and assessee challenged the decision before the Tribunal and the Tribunal relied upon the Judgment of the Supreme Court in the case of CIT v. B.C. Srinivasa Shetty [1981] 128 ITR

and the amendment to section 55(2) of the Income Tax Act and held that the assessee did not incur any cost to acquire the leasehold rights and that if at all any cost had been incurred it was incapable of being ascertained. It was therefore held that since the capital gains could not be computed as envisaged in section 48 of the Income Tax Act, therefore, capital gains earned by the assessee, if any, was not exigible to tax. The Department's Appeal to the High Court was dismissed and that is how it approached the Hon'ble Supreme Court. In dealing with the rival contentions, the Hon'ble Supreme Court held as under:

'(8) In 1981 this court in CIT v. B.C. Srinivasa Shetty(1981) 128 ITR 294; (1981) 2 SCC 460 held that all transactions encompassed by section 45 must fall within the computation provisions of section 48. If the computation as provided under section 48 could not be applied to a particular transaction, it must be regardedas "never intended by section 45 to be the subject of the charge". In that case, the court was considering whether a firm was liable to pay capital gains on the sale of its goodwill to another firm. The court found that the consideration received for the sale of goodwill could not be subjected to capital gains because the cost of its acquisition was inherently incapable of being determined. Pathak J. as his Lordship then was, speaking for the court said (page 300)

"what is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possess the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class it may, on the facts of a certain case, be acquired without the payment of money"

(9) In other words, an asset which is capable of acquisition at a cost would beIncluded within the provisions pertaining to the head "Capital gains" as opposed with the acquisition of which no cost at all can be principle propounded in B.C. Srinivasa Shetty (1981) 128 ITR 294 (SC)has been allowed by several High Courts with reference to Surrender of tenancy rights, the consideration received on (see among others Bawa Shiv Charan Singh v. CIT (1984) 149 ITR 29 (Delhi); CIT v. Mangtu Ram Jaipuria (1991) 192 ITR 533 (Cal); CIT v., Joy Ice-Creams (Bangalore) P. Ltd. (1993) 201 ITR 894 (Karn.); CIT v. 987) 165 ITR 386 (AP); CIT v. Markapakula Agamma (1987) Merchandisers P. Ltd. (1990) 182 ITR 107 (Ker.) In all these decisions, the several High Courts held that if the cost

of acquisition of tenancy rights cannot be determined, the consideration received by reason of surrender of such tenancy rights could not be subjected to capital gains tax.

(10) According to a circular issued by the Central Board of Direct Taxes (CircularNo. 684 dated 10th June, 1994-(1994) 208 ITR (St.) 8 it was to meet the situation created by the decision in B.C. Srinivasa Shetty (128 ITR 294) (SC) and the subsequent decisions of the High Court that the Finance Act, 1994, amended section 55(2) to provide that the cost of acquisition of, inter alia, a tenancy right. would be taken as nil. By this amendment, the judicial interpretation put on capital assets for the purposes of the provisions relating to capital gains was met. In other words, the cost of acquisition would be taken as determinable but the rate would be nil.

(11) The amendment took effect from 1 April, 1995 and accordingly applied, inrelation to the assessment year 1995-96 and subsequent years. But till that amendment in 1995, and therefore covering the assessment year in question, the law as perceived by the Department was that if the cost of acquisition of a capital asset could not in fact be determined, the transfer of such capital asset would not attract capital gains. The appellant now says that CIT v. B.C. Srinivasa Shetty's case [1981] 128 ITR 294 (SC) would have no application because a tenancy right cannot be equated with goodwill. As far as goodwill is concerned, it is impossible to specify a date on which the acquisition may be said to have taken place. It is built up over a period of time. Diverse factors which cannot be quantified in monetary terms may go into the building of the goodwill, some tangible some intangible. It is contended that a tenancy right is not a capital asset of such a nature that the actual cost on acquisition could not be ascertained as a natural legal corollary.

(12) In A. R. Krishnamurthy v. CIT (1989) 176 ITR 417 this court held that itcannot be said conceptually that there is no cost of acquisition of grant of the lease. It held that the cost of acquisition of leasehold rights can be determined. In the present case, however, the Department's stand before the High Court was that the cost of acquisition of the tenancy was incapable of being ascertained. In view of the stand taken by the Department before the High Court, we uphold the decision of the High Court.

(13) In United Commercial Bank Ltd. v. CIT (1957) 32 ITR 688 (SC), it was heldthat the heads of income provided for in the sections of the Indian Income Tax Act, 1922 are mutually exclusive and where any item of income falls specifically under one head, it has to be charged under that head and no other. In other words, income derived from different sources falling under a specific head has to be computed for the purposes of taxation in the manner provided by the appropriate section and no other. It has been further held by this court in East India Housing and Land Development Trust Ltd. v. CIT (1961) (42 ITR 49) that if the income from a source falls within a specific head, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head. (See also CIT v. Chugandas and Co. (1965) 55 ITR 17 (SC).

(14) Section 14 of the Income Tax Act, 1961 as it stood at the relevant timesimilarly provided that "all income shall for the purposes of charge of income tax and computation of total income be classified under six heads of income," namely:-

(A) Salaries;

(B) Interest on Securities;

(C) Income from house property;

(D) Profits and gains of business or profession;

(E) Capital gains;

(F) income from other sources unless otherwise, provided in the Act.

(15) Section 56 provides for the chargeability of income of every kind which hasnot to be excluded from the total income under the Act, only if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E. Therefore, if the income is included under any one of the heads, it cannot be brought to tax under the residuary provisions of section 56.

(16) There is no dispute that a tenancy right is a capital asset the surrender ofwhich would attract section 45 so that the value received would be a capital receipt and assessable if at all only under item E of section 14. That being so, it cannot be treated as a casual or non-recurring receipt under section 10(3) and be subjected to tax under section 56. The argument of the appellant that even if the income cannot be chargeable under section 45, because of the inapplicability of the computation provided under section 48, it could still impose tax under the residuary head is thus unacceptable. If the income cannot be taxed under

section 45, it cannot be taxed at all. (See S. G. Mercantile Corporation P. Ltd. v. CIT (1972) 83 1TR 700 (SC).

(17) Furthermore, it would be illogical and against the language of section 56 tohold that everything that is exempted from capital gains by the statute could be taxed as a casual or non-recurring receipt under section 10(3) read with section 56. We are fortified in our view by a similar argument being rejected in Nalinikant Ambalal Mody v. S.A.L. Narayan Row,CIT (1966) 61 ITR 428 (SC)".

11.8 Thus, the conclusion of the Supreme Court is that an asset which is capable of acquisition at a cost would be included within the provisions pertaining to the head "Capital gains" as opposed to assets in the acquisition of which no cost at all can be conceived. There was no cost of acquisition, which was determined and on the basis of which the Assessing Officer could have proceeded to levy and assess the gains derived as capital gains. Sub-section (2) of section 55 clause (a) having been amended, there is no stipulation with regard, to relinquishment of trusteeship. However, even in the case of tenancy right, the view taken by the Supreme Court, after the provision was substituted w.e.f. 1st April, 1995, is as above, which is squarely applicable to the assessees' case also. The further argument of the Ld. AR is that the relinquishment of trusteeship cannot be brought within the tax net though it was capable of being transferred. The Supreme Court held that it must be capable of being acquired at a cost or that has to be ascertainable, then only transfer of capital asset is subject to tax. A specific insertion would therefore be necessary so as to ascertain its case for computing the capital gains. Since the assessee had not incurred any cost of acquisition in respect of gain on account of relinquishment of trusteeship in Carmel Educational Trust, it cannot be brought to tax as capital gains. Accordingly, we hold that capital receipt accrued to the assessee in AY 2009-10 and in that assessment year on relinquishment of trusteeship, which being a capital asset was acquired without any cost of acquisition, the same cannot be brought to tax as held by the Supreme Court in the case of B.C. Srinivasa Shetty (supra). This ground of appeal of the assesses is allowed."

8. We find ourselves unable to accept the finding of the Tribunal that the amounts received by the assessees as consideration for relinquishment of their trusteeship would qualify as a capital receipt for the purpose of the I.T. Act, and further that in the absence of any statutory provision under the I.T. Act that provides for a determination of the cost of acquisition of the asset,

the capital gains cannot be assessed. A perusal of the trust deed in the instant cases does not indicate that any power was conferred on the trustees to relinquish their position as trustees *en banc*. Rather, as noticed by the Supreme Court in **Sheikh Abdul Kayum and Others v. Mulla Alibhai and Others and Others – [AIR 1963 SC 309],** a person who is appointed as trustee is not bound to accept the trust, but having once entered upon the trust he cannot renounce the duties and liabilities except with the permission of the court or with the consent of the beneficiaries or by the authority of the trust deed itself. The relevant portion of the said decision reads as under:

(16) There cannot, in our opinion, be any doubt about the correctness of the legal position that trustees cannot transfer their duties, functions & powers to some other body of men and create them trustees in their own place unless this is clearly permitted by the trust deed, or agreed to by the entire body of beneficiaries. A person who is appointed a trustee is not bound to accept the trust; but having once entered upon the trust he cannot renounce the duties and liabilities except with the permission of the Court or with the consent of the beneficiaries or by the authority of the trust deed itself. Nor can a trustee delegate his office or any of his functions except in some specified cases. The rules against renunciation of the trust by a trustee and against delegation of his functions by a trustee are embodied, in respect of trusts to which the Indian Trusts Act applies, in Ss.46 and 47 of that Act.
These sections run thus:-

"46. A trustee who has accepted the trust cannot afterwards renounce it except (a) with the permission of a principal Civil Court of Original Jurisdiction, or (b) if the beneficiary is competent to contract, with his consent, or (c) by virtue of a special power in the instrument of trust.

47. A trustee cannot delegate his office or- any of his duties either to a cotrustee or to a stranger, unless (a) the instrument of trust so provides, or(b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation."

(17) It is true that S. 1 of the Indian Trusts Act makes provisions of the Act inapplicable to public or private religious or charitable endowments; and so, these sections may not in terms apply to the trust now in question. These sections however embody nothing more or less than the principles

which have been applied to all trusts in all countries. The principle of the rule against delegation with which we are concerned in the present case, is clear; a fiduciary relationship having been created, it is against the interests of society in general that such relationship should be allowed to be terminated unilaterally. That is why the law does not permit delegation by a trustee of his functions, except in cases of necessity or with the consent of the beneficiary or the authority of the trust deed itself; apart from delegation "in the regular course of business", that is, all such functions which a prudent man of business would ordinarily delegate in connection with his own affairs.

(18) What we have got in the present case is not delegation of some functions only, but delegation of all functions and of all powers and is nothing short of abdication in favour of a new body of men. Necessarily there is also the attempt by the old trustees to divest themselves of all properties vested in them by the settlor and vesting them in another body of persons. We know of no principle of law and of no authority which permits such abdication of trust in favour of another body of persons.

(19) In the deed itself there is no thing which contemplates or allows such an abdication and the substitution of the old trustees by a new body of trustees. It is necessary in this connection to consider the terms of Cl. 5 of the trust deed, That clause is in these words:-

"5. All the aforesaid trustees shall be entitled to govern, manage and administer the affairs of the school above. These trustees shall have the power of framing rules and regulations from time to time for the benefit and the efficient running of the school, and they shall have the power to appoint new trustees from time to time in accordance with the rules and regulations on behalf hereof. All the movable and immovable properties connected with the said school shall come to vest in the trustees and they shall be managed and administered in accordance with the rules and regulations framed on that behalf. The trustees for the time being shall have the power to alter and cancel the rules and regulations and to frame new ones instead thereof at the time when necessary. The treasurer shall have the power to open the cash account in some reliable bank and he shall always arrange for cash dealings to the benefit of the said school in accordance with the holy law of Islam. (Shariat)."

(20) The provision for the appointment of new trustees cannot by any stretch of imagination be held to mean the substitution of the old body

of trustees by a new body. That provision only permits the old trustees to add to their number. Nor does the power to frame rules and regulations for the benefit and efficient running of the school authorise the trustees to give up the management of the school themselves or to divest themselves of the properties entrusted to them by the trust deed and vest them in other persons. We are satisfied therefore that Cl. 5 of the trust deed does not in any manner authorise the trustees appointed by deed to abdicate in favour of another body of persons or to constitute that body as trustees in their own place. (*emphasis supplied*)

(21) There is no question here also of the beneficiary, i.e., the school consenting to such abdication. There is therefore no escape from the conclusion that the act of the trustees, who were appointed by the trust deed, in handing over the management of the school to the Hakimia Society and the properties of the school to the members of the governing body of the Hakima Society was illegal and void in law. The members of the Society or the members of the governing body did not therefore become trustees in respect of the properties which are covered by the Burhanpur trust."

9. We are therefore of the view that the *en banc* resignation/relinquishment by the assessees, of their position as trustees of the Carmel Educational Trust, that too for a consideration, cannot get the imprimatur of this Court. The consideration received by them for such relinquishment cannot be treated as a capital receipt for the purposes of assessing the same under the head of capital gains. The consideration will have to be treated as the individual income of the assessees and assessed accordingly under the appropriate head. We therefore set aside the said findings in the impugned order of the appellate tribunal and remand the matter back to the tribunal to pass a fresh order on this issue in the light of our findings above.

10. In relation to Jose Thomas and Gracy Babu, for the assessment years 2009-10 and 2010-11, the Assessing Officer had also found that they had both been in receipt of Rs.34 lakhs and Rs.4.50 crores each by way of reimbursement for amounts paid by them towards civil constructions and constructions of buildings on behalf of the Trust up to the date of the

agreement entered into with Believer's Church. The Assessing Officer found that these amounts were in fact nothing but amounts received as consideration in lieu of relinquishment of trusteeship, and hence, had to be brought to tax in their individual hands. In appeals before the First Appellate Authority, the Commissioner of Income Tax (Appeals) [CIT (A)] found that the evidence obtained in the course of search proceedings reveal that no construction work had actually been undertaken by the said assessees or any of the trustees, and hence, the payments shown as contractual receipts were nothing but payments received for voluntary relinquishment of trusteeship in favour of certain identified individuals. The CIT (A) also found that there was a credit of Rs.8.68 lakhs in the books of accounts of Carmel Educational Trust which had gone into the TDS account of Gracy Babu for assessment year 201112 and had not been claimed by her and hence the protective addition in the hands of the assessee for assessment year 2011-12 was reduced from Rs.4.84 crores to Rs.8.68 lakhs. He however sustained the substantive addition of Rs.34 lakhs and Rs.4.50 crores for the assessment years 2009-10 and 2010-11 respectively in the case of both the assessees.

11. The findings of the Tribunal on the above issue are in paragraphs 12.7 and 12.8 of the impugned order and read as follows:

"12.7 We have heard the rival submissions and perused the record. The amounts of Rs.34,00,000/- in AY 2009-10 and Rs.4.50 crores in AY 201011 each received by Gracy Babu and Jose Thomas from which is said to be towards the on-going construction work as mentioned in clause 5 of the agreement dated 10/03/2009 and pages 4 & 5 of the deed of agreement dated 01/06/2010 entered into between Believers Church and Gracy Baby and her two sons and Jose Thomas and his three family members. The parties to the agreement (7 persons) together had completed the construction in the F.Y. 2010-11 as evidenced by clause 2 of the agreement dated 01/06/2010 for a total amount of Rs.9.68 crores and vide clause 3 of the said agreement it was agreed to appropriate the contract amount from the amount already paid to the parties. Contrary to this, the Assessing Officer had relied on the unsigned agreement and the agreement dated 10/03/2009, but had ignored the agreement dated 01/06/2010 which confirmed the construction. Clause 5 of the agreement dated 10/03/2009 reads as follows:

"5. It is agreed by the first and second parties together that they with the help of their Chartered Accountants shall prepare all the debts and

liabilities during the above said period of within six months since from the execution of this agreement in order to clear it by receiving the above said amount of 37.50 crores (Rupees thirty seven Crores and Fifty lakhs only) in different instalments and the first parties agree that they will release such funds without any delay as per the demand of the second parties. It is further agreed by the second parties that they shall complete the ongoing constructions of buildings, landscape, hostels, play grounds etc. with approve estimates and supporting bills within the said period and the 1st party shall release the said amount on the basis of such records from the said amount of Rs.37.50 Crores (Rupees Thirty seven Crores and Fifty lakhs only) proportionately to each three groups among the 2nd parties."

Clause 2 to 6 of the agreement dated 01/06/2010 reads as under:

"2. The statement of debts and liabilities as prepared pursuant to clause 5 of the agreement does not disclose any debts or liability as on the date of agreement and the 2nd party is not eligible for any further amount for the said purpose as envisaged in the agreement dated 10/03/2009.

3. The 2nd Parties i.e. parties 1 to 3 and Parties 8 to 11 in the agreement dated 10-03-2009 can appropriate from the payment of Rs.9.68 Crores already made to them, subject to deduction of tax at Source under section 194C of the Income Tax Act, towards the cost of the said constructions as per clause above which will be accounted by the first party in the books of accounts of the Trust.

4. The 2nd party i.e. parties 1 to 3 and 8 confirm that they have not further claim from the amount of Rs.3.75 crores as per clause 4 of the agreement other than the amount already appropriated towards the cost of construction.

5. The 2nd parties 1 to 3 and 8 to 11 will settle the accounts in respect of the balance amount due to the 1st party from the payment of Rs.9 crores in the event if requires so.

6. The 2nd party i.e. parties 1 to 3 and (8, 9, 10 and 11) in the said agreement has undertaken the construction as per clause 5 of the Deed dated 10.03.2009, incurring a cost of Rs.9.68 Crores for which the statement will be filed by the said parties 1 to 3 and 8 to 10 to the first party in the agreement dt. 10.03.2009 within one month from today."

12.8The Believers Church had disclosed this construction in its Balance Sheet as on 31/03/2010 and 31/03/2011. Being so, there was construction activity and the Believers Church paid the contract amount to these two assessees. By any stretch of imagination, it cannot be considered as an amount paid towards relinquishment of trusteeship in Carmel Educational Society. In our opinion, it is appropriate to estimate the income from construction contract amount at 8% for these assessment years. Directed accordingly. Thus the appeals of the assessee in ITA Nos.208, 209, 210 & 211/Coch/2019 are partly allowed."

12. Although the learned counsel for the revenue strenuouslyargued that the Tribunal erred in not finding that the consideration received by the assessees was in fact a part of the remuneration for the relinquishment of their trusteeship in the Carmel Educational Trust, we find no evidence to support such a contention. As the Tribunal has relied on the audited balance sheet of the Believers Church and the TDS payments made to the Department in relation to the payments made to the assessees, we see no reason to interfere with the aforesaid finding of the Tribunal.

I.T.A.No.6/2021:

13. In I.T.A.No.6/2021, the following substantial questions oflaw have been raised:

(i) Whether agreements signed subsequent to search have any sanctity, as it had been done as an afterthought to suit the needs of the delinquent assessees and to evade tax ?

(ii) Whether mere deduction of tax at source on an amount paid is sufficient to establish that alleged service is rendered, in respect of the amount paid ?

(iii) Whether payment made to erstwhile trustees without services actually rendered by them, will fall outside the ambit of Sec.13 ?

(iv) Whether mere book addition in the asset side of the balance sheet is sufficient to prove that asset has actually come into being, even if the same is not substantiated by bills or vouchers ?

14. The finding of the Tribunal in paragraph 11 above also covers the enhancement made by the CIT (A) in respect of an amount of Rs.14.55 crores allegedly paid by the Trust to its erstwhile trustees for construction of building on behalf of the Trust. As already seen above, the Tribunal deleted the said additions which had been made by the CIT (A). As a matter of fact, the CIT (A), while finding that the erstwhile trustees had not caused any construction work to be done as consideration for the amount paid to them by way of advance, also simultaneously enhanced the income of the Trust by a like sum of Rs.14.55 crores by disallowing its claim for expenditure in the same amount. In relation to the Trust, the finding of the Tribunal, which is impugned in I.T.A.No.6/2021 filed by the Department in relation to assessment year 2010-11 is found in paragraphs 19 to 19.5, which read as follows:

"19. The CIT(A) observed that the assessee had created a fresh asset in his balance sheet for AY 2010-11 which has in the subsequent years been clubbed in the building expenditure undertaken by the assessee Trust during the relevant year and hence, an enhancement notice was given to the assessee in reply to which the assessee submitted that it was the old trustees who have benefited from the various transactions and none of the capitation fees collected by them was passed on to the trust. Further, it was stated that a payment of Rs.14,54,59,169/- was old trustees as per agreement and repeated request from them stating that they have constructed the building and supporting vouchers and bills shall be submitted to the trust for the construction made. It was submitted that the payment was made and remitted the TDS portion u/s 194C also on the payment towards expenses incurred by them for constructing the building. It was submitted that the advance given was not shown as utilization in the computation of income of the Trust and a journal entry only was made in the books of accounts of the Trust transferring the advance amount to the building account without claiming it as utilization. Rejecting the contentions of the assessee the CIT(A) added the amount of Rs. 14,54,59,169/- to the income of the assessee-Trust, which is to be assessed as AOP.

19.1 Against this, the assessee is in appeal before us. It was submitted that the CIT(A) had enhanced the income of the Trust by amount of Rs. 14,54,59,169/- for the reason that the Trust has paid the amount for the purpose of construction of building to erstwhile trustees but had failed to produce bills and invoices to substantiate the same. It was submitted that the CIT(A) had acted beyond jurisdiction by going into new addition not at all in the realm of the assessment . The Assessing Officer denied

exemption u/s.11 for the reason of violation of don 13(1)(c) and protectively added the amounts purportedly in violation i.e., donations. The issue of amount given for construction was an entirely new issue which was not at all considered by AQ and the jurisdiction to deal with the same is only u/s..147/148/263. Reliance in this connection was placed on the decision of Full Bench of Delhi High Court in CIT v. Sardarilal & Co (2011 251 ITR 684 (Del) (FB).

19.2 It was submitted that the building existed and a college was running is testimony of the construction having taken place and the total built-up area of the buildings totals to 236,999,78 Square Feet (220,118.57 Square Meter). It was submitted that even considering a conservative per square feet rate of of Rs.1400 per Square Feet, the total cost comes to Rs.33.18 Crores. The Ld. AR submitted that as per the Audited balance sheet of AY 2018-19, the gross building value (without depreciation) was Rs.24,38,23,931.53 and this amount was inclusive of Rs. 14,54,59,169/- given to the erstwhile trustees who constructed the buildings for the Trust which clearly showed that there had been no overstatement of building value and the amount paid was for the buildings constructed by them. Thus, there was no violation of section 13(1)(c). The amount paid to the erstwhile trustees were for the construction of infrastructure. It was submitted that no benefit arises to the erstwhile trustees through the payment of Rs. 14,54,59,169/made to them by the Trust. Such benefit would have been there, if it was diversion of Trust funds by virtue of section 13(2)(g). It was submitted that the payments were made to offset the cost of construction of building done by the erstwhile Trustees and hence, there was no diversion.

19.3 The Ld. AR submitted that the Trust did not claim Rs. 14.55 crores as expenditure or application and hence, the same cannot be added to income of the Trust (copy of Balance Sheet and Income and Expenditure account for year ended 31.03.2009, 31.03.2010 and 31.03.2011 along with enclosures placed before the Bench in Serial Number 11 to 12 of the Paper Book). Even otherwise, it was submitted that the total value of the building with the built up area of 236.999.78 Square feet would not be less than Rs.33.18 Crores against the balance sheet value as on 31.03.2018 is only Rs.24,38,23,931.5 and this will offset the difference. It was submitted that the assessee had given construction contract to erstwhile Trustees who carried out the same and since the assessee did not undertake construction it was not in possession of bills and invoices. It was submitted

that if at all only the income over expenditure for the A.Y.2010-11 amounting to Rs.2,31,78,710/can be taxed subject to set off of excess application of earlier years.

19.4 The Ld. DR relied on the order of the lower authorities.

19.5 We have heard the rival submissions and perused the record. As discussed in case of Jose Thomas and Gracy Babu in ITA Nos.238 & 239/Coch/2019 in para 12.7 and 12.8 of this order, wherein it was held that there was construction activity carried out by those two assesses as evidenced by the agreements cited supra and the construction was reflected in the balance sheet of the present assesses which was subjected to TDS. Thus, by any stretch of Imagination, it cannot be said that there was no construction activity carried out by the assesses and it cannot be said that payments were not made towards construction of building which was for the establishment of educational institution. Thus, this ground of appeals of the assessee is allowed."

For the reasons already stated in connection with the assessment of Gracy Babu and Jose Thomas for the assessment years 2009-10 and 2010-11 on this issue in paragraph No.12, we refrain from interfering with this finding of the Tribunal as well.

I.T.A.Nos.54/2020, 55/2020, 56/2020, 68/2020:

15. In I.T.A.Nos.54/2020, 55/2020, 56/2020 and 68/2020, the following substantial questions of law have been raised:

(i) Whether the ITAT was right in deleting the addition of Rs.8 crores each, made in the hands of Shri. Jose Thomas and Smt. Gracy Babu, which was received as compensation for relinquishment for trusteeship ?

(ii) Whether the ITAT was correct in not appreciating that the donation of Rs.16 crores (assessed at Rs.8 crores each in the hands of Shri. Jose Thomas and Smt. Gracy Babu) is nothing but the diverted 'sale consideration' of Carmel Educational Trust ?

16. I.T.A.Nos.54 and 55 of 2020 and I.T.A.Nos.56 and 68 of 2020 pertain to the assessment years 2011-12 in relation to Gracy Babu and Jose Thomas

respectively. The issue involved in these cases is with regard to the accounting treatment to be accorded to the donations received by St. Thomas Education Trust, which the Department alleged was nothing but an amount received by the assessees as consideration for the relinquishment of their trusteeship in the Carmel Educational Trust. While this was the stand of the Assessing Authority, the CIT (A) found that the amount of Rs.8 crores received as donation by St. Thomas Education Trust could not be considered as income in the hands of the above assessees who were trustees in the said St. Thomas Education Trust. This view of the CIT (A) against which the Department had preferred an appeal before the Tribunal, was upheld by the Tribunal. We also see no reason to take a different view since it is not in dispute that the payments in question were actually made to the trust and not to the trustees in their individual names.

In the result:

1. I.T.A.Nos.54/2020, 55/2020, 56/2020, 68/2020 and 6/2021 are dismissed by answering the substantial questions of law raised therein against the revenue and in favour of the assessee.

2. I.T.A.Nos.46/2020, 48/2020, 49/2020 and 51/2020 are partly allowed by way of remand. The substantial questions of law raised therein, other than on questions (i), (ii), (iii) and (iv) that have been remanded to the Tribunal by this judgment, are answered against the revenue and in favour of the assessee.

3. I.T.A.No.47/2020 is allowed by way of remand on questions (i), (ii), (iii) and (iv) raised therein.