A83

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

SUBMISSION IN REPLY TO MR. P.N. MISHRA, H.S. JAIN AND MR. M.C DHINGRA (SHIA WAQF BOARD), ADVOCATES
BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

INDEX

S. NO.	PARTICULARS	TAB
1.	Submission in Reply to Mr. P. N. Mishra, H. S. Jain and Mr. M.C. Dhingra, Advocates.	15
2.	Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan & Ors. (1964) 1 SCR 561	16
3.	The Durgah Committee, Ajmer & Anr. Vs. Syed Hussain Ali & Ors. (1962) 1 SCR 383	17
4.	Jewun Doss Sahoo Vs. Shah Kubeer-Ood-Deen (1840) 2 MIA 391	18
5.	The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt. 1954 SCR 1005	19

TAB-15

I. RESPONSE TO P.N. MISHRA, ADVOCATE'S ARGUMENT

P.N. Mishra Advocate made the following arguments:

(a) On the regime argument: The regime inherited by the British from the Nawab was one of Darul-i-Islam which was binding on the British and now on the Indian legal system.

(b) On the Furman argument: Furmans' issued by the Nawab regime were both Muslim law and the law of the land to be enforced by the British.

(c) The Exact location argument: It was possible from Bakker's co-ordinates to locate the exact birthplace of Lord Ram.

(d) The Babur-Aurangzeb Argument: Travellers accounts suggest that the mosque was not build by Babur when a temple pre-existed on the site but which was destroyed by Aurangzeb.

(e) The Interpolation argument: The inscriptions were interpolated to add an Islamic dimension

(f) The Koranic argument: The mosque was not a valid mosque because it did not correspond to the sharia including the hadith.

These are considered as below:

(A) On the regime argument;

1.1 The regime inherited by the British from the Nawab was one of Darul-i-Islam which was binding on the British and now on the Indian legal system.

1.2 The Muslim law recognize that a legal regime of Darul-i-Islam exists when a Muslim regime takes over from another Muslim regime whereby in 1858 the law applicable was governed by Islamic law as inherited from the Nawabs of Avadhs.

1.3 It has already been submitted that the relevant regime was the previous British law based on justice, equity and good conscience (JEGC), statute law and judicial

decisions. Thus, the furman was not absolute law over the surrendered and conquered territories but only as evidence to the extent recognized.

(See early submissions on JEGC etc)

(B) On the Furman argument:

2.1 Thelegal status of a furman has been recognized by Indian Courts in the following cases:

(a) *Tilkayat v. State of Rajasthan (1964) 1 SCR 561*

(b) *Durgah Committee v. Syed Husssain Ali (1962) 1 SCR 383*

(c) *Jeewan Doss Sahu v. Shah Kuber (1840) MIA 391*

(Note these cases were strongly relied on but not presented for paucity of time. The point with case law is mentioned in the impugned High Court judgment.)

2.2 In *Jewun Doss v. Shah Kuber (1840) 2 MIA 391* the Court ruled that the term 'Altamgha' or 'Atamghainam' in a royal grant or Firman of 14 March 1 does not give absolute proprietary right according to British Regulations and excepted from limitation.

Nor was it necessary that such a document mention the word 'waqf' as such tenure can be inferred.

(This case is in Dhavan's Preliminary Submission)

2.3 In *Tilkayat v. State of Rajasthan (1964) 1 SCR 561*, the issue was whether the Udaipur Durbar's Furman of 1934 whereby the Tilkayat of the Nathdwara Temple (built in 1761) was appointed manager. After a scheme was consecrated by statute, the Tilkayat claimed the property through the Firman. The Supreme Court records that the High Court held the Firman created a public endowment with a property right in the Tilkayat SC to be recognized under Article 19(1) (f) of the Constitution but the statute of 1959 did not transgress this right (at pp. 568-570), but in the light

of historical circumstances relating to the Vallabh sect. On deciding whether the firman was law or not, the Supreme Court held (at 591)

> *'In appreciating the effect of this Firman, it is first necessary to decide whether the Firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur, it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and, did govern the rights of the parties affected thereby. This position is covered by: decisions of this Court and it has not been disputed before us, vide Madhaorao-Phalke v. State of Madhya Bharat[9]. Ammer-un-Nissa Begum Mahboob Begum[10] and Director of Endowments, Government of Hyderabad v. Akram Ali.*
>
> *It is true that in dealing with the effect of this Firman, the learned Attorney-General sought to raise before us a novel point that under Hindu law even an absolute monarch was not competent to make a law affecting religious endowments and their administration. He suggested that he was in a position to rely upon the opinions of scholars which tended to show that a Hindu monarch was competent only to administer the law as prescribed by Smritis and the oath which he was expected to take at the time of his coronation enjoined him to obey the Smritis and to see that their injunctions were obeyed by his subject. We did not allow the learned Attorney-General to develop this point because we hold that this novel point cannot be accepted in view of the well-recognised principles of jurisprudence.'*

Far from establishing the point made by Mr. Mishra Advocate for the Hindu side is not established.

2.4 The next case relied on was *The Durgah Committee v. Syed Hussain Ali (1962) 1 SCR 383*concerns the challenge of the khadims on the Durga Khwaja Sahib Act 1955 to claim property and professional rights, referring to Emperor Akhbar's Firman of 18 villages being given to the Durgah. The Court held that modern law had superceded the situation which had to be considered in context, observing (at. P. 414- 415)

> *'The history of the administration of the property endowed to the tomb in the present case which is spread over nearly four centuries is sufficient to raise a legitimate inference about the origin of the terms on which the endowments were founded, an origin which is inconsistent with any rights subsisting in the denominations to administer the properties belonging to the institution. It was because the respondents were fully conscious of this difficulty that they did not adopt this broad basis of challenge in their writ petition.'*

2.5 Thus, these cases far from supporting the proposition of Mr. Mishra, Advocate, in fact, controvert it.

(C) The Exact location argument:

3.1 Two arguments have been advanced to show that the site of Babri Masjid is the exact location of birthplace of Lord Ram:-

a) Ayodhya Mahatamya in Skanda Purana gives the location which matches with the site of Babri Masjid.

b) Hans Baker also locates the birth place of Lord Ram at the site of the Babri Masjid.

3.2 The *Skanda Purana* argument:

a) It is submitted that in Skanda Puran, reliance has been placed on Ayodhya-Mahatamya which are the merits of visiting Ayodhya given in the Skanda Puran. In this reference reliance maybe placed on the Historians Report to the

Nation - which has been exhibited by Plaintiffs in Suit 5 as well as Plaintiffs in Suit 4. It is Exhibit 45 in Suit 5 (**Pgs. 432-449/Vol 74)** and Exhibit 62 in Suit 4 **(1720 – 1757/Vol. 11)**. In this report it has been stated that the location described in the Ayodhya Mahatamya of Skand Puran does not match with the present-day location of Babri Masjid.

b) The Ayodhya Mahatamya uses the term Janamsthan & Janambhumi, according to this report even if both are taken to be the same place, the resultant place does not match with the site of the Babri Masjid.

c) According to Ayodhya Mahatamya of Skanda Purana, Janamsthan should be located either:-

   a. Somewhere west in the vicinity of Bhahamakunda close to the bed of Sarayu. or

   b. Somewhere between Rinamochana and Bharmakunda on the Bank of Sarayu.

d) No place in Ayodhya is associated with Rama's birth either in 11th Century or even 6 centuries after.

e) When a place is associated with the birth of Lord Ram, possibly in the late 18th Century its location given in the various Mahatamyas does not tally with the Babri Masjid.

3.3 The Hans Baker argument:-

a) Mr. P. N. Mishra, Advocate heavily relied on mapping of location by Hans Baker. Based on the topography of the Janamasthan in Ayodhya Mahatam, Hans Baker tried to find the exact location. @ pgs. 2045 to 2048/Vol.II, para 3539.

b) Reliance on Hans Baker to state that Babri Masjid was built on the birthplace of Lord Ram is misplaced as:-

a. Hans Baker proceeds on the presumption that Ayodhya is not a real city but a figment of the poet's imagination. **[Pg. 2229/Vol. 82]**

b. He proceeds by equating Ayodhya to the city of Saketa. **[Pg. 2231/Vol. 82]**

c. Even while mapping the birthplace from Ayodhya Mahatamya, he cites considerable difficulties and ultimately states that Babri Masjid is built at the birthplace as is confirmed by local belief. **[Pg. 2047/Vol. II of the Impugned Judgment]**

d. Even the impugned judgment records that Hans Baker proceeds on the basis of conjectures without assigning any reason. **[Pg. 2050 at para 3541/Vol. II of the Impugned Judgment.]**

c) Though variations exist in mapping of Ayodhya by different Travellers and Gazetteers as has been recorded as under:

a) **"Ain-e-Akbari"**

Awadh (Ajodhya) is one of the largest cities of India. In is situated in longitude 118°, 0', and latitude 27°, 22'.
(Vol. I, pg. 1074, pr. 1618; Vol. III, pg. 2781, pr. 4365, pg. 3085)

b) **"Gazetteer of Oudh"** by **Mr. W.C. Benett**

Mentions that Ajodhya lies 26^{O} 47' north latitude and 82^{O} 15' east longitude, on the banks of the Gogra.
(Copied extracts written by P. Carnegy, Esq., Commissioner)

(Vol. II, pg. 2645-2646, pr. 4263; Vol. III, pg. 3094)

c) **"Encyclopedia of India and of Eastern and Southern Asia By Surgeon General Edward Balfour, 1885**
Mentions Ayodhya at latitude 26° 48' 20" North and longitude 82^{O} 24'40" East **(Vol. III, pg. 4083)**

(D) The Babur-Aurangzeb Argument:

4.1 It was argued that the inscriptions on the disputed structure were the only evidence to show that Babur built the mosque, however since the inscriptions have been doubted, the Hon'ble Judges erred in holding the Babur built the mosque.

a) Finding of Justice Khan – Mosque built under the command of Babur @ pg. 115/Vol. 1 of the Impugned Judgment.

b) Finding of Justice Agarwal- Informed guess that mosque was built during the regime of Aurangzeb [Para 1682 @ pg. 1101/Vol. 1 of the Impugned Judgment]

c) Finding of Justice Sharma-Mir Baki built the mosque at the command of Babur [Pg. 3242/Vol. 3 of the Impugned Judgment]

4.2 It was submitted that findings of Justice Khan and Justice Sharma were perverse in as much as the inscriptions which were the only proof that Babur built the mosque were held to be unreliable.

4.3 It is submitted that the Plaint of Suit 5 itself mentions that the mosque was built under the orders of Babur. [Para 23 @pg. 245-246/Vol. 72-Pleadings Volume]

4.4 Further, even though the Hon'ble High Court pointed out that there were discrepancies in the several versions of translations, it is relevant to note that all versions of translations noted that the inscriptions on the mosque bore the name of Babar.

4.5 Even all the traveller's and gazetteers (except Tieffenthaler) mention that the mosque was constructed under the orders of Babur.

4.6 Another submission was made by Mr. Mishra about there being a dichotomy in finding (1) & (2) of Justice Khan [Pg. 115/Vol. 1 of the Impugned Judgment]. The said findings are as follows:-

1. The disputed structure was constructed as mosque by or under orders of Babar.

2. It is not proved by direct evidence that premises in dispute including constructed portion belonged to Babar or the person who constructed the mosque or under whose orders it was constructed.

4.7 It is submitted that there is no dichotomy in finding no. 1 & 2, while finding no.1 only refers to the fact that the mosque was constructed under the orders of Babur, finding no. 2 only states that it was unclear whether the land on which the mosque was constructed *belonged* to Babur.

(E) The Interpolation argument:

5.1 It was argued that the first settlement report of 1861 which mentions the masjid, there were interpolations.

5.2 It is submitted that Justice Sharma has held that there has been interpolation of record on the basis of the report submitted by District Magistrate, Faizabad as well as the Forensic report given by Forensic Science Lab, Lucknow. It is relevant to note that these reports were neither exhibited by any of the parties nor were those supplied to the Muslim parties. However, the reports have been annexed by Justice Sharma at **pgs 4269 to 4275 and @ pg. 4276 to 4277 respectively of the Vol. III of the Impugned Judgment.**

5.3 Further it is relevant to note that the deposition of DW2/2, Shri Ram Saran Srivastava qua interpolation is as follows :

> *I have seen the concerned records. Masjid, Shahi Masjid or Janmsthan Masjid was not written in the first and second settlement's record. There were interpolation in some records of Khasra, Khatouni and Khewat of third settlement, wherein Janmsthan Masjid or Jama Masjid was written in interpolation in some numbers of disputed site. This report was send by me. I have sent the report, in this connection, in 1989 to Board of Revenue. Enquiry was made on the basis of my report. Some officer has came from Revenue Board. An Officer below the rank of Secretary, Board of Revenue, was an*

Enquiry Officer and not a member. Records, which were interpolated and the report sent by me, were never rectified because the case was pending in the Court. I have not seen the report of enquiry officer. I know, that enquiry officer had filed his report. Which numbers of third settlement were interpolated, I do not know. I do not remember if plot No. 159 and 160 were interpolated or not. @ **pg. 8422-8423, Vol. 49.**

5.4 Further in cross examination, the Witness deposed as follows:

Question: Would it be right to say that settlement of habitation was also covered under the settlement of 1861-62, which is called first grade settlement and map of habitation in large scale and Khasra was prepared separately?

Answer: In that settlement revenue record in connection with the land properties and nazool records were got corrected. Habitation falling under revenue area was also covered in the settlement.

Settlement of habitation of the disputed site was also covered under that settlement. I have seen the record of that settlement. So far I remember, disputed site was referred as a Janmsthan. In the first settlement, Babri mosque of masjid Ahede Shahi was not referred therein. In the later settlement records concerning to entry of disputed site were interpolated. I supposed these entries were interpolated after the third settlement. Records of first, second and third settlement were not interpolated. @ **pg. 8504-8505, Vol. 50.**

5.5 Without prejudice to the foregoing there is sufficient evidence on record to show that there was a mosque in existence at the disputed site which was dedicated to 'Allah'.

(F) The Koranic argument:

These shall be dealt separately by Mr. Nizam Pasha, Advocate.

II. RESPONSE TO H. S. JAIN, ADVOCATE

(A) Arguments:

1.1 The basic argument made by H.S. Jain Advocate is that after the constitution

a) The relevant law was Hindu law and not Muslim law which was restored by the constitution.

b) That the constitution guaranteed the Hindu right to prayer under Article 25 and 26.

c) This was the secular solution.

(B) Response:

2.1 Article 372 of the constitution constitutes Hindu and Muslim law.

2.2 The Constitutional right to pray is a new right, hedged in with limitations and require proof of existence of the right as is clear from the following cases:

- *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,* ***1954 SCR 1005;***
- *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan,* ***(1964) 1 SCR 561;***
- *Durgah Committee v. Syed Hussain Ali,* ***(1962) 1 SCR 383***

2.3 The Constituent Assembly debates show that any particular religion was excluded from the dedication of the preamble of the constitution.

2.4 The following extract from the constituent Assembly Debates (hereinafter also referred as CAD) illustrates the attempt to introduce the word "God"/ "Parameshwar"/ "Supreme being" in the Preamble. -

- *Shri H. V. Kamath: I regret I cannot accept the appeal. I shall move amendment No. 430 standing in my name. Sir, I move: "That in amendment no. 2 of the list of Amendments (Volume I), the following be substituted for the proposed preamble:-*

  'In the name of God,

  We, the people of India,....."

  [See Constituent Assembly Debates Vol X dated 17.10.1949, pg. 439 at TAB 2 of Miscellaneous Compilation in Response to submission made by Mr. P. N. Mishra, Advocate and Mr. H. S. Jain.]

- ***Pandit Govind Malaviya :*** *The amendment of which I had given notice ran thus: "That in the Preamble, for the words 'We the people of India' the following be substituted:- 'By the grace of Parameshwar, the Supreme Being, Lord of the Universe (called by different names by different peoples of the world)...."*

  [See Constituent Assembly Debates Vol X dated 17.10.1949, pg. 445 at TAB 2 of Miscellaneous Compilation in Response to submission made by Mr. P. N. Mishra, Advocate and Mr. H. S. Jain.]

- ***Pandit Govind Malaviya:*** *The amendment of which I had given notice ran thus:*

  "That in the Preamble, for the words 'We the people of India' the following be substituted:- By the grace of Parameshwar, the Supreme Being, Lord of the Universe (called by different names by different peoples of the world)."

  [See Constituent Assembly Debates Vol X dated 17.10.1949, pg. 446 at TAB 2 of Miscellaneous Compilation

in Response to submission made by Mr. P. N. Mishra, Advocate and Mr. H. S. Jain.]

2.5 That it is submitted that neither of the above three suggestions/ amendments were incorporated into the Constitution of India. The words "God" or "Parameshwar" or " Supreme Being" do not reflect into the Preamble of the Constitution of India. The Preamble is sans any reference to religious fervor.

2.6 This Hon'ble Court in plethora of judgments has held that the spirit of secularism is embodied into the Constitution.

- That State has no religion and the state practices the policy of neutrality in the matter of religion. ***Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130 at page 147@para 147**

- While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. **See S. R. Bommai v Union of India. (1994) 3 SCC 1, para 304@pg. 232**

- Our concept of secularism, to put it in a nutshell, is that the "State" will have no religion. The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship. **(2005) 6 SCC 690 at page 704, para 37.**
  [Note on secularism along with cases is at TAB 3 of Miscellaneous Compilation in Response to submission made by Mr. P. N. Mishra, Advocate and Mr. H. S. Jain]

III. RESPONSE TO M. C. DHINGRA (SHIA CLAIM)

(A) The entire response is based on:

Case:

a) The Suit between the Shia Central Board Wakf v. Sunni Central Board Wakf, numbered as Suit No. 29 of 1945 which was filed before the Court of Civil Judge, Faizabad on 04th of July 1945. **[Pgs. 1-11/Vol. 73]**

b) The aforesaid suit claimed rights on Babri Masjid as it being a Shia Waqf.

Judgment dated 30.03.1946:

a) The Learned Civil Judge, Faizabad vide the Judgement dated March 30, 1946 passed in Suit No. 29 of 1945 dismissed the aforesaid Suit filed by Shia Central Board against Sunni Central Board on the ground that the inscriptions on the Mosque as well as grant made by Babar for the upkeep of the Mosque suggests that the founder of the Mosque was a Sunni (Babar), also that tarwaeeh prayers which is recited by Sunnis was being allowed and paid for and also that had the founder been a Shia, the funds for its maintenance would not have been utilized for the payment of Sunni Imams and Muezzins. **[Pgs. 4202-4208/Vol. III of the Impugned Judgment]; This document is A 42 in O.O.S. No. 1 of 1989, at pgs. 93 to 108 of Vol. 3**

(B) It was further argued that at the time when the judgement dated 30.03.1946 was rendered against the Shia Waqf Board, a notification dated 26.02.1944 was pre-existing. Subsequently, during the hearing of the suits, this notification was set aside held to de deficient by the Learned. Civil Judge on 21.04.1966. It was therefore argued that since there was no notification existing as on date categorizing the disputed mosque as Sunni Mosque, the prayer of the Shia Waqf Board that the disputed Mosque was a Shia Mosque be allowed.

(C) It is submitted that Shia Waqf Board, though being a party to the Suits never entered appearance in the same. Even after, the notification dated 26.02.1944 was held to

be deficient on 21.04.1966, the Shia Waqf board took no steps whatsoever to challenge the judgement dated 30.03.1946.

(D) This judgement dated 30.03.1946 is now being sought to be set aside by filing SLP (Diary No. 22744 of 2017) titled *'Shia central Board of Waqf U.P. Vs. Sunni Central Board of Waqf'* on which notice is not issued.

(E) Under such circumstances, when Shia Waqf board has slept over its rights to challenge the same for over half a century, there is no basis either for condonation of delay or re-opening of the Judgment dated 30.03. 1946 by way of Special Leave Petition.

(F) It is reiterated that they never raised their point either in 1945-46, or in 1966-89 or in 1989-2017.

to—an order for possession of the premises in question. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

1963

Krishanlal Ishwar Desai v. Bai Vijkor Gujendragadkar

1963

January, 21.

TILKAYAT SHRI GOVINDLALJI MAHARAJ

v.

THE STATE OF RAJASTHAN AND OTHERS

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Nathdwara Temple—Private or public temple—Tests—Validity of enactment providing for proper administration of temple—Constitutionality—Nathdwara Temple Act, 1959 (Rajasthan 13 of 1959) ss. 2 (viii), 3, 4, 5, 7, 10, 11, 16, 21, 22, 27, 28, 30, 35, 36, 37—Constitution of India, Arts. 14, 19 (1) (f), 25, 26, 31 (2).

The history of the Nathdwara Temple in the District of Udaipur showed that Vallabha, who was the founder of the denomination known as Pushtimargiya Vaishnava Sampradaya, installed the idol of Srinathji in a temple and that later on his descendants built the Nathdwara Temple in 1761. The religious reputation of the temple grew in importance and several grants were made and thousands of devotees visiting the temple made offerings to the temple. The succession to the Gaddi of the Tilkayat received recognition from the Rulers of Mewar, but on several occasions the Rulers interfered whenever it was found that the affairs of the temple were not managed properly. In 1934 a Firman was issued by the Udaipur Darbar, by which, inter alia, it was declared that according to the law of Udaipur all the property dedicated or presented to or otherwise coming to the Deity Shrinathji was property of the shrine, that the Tilkayat Maharaj for the time being was merely a custodian, Manager and Trustee of the said property and that the Udaipur Darbar had absolute right to supervise that the

1963

Tilkayat
Shri Govindlalji
Maharaj
v.
State of Rajasthan

property dedicated to the shrine was used for the legitimate purposes of the shrine. The management of the affairs by the appellant Tilkayat was not successful and it became necessary that a scheme should be framed for the management of the Temple. On February 6, 1959, the Governor of Rajasthan promulgated an Ordinance, which was in due course replaced by the Nathdwara Temple Act, 1959. The appellant challenged the validity of the Act on the grounds, inter alia, that the idol of Shrinathji in the Nathdwara Temple and all the property pertaining to it were his private properties and, as such, the State Legislature was not competent to pass the Act, that even if the Nathdwara Temple was held to be a public temple, he as Mahant or Shebait had a beneficial interest in the office of the high priest as well as the properties of the temple and that on that footing, his rights under Arts. 14, 19 (1) (f) and 31 (2) of the Constitution of India had been contravened by the Act. It was also urged that the provisions of the Act infringed the fundamental rights guaranteed to the Denomination under Arts. 55 (1) and 26 (b) and (c) of the Constitution. The question was also raised as to whether the tenets of the Vallabha denomination and its religious practices required that the worship by the devotees should be performed at the private temple and so the existence of public temples was inconsistent with the said tenets and practices.

Held, (1) that neither that tenets nor the religious practices of the Vallabha school necessarily postulate that the followers of the school must worship in a private temple.

(2) that in view of the documentary evidence in the case it could not be held that the temple was built by the Tilkayat of the day as his private temple or that it still continues to have the character of a private temple; that though from the outside it had the appearance of a Haveli, the majestic structure inside was consistent with the dignity of the idol and with the character of the temple as a public temple.

(3) that an absolute monarch was the fountain-head of all legislative, executive and judicial powers, that it was of the very essence of sovereignty which vested in him that he could supervise and control the administration of public charity, and that this principle applied as much to Hindu monarchs as to any other absolute monarch. Any order issued by such a Ruler would have the force of law and govern the rights of the parties affected thereby; and that, accordingly, the Firman issued by the Maharana of Udaipur in 1934 was a law by which the affairs of the Nathdwara Temple were governed after its issue,

Madhaorao Phalke v. *The State of Madhya Bharat*, [1961] 1 S. C. R. 957, relied on.

(4) that under the law of Udaipur the Nathdwara Temple was a public temple and that the Tilkayat was no more than the Custodian, Manager and Trustee of the property belonging to the temple.

(5) that having regard to the terms of the Firman of 1934 the right claimed by the Tilkayat could not amount to a right to property under Art. 19 (1) (f) or constitute property under Art. 31 (2) of the Constitution; that even if it were held that this right constituted a right to hold property, the restrictions imposed by the Act must be considered as reasonable and in the interests of the public under Art. 19 (5).

Vidya Varuthi Thirtha v. *Balusami Ayyar*, (1921) L. R. 48 I. A. 302 and the *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*, [1954] S. C. R. 1005, considered.

(6) that the Act was not invalid on the ground of discrimination under Art. 14.

Shri Ram Krishna Dalmia v. *Shri Justice S. R. Tendolkar*, [1959] S. C. R. 279, relied on.

(7) that the right to manage the properties of a temple was a purely secular matter and could not be regarded as a religious practice under Art. 25 (1) or as amounting to affairs in matters of religion under Art. 26 (b). Consequently, the Act in so far as it provided for the management of the properties of the Nathdwara Temple under the provisions of the Act, did not contravene Arts. 25 (1) and 26 (b).

The Durgah Committee, Ajmer v. *Syed Hussain Ali*, [1962] 1 S. C. R. 333, referred to.

(8) that the expression "Law" in Art. 26 (d) meant a law passed by a competent legislature and under that Article the legislature was competent to make a law in regard to the administration of the property belonging to the denomination and that the provisions of the Act providing for the constitution of a Board to administer the property were valid.

Ratilal Panachand Gandhi v. *The State of Bombay*, [1954] S. C. R. 1055, referred to.

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

(9) that the scheme envisaged by ss. 3, 4, 16, 22 and 34 of the Act merely allowed the administration of the properties of the temple which was a purely secular matter to be undertaken by the Board and that the sections were valid.

(10) that under s. 5 (2) (g) it was necessary that the members of the Board other than the Collector of Udaipur District should not only profess Hindu religion but must also belong to the Pushti Margiya Vallabhi Sampradaya; and that the proviso to s. 5 (2) (g) which enabled a Collector to be a statutory member of the Board even though he may not be a Hindu and may not belong to the denomination, did not contravene Arts. 25 (1) and 26 (b).

(11) that the expression "affairs of the temple" in s. 16 referred only the purely secular affairs in regard to the administration of the temple and that the section was valid.

(12) that s. 30 (2) (a) in so far as it conferred on the State Government power to make rules in respect of the qualifications for holding the office of the Goswami, was invalid.

(13) that ss. 5, 7, 10, 11, 21, 27, 28, 35, 36 and 37 were valid.

CIVIL APPELATE JURISDICTION : Civil Appeals Nos. 652, 653 and 757 of 1962.

Appeals from the judgment and order dated January 31, 1962, of the Rajasthan High Court in D. B. Civil Writ Petition No. 90 of 1959.

AND

VICE VERSA

(b) Civil Appeals Nos. 654, 655 and 758 of 1962.

Appeals from the judgment and order dated January 31, 1962, of the Rajasthan High Court in D. B. Civil Writ Petition No. 310 of 1959.

AND

VICE VERSA

(c) Civil Appeal No. 656 of 1962.

Appeal from the judgment and order dated January 31, 1962, of the Rajasthan High Court in D. B. Civil Writ Petition No. 421 of 1960.

(d) Writ Petition No. 74 of 1962.

Petition under Article 32 of the Constitution of India for the enforcement of fundamental rights.

M. C. Setalvad, Attorney-General for India, G. S. Pathak, B. B. Desai, V. A. Seyid Muhammad and *B. C. Misra,* for the appellant (in C. A. No. 652 of 1962) and respondent No. 1 (in C. As. Nos. 653 and 757 of 1962).

C. K. Daphtary, Solicitor-General of India, G. C. Kasliwal Advocate-General for the State of Rajasthan, M. M. Tewari, S. K. Kapur, B. R. L. Iyengar,, Kan Singh, V. N. Sethi, B. R. C. K. Achar and *P. D. Menon,* for respondents Nos. 1 and 2 (in C. A. Nos. 652 and 656/62) respondent No. 1 (in C. A. No. 654/62), respondents Nos. 2 and 3 (in C. A. No. 757/62), respondent No. 11 (in C. A. No. 758/62) and appellants (in C. A. Nos. 653, and 655/62).

Sarjoo Prasad, S. B. L. Saxena and *K. K. Jain,* for respondents Nos. 3 to 5 (in C. A. No. 652/62) respondents Nos. 2-4 (in C. A. No. 653/62), respondents Nos. 2, 3, 5, 6 and 7 (in C. A. No. 654/62), the Board and its members (in C. A. No. 655/62), respondents Nos. 3-12 (in C. A. No. 656/62) and the appellants (in C. A. Nos. 757 and 758 of 1962.)

A. V. Viswanatha Sastri, Balkrishna Acharya and *M. V. Goswami,* for the appellants (in C. A. No. 654/62), respondents Nos. 1-10 (in C. A No. 655/62) and respondents Nos. 1-10 (in C. A. No. 758/62).

P. K. Chakravarty, for the appellant (in C. A. No. 656/62).

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

G. S. Pathak, B. Datta and *B. P. Maheshwari*, for the petitioner (in W. P. No. 74/62).

C. K. Daphtary, Solicitor-General of India, G. S. Kasliwal, Advocate-General for the State of Rajasthan, M. M. Tewari, S. K. Kapur, B. R. L. Iyengar, Kan Singh, V. N. Sethi and *P. D. Menon*, for respondents Nos. 1 and 2 (in W. P. No. 74/62).

Sarjoo Prasad, S. B. L. Sexena and *K. K. Jain*, for respondents Nos. 3-12 (in W. P. No.74/62).

1963. January 21. The Judgment of the Court was delivered by

Gajendragadkar, J.

GAJENDRAGADKAR, J.—This group of seven cross-appeals arises from three writ petitions field in the High Court of Judicature for Rajasthan, in which the validity of the Nathdwara Temple Act, 1959 (No. XIII of 1959) (hereinafter called the Act) has been challenged. The principal writ petition was Writ Petition No. 90 of 1959; it was filed by the present Tilkayat Govindlalji (hereinafter called the Tilkayat) on February 28, 1959. That Petition challenged the validity of the Nathdwara Ordinance, 1959 (No. II of 1959) which had been issued on February 6, 1959. Subsequently this Ordinance was repealed by the Act which, after receiving the assent of the President, came into force on March 28, 1959. Thereafter, the Tilkayat was allowed to amend his petition and after its amendment, the petition challenged the vires of the Act the provisions of which are identical with the provisions of its predecessor Ordinance. Along with this petition Writ Petition No. 310 of 1959 was filed on August 17, 1959, by ten petitioners who purported to act on behalf of the followers of the Pushtimargiya Vaishnava Sampradaya. This petition attacked the validity of the Act on behalf of the Denomination of the followers of Vallabha. On November 3, 1960,

the third Writ Petition (No. 421 of 1960) was filed on behalf of Goswami Shri Ghanshyamlalji who as a direct descendant of Vallabha, set up an interest in himself in regard to the Nathdwara Temple, and as a person having interest in the said Temple, he challenged the validity of the Act. These three petitions were heard together by the High Court and have been dealt with by a common judgment. In substance, the High Court has upheld the validity of the Act, but it has struck down as *ultra vires* a part of the definition of 'temple' in s. 2 (viii), a part of s. 16 which refers to the affairs of the temple; s. 28, sub-ss. (2) and (3); s. 30 (2)(a); ss. 36 and 37. The petitioners as well as the State of Rajasthan felt aggrieved by this decision and that has given rise to the present cross-appeals. The Tilkayat has filed Appeal No. 652 of 1962, whereas the State has filed appeals Nos. 653 and 757 of 1960. These appeals arise from Writ Petition No. 90 of 1959. The Denomination has filed Appeal No 654 of 1962, whereas the State has filed Appeals Nos. 655 and 758 of 1962. These appeals arise from Writ Petition No. 310 of 1959. Ghanshyamlalji whose Writ Petition No. 421 of 1960 has been dismissed by the High Court on the ground that it raises disputed questions of fact which cannot be tried under Art. 226 of the Constitution, has preferred Appeal No. 656 of 1962. Since Ghanshyamlalji's petition has been dismissed *in limine* on the ground just indicated, it was unnecessary for the State to prefer any cross-appeal. Besides these seven appeals, in the present group has been included Writ Petition No. 74 of 1962 filed by the Tilkayat in this Court under Art. 32. By the said writ petition the Tilkayat has challenged the vires of the Act on some additional grounds. That is how the principal point which arises for our decision in this group is in regard to the Constitutional validity of the Act.

At this stage, it is relevant to indicate broadly the contentions raised by the parties before the High

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Gajendragadkar, J.

Court and the conclusions of the High Court on the points in controversy. The Tilkayat contended that the idol of Shri Shrinathji in the Nathdwara Temple and all the property pertaining to it were his private properties and as such, the State Legislature was not competent to pass the Act. In the alternative, it was urged that even if the Nathdwara Temple is held to be a public temple and the Tilkayat the Mahant or Shebait in charge of it, as such Mahant or Shebait he had a beneficial interest in the office of the high priest as well as the properties of the temple and it is on that footing that the validity of the Act was challenged under Art. 19 (1) (f) of the Constitution. Incidentally the argument for the Tilkayat was that the idols of Shri Navnit Priyaji and Shri Madan Mohanlalji were his private idols and the property pertaining to them was in any case not the property in which the public could be said to be interested. The Denomination substantially supported the Tilkayat's case. In addition, it urged that if the temple was held to be a public temple, then the Act would be invalid because it contravened the fundamental rights guaranteed to the denomination under Art. 25 (1) and Art. 26 (b) and (c) of the Constitution. Ghanshyamlalji pleaded title in himself and challenged the validity of the Act on the ground that it contravened his rights under Art. 19 (1) (f).

On the other hand, the State of Rajasthan urged that the Nathdwara Temple was a public temple and the Tilkayat was no more and no better than its manager. As such, he had no substantial benefical interest in the property of the temple. The contention that the Tilkayat's fundamental rights under Art. 19 (1) (f) have been contravened by the Act was denied; and the plea of the Denomination that the fundamental rights guaranteed to it under Arts. 25 (1) and 26 (b) and (c) had been infringed was also disputed. It was urged that the law was prefectly valid and

did no more than regulate the administration of the property of the temple as contemplated by Art. 26 (c) of the Constitution. The Tilkayat's claim that the two idols of Navnit Priyaji and Madan Mohanlalji were his private idols was also challenged. Against Ghanshyamlalji's petition, it was urged that it raised several disputed questions of fact which could not be appropriately tried in proceedings under Art. 226.

The High Court has upheld the plea raised by the State against the competence of Ghanshyamlalji's petition. We ought to add that the State had contended that the Tilkayat's case about the character of the temple was also a mixed question of fact and law and so, it could not be properly tried in writ proceedings. The High Court, however, held that it would be inexpedient to adopt a technical attitude in this matter and it allowed the merits of the dispute to be tried before it on the assurance given by the learned counsel appearing for the Tilkayat that the character of the property should be dealt with on the documentary evidence adduced by him. Considering the documentary evidence, the High Court came to the conclusion that the temple is a public temple. It examined the several Firmans and Sanads on which reliance was placed by the Tilkayat and it thought that the said grants supported the plea of the State that the temple was not the private temple of the Tilkayat. It has, however, found that the Tilkayat is a spiritual head of the Denomination as well as the spiritual head of the temple of Shrinathji. He alone is entitled to perform 'Seva' and the other religious functions of the temple. In its opinion, the two minior idols of Navnit Priyaji and Madan Mohanlalji were the private idols of the Tilkayat and so, that part of the definition which included them within the temple of Shrinathji was struck down as invalid. In this connection, the High Court has very strongly relied on the Firman issued by the Maharana of Udaipur on December 31, 1934, and it

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

has observed that this Firman clearly established the fact that the temple was a public temple, that the Tilkayat was no more than a Custodian, Manager and Trustee of the property belonging to the temple and that the State had the absolute right to supervise that the property dedicated to the shrine was used for legitimate purposes of the shrine. Having found that the Tilkayat was the head of the denomination and the head priest of the temple, the High Court conceded in his favour the right of residence, the right to distribute Prasad and the right to conduct or supervise the worship and the performance of the Seva in the temple. In the light of these rights the High Court held that the Tilkayat had a beneficial interest in the properties of the temple and as such, was entitled to contend that the said rights were protected under Art. 19 (1) (f) and could not be contravened by the Legislature. The High Court then examined the relevant provisions of the Act and held that, on the whole, the major operative provisions of the Act did not contravene the fundamental rights of the Tilkayat under Art. 19 (1) (f); ss. 16, s. 28, sub-ss. (2) and (3), s. 30 (2) (a), ss. 36 & 37, however, did contravene the Tilkayat's fundamental rights acccording to the High Court, and so, the said sections and the part of the definition of 'temple' in s. 2 (viii) were struck down by the High Court as *ultra vires*. The plea that the fundamental rights under Art. 25 (1) and Art. 26 (b) and (c) were contraveneisd did not appeal to the High Court to be well-founded. In the result, the substantial part of the Act has been held to be valid. It appears that before the High Court a plea was raised by the Tilkayat that his rights under Arts. 14 and 31 (2) had been contravened by the Act. These pleas have been rejected by the High Court and they have been more particularly and specifically urged before us by the Tilkayat in his Writ Petition No. 74 of 1962. That, in brief, is the

nature of the findings recorded by the High Court in the three writ petitions filed before it.

Before dealing with the merits of the present dispute, it is necessary to set out briefly the historical background of the temple of Shrinathji at Nathdwara and the incidents in relation to the management of its properties which ultimately led to the Act. The temple of Shrinathji at Nathdwara holds a very high place among the Hindu temples in this country and is looked upon with great reverence by the Hindus in general and the Vaishnav followers of Vallabha in particular. As in the case of other ancient revered Hindu temples, so in the case of the Shrinathji temple at Nathdwara, mythology has woven an attractive web about the genesis of its construction at Nathdwara. Part of it may be history and part may be fiction, but the story is handed down from generation to generation of devotees and is believed by all of them to be true. This temple is visited by thousands of Hindu devotees in general and by the followers of the Pushtimargiya Vaishnava Sampradaya in particular. The followers of Vallabha who constitute a denomination are popularly known as such. The denomination was founded by Vallabha (1479-1531 A. D.)* He was the son of a Tailanga Brahmin named Lakshmana Bhatt. On one occasion, Lakshmana Bhatt had gone on pilgrimage to Banaras with his wife Elamagara. On the way, she gave birth to a son in 1479 A. D. That son was known as Vallabha. It is said that God Gopala Krishna manifested himself to Vallahha on the Govardhana Hill by the name of Devadamana, also known as Shrinathji. Vallabha saw the vision in his dream and he was commanded by God Gopala Krishna to erect a shrine for Him and to propagate amongst his followers the cult of worshipping Him in order to obtain salvation (1). Vallabha then went to the hill and he found the image corresponding to the vision which he had seen in this dream. Soon thereafter, he got a small

*Some scholars think that Vallabha was born in 1473 A.D., vide The Cultural Heritage of India vol. III at p. 347.

(1) Bhandarkar on 'Vaishnavism, S'aivism & Minor Religious systems at p. 77.

963

Tilkayat
hri Govindlalji
Maharaj
v.
te of Rajasthan

jendragadkar, J.

temple built at Giriraj and installed the image in the said temple. It is believed that this happened in 1500 A. D.. A devotee named Ramdas Chowdhri was entrusted with the task of serving in the temple. Later on, a rich merchant named Pooranmal was asked by Govardhannathji to build a big temple for him. The building of the temple took as many as 20 years and when it was completed, the Image was installed there by Vallabha himself and he engaged Bengali Brahmins as priests in the said temple, (1).

In course of time, Vallabha was succeeded by his son Vithalnathji who was both in learning and in saintly character a worthy son of a worthy father. Vithalnath had great organising capacity and his work was actuated by missionary zeal. In the denomination, Vallabha is described as Acharya or Maha Prabhuji and Vithalnath is described as Gosain or Goswamin. It is said that Vithalnath removed the idol of Shrinathji to another temple which had been built by him. It is not known whether any idol was installed in the earlier temple. Vithalnath lived during the period of Akbar when the political atmosphere in the country in Northern India was actuated by a spirit of tolerance. It appears that Akbar heard about the saintly reputation of Vithalnath and issued a Firman granting land in Mowza of Jatipura to Vithalnathji in order to build buildings, gardens, cowsheds and workshops for the temple of Govardhannathji. This Firman was issued in 1593 A. D. Later, Emperor Shahajahan also issued another Firman on October 2, 1633, which shows that some land was being granted by the Emperor for the use and expenses of Thakurdwara exempt from payment of dues.

Goswami Vithalnath had seven sons. The tradition of the denomination believes that besides the idol of Shrinathji Vithalnathji received from his father

(1) Bhai Manilal C. Parekh's 'A Religion of Grace'.

seven other idols which were also "Swaroops" (manifestations) of Lord Krishna. Before his death, Vithalnathji entrusted the principal idol of Shrinathji, to his eldest son Girdharji and the other idols were given over to each one of his other sons. These brothers in turn founded separate shrines at various places which are also held by the members of the denomination in high esteem and reverence.

When Aurangzeb came on the throne, the genial atmosphere of tolerance disappeared and the Hindu temples were exposed to risk and danger of Aurangzeb's intolerant and bigoted activities. Col. Todd in the first volume of his 'Annals of Rajasthan' at p. 451 says that "when Aurangzeb prescribed Kanaya and rendered his shrines impure throughout Vrij, Rana Raj Singh offered the heads of one hundred thousand Rajpoots for his service, and the God was conducted by the route of Kotah and Rampoora to Mewar. An omen decided the spot of his future residence. As he journeyed to gain the capital of the Sessodias, the chariot-wheel sunk deep into the earth and defied extrication; upon which the Sookuni (augur) interpreted the pleasure of the deity that he desired to dwell there. This circumstance occurred at an inconsiderable village called Siarh, in the fief of Dailwara, one of the sixteen nobles of Mewar. Rejoiced at this decided manifestation of favour, the chief hastened to make a perpetual gift of the village and its lands which was speedily confirmed by the patent of the Rana. Nathji (the god) was removed from his car, and in due time a temple was erected for his reception, when the hamlet of Siarh became the town of Nathdwara. This happened about 1671 A. D." This according to the tradition, is the genesis of the construction of the temple at Nathdwara. Since then, the religious reputation of the temple has grown by leaps and bounds and today it can legitimately claim to be one of the few leading religious temples of the Hindus. Several

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Gajendragadkar, J.

grants were made and thousands of devotees visiting the temple in reverence made offerings to the temple almost everyday throughout the year. No wonder that the temple has now become one of the richest religious institutions in the country.

The succession to the Gaddi of the Tilkayat has, from the beginning, been governed by the rule of Primogeniture. This succession received recognition from the rulers of Mewar from time to time. It appears that in 1813 A. D. Tilkayat Govindlalji was adopted by the widow of Tilkayat Damodarji and the ruler of Mewar recognised the said adoption. Later, the relations between the ruler of Mewar and the Tilkayat were strained during the time of Tilkayat Girdharlalji. It seems that the Tilkayat was not content with the position of a spiritual leader of the denomination but he began to claim special secular rights, and when the Darbar of Udaipur placed the villages belonging to the Nathdwara Temple under attachment, a protest was made by the members of the denomination on behalf of the Tilkayat. It was as a result of this strained relationship between the Darbar and the Tilkayat that in 1876 Tilkayat Girdharlalji was deposed and was deported from Nathdwara by the order passed by the Rana of Mewar on May 8, 1876.....The reason given for this drastic step was that the Tilkayat disobeyed the orders of the ruling authority and so, could not be allowed to function as such. In place of the deposed Tilkayat, his son Gordhanlalji was appointed as Tilkayat. Girdharlalji then went to Bombay and litigation started between him and his Tilkayat son in respect of extensive properties in Bombay. Girdharlalji claimed the properties as his own whereas his Tilkayat son urged that the fact that Girdharlalji had been deposed by the Rana of Udaipur showed that the properties no longer vested in him. It appears that the Bombay High Court consistently took the view that the order passed by

the Rana of Udaipur on May 8, 1876, was an act of a foreign State and did not effect his right to property in Bombay. It was observed that Girdharlalji was regarded as owner of the property, he had not lost his right as such to the said property in consequence of his deposition, and if he was merely a trustee, he had not been removed from his office by any competent Tribunal vide *Nanabai* v. *Shriman Goswami Girdharji* (1). *Goswami Shri Girdharji Maharaj Shri Govindraiji Maharaj Tilkayat* v. *Madhowdas Premji and Goswami Shri Govardhanlalji Girdharji Maharaj* (2) and *Shriman Goswami Shri 108 Shri Govardhanlalji Girdharlalji* v. *Goswami Shri Girdharlalji Govindrajji* (3). So far as the Nathdwara temple and the properties situated in Mewar were concerned, the Tilkayat Gordhanlalji who had been appointed by the Rana of Udaipur continued to be in possession and management of the same.

Unfortunately, in 1933, another occasion arose when the Rana of Udaipur had to take drastic action. After the death of Goverdhanlalji on September 21, 1933, his grand son Damodarlalji became the Tilkayat. His conduct, however, showed that he did not deserve to be a spiritual leader of the denomination and could not be left in charge of the religious affairs of the Shrinathji temple at Nathdwara. That is why on October 10, 1933, he was deposed and his son Govindlalji, the present Tilkayat, was appointed the Tilkayat of the temple. Before adopting this course, the Rana had given ample opportunities to Damodarlalji to improve his conduct, but despite the promises made by him Damodarlalji persisted in the course of behaviour which he had adopted and so, the Darbar was left with no other alternative but to depose him. That is how the present Tilkayat's regime began even during the lifetime of his father.

(1) 12 Bom. 351. (2) 17 Bom. 600.
(3) 17 Bom. 620

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

As on the occasion of the deposition of Girdharlalji in 1833, so on the occasion of the deposition of Damodarlalji, litigation followed in respect of Bombay properties. On January 6, 1934, Damodarlalji filed a suit in the Bombay High Court (No. 23 of 1934) against the Tilkayat and other persons representing the denomination. In this suit, he claimed a declaration that he was entitled to and had become the owner of all the properties mentioned in the plaint and that he was the owner of all the rights, presents, offerings, and emoluments arising in and accruing from the ownership of the idols, Shrinathji and Shri Navnit Priyaji as well as his position as the Tilkayat Maharaj in due course of his succession. In the said suit, the idols of Shrinathji and Shri Navnit Priyaji were added as defendants. At that time, the Tilkayat was a minor. Written statements were filed on his behalf and on behalf of the two idols. A counter claim was preferred on behalf of the idols that the properties belonged to them. Subsequently, the suit filed by Damodarlalji was withdrawn; but the counterclaim made by the idols was referred to the sole arbitration and final determination of Sir Chimanlal H. Setalvad, a leading Advocate of the Bombay High Court. On April 10, 1942, the arbitrator made his award and in due course, a decree was passed in terms of the said award on September 8, 1942. This decree provided that all the properties, movable, and immovable, and all offerings and Bhents donated to the idol of Shrinathji or for its worship or benefit belonged to the said idol, whereas properties donated, dedicated or offered to the Tilkayat Maharaj for the time being, or at the Krishna Bhandar Pedhis if donated, dedicated or offered for the worship or benefit of the idol belonged to the said idol. It also provided that the Tilkayat Maharaj for the time being in actual charge at Nathdwara is entitled to hold, use and manage the "properties of the said idol according to the

usage of the Vallabhi Sampradaya." The said award and the decree which followed in terms of it were naturally confined to the properties in the territories which then comprised British India and did not include any properties in the territories which then formed part of princely India or Native States as they were then known.

Meanwhile, after Damodarlalji was deposed and his son Govindlalji was appointed the Tilkayat, the Rana of Udaipur issued a Firman on December 31, 1934. By this Firman it was laid down that the shrine of Shrinathji had always been and was a religious institution for the followers of the Vaishnavas Sampradayak and all the properties offered at the shrine were the property of the shrine and that the Tilkayat Maharaj was merely a Custodian, Manager and Trustee of the said property for the shrine. It also provided that the Udaipur Darbar had absolute right to supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine. It also made certain other provisions to which we shall have occasion to return later.

When he was appointed the Tilkayat, Govindlalji was a minor and so, the management of the temple and the property remained with the Court of Wards, till April 1, 1948. On that date, the management of the Court of Wards was withdrawn and the charge of the property was handed over to the Tilkayat. It appears that the management of affairs by the Tilkayat was not very happy or successful and the estate faced financial difficulties. In order to meet this difficult situation the Tilkayat appointed a committee of management consisting of 12 members belonging to the denomination some time in 1952. This was followed by another committee of 21 members appointed on June 11, 1953. Whilst this latter committee was in charge of the

1963

Talkayat Shri Govindlalji Maharaj v. State of Rajasthan

Rajendragadkar, J.

management, some valuables stored and locked in the room in the premises of the Temple of Shrinathji were removed by the Tilkayat in December, 1957. This news created excitement amongst the members of the public in general and the followers of the denomination in particular, and so, the Rajasthan Government appointed a Commission of Enquiry. In the preamble to the notification by which the Commission of Enquiry was appointed, it was stated that the State of Rajasthan as the successor of the covenanting State of Mewar had a special responsibility to supervise that the endowments and properties dedicated to the shrine are safeguarded and used for the legitimate purposes of the shrine. The Commission of the Enquiry made its report on October 11, 1959. This report passed severe strictures against the conduct of the Tilkayat. At this stage, we ought to add that the dispute between the Tilkayat and the Rajasthan Government as to the ownership of the valuable articles removed from the temple was later referred to the sole arbitration of Mr. Mahajan, the retired Chief Justice of this Court. The arbitrator made his award on September 12, 1961, and held that except in regard to the items specified by him in his award, the rest of the property belonged to the Tilkayat; and he found that when the Tilkayat removed the properties, he believed that they were his personal properties.

It was in the background of these events that the State of Rajasthan thought it necessary that a scheme should be drafted for the management of the Temple and this proposal received the approval of the Tilkayat. In order to give effect to this proposal it was agreed between the parties that a suit under, s. 92, Code of Civil Procedure, should be filed in the Court of the District Judge at Udaipur. The parte then thought that the suit would be non-contentious and would speedily end in a scheme of management being drafted with the consent of parties

Accordingly, suit No. 1 of 1956 was filed in the District Court at Udaipur, and in accordance with the agreement which he had reached with the authorities, the Tilkayat filed a non contentious written statement. However, before the suit could make any appreciable progress, Ghanshyamlalji and Baba Rajvi, the son of Tilkayat, applied to be made parties to the suit and it became clear that these added parties desired to raise contentions in the suit and that entirely changed the complexion of the litigation. It was then obvious that the litigation would be a long-drawn out affair and the object of evolving a satisfactory scheme for the management of the affairs of the temple would not be achieved until the litigation went through a protracted course.

It was under these circumstances that the Governor of Rajasthan promulgated an Ordinance called the Nathdwara Ordinance, 1959 (No. II of 1959) on February 6, 1959. The Tilkayat immediately filed his Writ Petition No. 90 of 1959 challenging the validity of the said Ordinance. The Ordinance was in due course replaced by Act 13 of 1959 and the Tilkayat was allowed to amend his original writ petition so as to challenge the vires of the Act. Shortly stated, this is the historical background of the present dispute.

The first question which calls for our decision is whether the tenets of the Vallabh denomination and its religious practices postulate and require that the worship by the devotees should be performed at the private temple owned and managed by the Tilkayat, and so, the existence of public temples is inconsistent with the said tenets and practices. In support of this argument, the learned Attorney-General has placed strong reliance on the observadons made by Dr. Bhandarkar in his work on Vaisnavism, Saivism and Minor Religious Systems, ti 80. In the section dealing with Vallabh and his

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

school; the learned Doctor has incidentally observed that the Gurus of this sect ordinarily called Maharajs are descendants of the seven sons of Vithalesa. Each Guru has a temple of his own, and there are no public places of worship. He has also added that the influence exercised by Vallabh and his successors over their adherents is kept up by the fact that God cannot be worshipped independently in a public place of worship, but in the house and temple of the Guru or the Maharaj which, therefore, has to be regularly visited by the devotees with offerings. These temples are generally described as Havelis and the argument is that the said description also brings out the fact that the temples are private temples owned by the Tilkayat of the day. It is true that the observations made by Dr. Bhandarkar lend support to the contention raised before us by the learned Attorney-General on behalf of the Tilkayat, but if the discussion contained in Dr. Bhandarkar's work in the section dealing with Vallabh is considered as a whole, it would be clear that these observations are incidental and cannot be taken to indicate the learned Doctor's conclusions after a careful examination of all the relevant considerations bearing on the point. Since, however, these observations are in favour of the plea raised by the Tilkayat, it is necessary very briefly to enquire whether there is anything in the tenets or the religious practices of this denomination which justifies the claim made by the learned Attorney-General.

What then is the nature of the philosophical doctrines of Vallabh? According to *Dr. Radha Krishnan* (1), Vallabh accepts the authority not only of the Upanishads, the Bhagvad-gita and the Brahma Sutras, but also of the Bhagavata Purana. In his works, Anubhasya, Siddhantarahasya and Bhagavata-Tikasubodhini, he offers a theistic interpretation of the Vedanta, which differs from those of Sankara and Ramanuja. His view is called Suddhadvaita, or

(1) "Indian Philosophy" by Dr. Radha Krishnan, pp. 756 and 758.

pure non-dualism, and declares that the whole world is real and is subtly Brahman. The individual souls and the inanimate world are in essence one with Brahman. Vallabha looks upon God as the whole and the individual as part. The analogy of sparks of fire is employed by Him to great purpose. The Jiva bound by maya cannot attain salvation except through the grace of God, which is called Pushti. Bhakti is the chief means of salvation, though Jnana is also useful. As regards the fruit of Bhakti, there are diverse opinions, says *Dasgupta* (1). Vallabha said in his Sevaphala-vivrti that as a result of it one may attain a great power of experiencing the nature of God, or may also have the experience of continual contact with God, and also may have a body befitting the service of God. Vallabha, however, is opposed to renunciation after the manner of monistic sanyasa, for this can only bring repentance, as being ineffacious. Thus, it will be seen that though Vallabha in his philosophical theories differs from Sankara and Ramanuja, the ultimate path for salvation which he has emphasised is that of Bhakti and by Bhakti the devotee obtains Pushti (divine grace). That is why the cult of Vallabha is known as Pushtimarg or the path for obtaining divine grace.

Dr. Bhandarkar points out that according to Vallabha, Mahapushti, or the highest grace, is that which removes great obstacles and conduces to the attainment of God himself. Thus Pushtibhakti is of four kinds: (1) Pravaha-Pushtibhakti, (2) Maryada-Pushtibhakti, (3) Pushti-Pushtibhakti and (4) Sudha-Pushtibhakti. The first is the path of those who while engaged in a worldly life with its me and mine, do acts calculated to bring about the attainment of God. The second is of those who, withdrawing their minds from worldly enjoyments, devote themselves to God by hearing His praise and listening to discourses about Him. The third is of those who already enjoyed God's grace and are made competent

(1) A history on "Indian Philosophy" by Das Gupta, pp. 355—356.

1963

Tilkayat Shri Govindlalji Maharaj
v
State of Rajasthan

Gajendragadkar, J.

to aquire knowledge useful for adoration and thus come to know all about the ways of God. The fourth is of those who through mere love devote themselves to the singing and praising of God as if it were a haunting passion. Thus, it would be seen that the tenets of the cult emphasised the importance of Bhakti, and the religious practices accordingly centered round this doctrine of Bhakti.

The practical modes of worship adopted by the members of this cult bring out the same effect. Lord Krishna as a child is the main object of worship. His worship consists of several acts of performance every day in the prescribed order of ceremonies. These begin with the ringing of the bell in the morning and putting the Lord to bed at night. After the Lord is awakened by the ringing of the bell, there is a blowing of the conch-shell, awakening of the Lord and offering morning refreshments; waving of lamps; bathing; dressing; food; leading the cows out for grazing; the mid-day meal; waving of lamps again; the evening service; the evening meal and going to bed. These rituals performed with meticulous care from day to day constitute the prescribed items of Seva which the devotees attend every day in the Vallabh temple. In order to be able to offer Bhakti in a proper way, the members of this denomination are initiated into this cult by the performance of two rites; one is Sharana Mantropadesh and the other is Atma Nivedan. The first gives the devotee the status of a Vaishnava and the second confers upon him the status of an Adhikari entitled to pursue the path of service of devotion. At the performance of the first rite, the mantra which is repeated in the ears of the devotee is "Shree Krishna Sharanam Mamah" and on the occasion a 'tulsi Kanthi' is put around the neck of the devotee. At the second initiation, a religious formula is repeated, the effect of which is that the devotee treats himself and all his properties as belonging to Lord Krishna. We have already

referred to the original image which Vallabha installed in the temple built in his time and the seven idols which Vithalnathji gave to his sons. These idols are technically described as 'Nidhi' Swaroops'. Besides these idols, there are several other idols which are worshipped by Vaishnava devotees after they are sanctified by the Guru. It is thus clear that believing in the paramount importance and efficacy of Bhakti, the followers of Vallabha attend the worship and services of the Nidhi Swaroops or idols from day to day in the belief that such devotional conduct would ultimately lead to their salvation.

It is significant that this denomination does not recognise the existence of Sadhus or Swamis other than the descendants of Vallabha and it emphasises that it is unnecessary to adopt ritualistic practices or to repeat Sanskrit Mantras or in cantations in worshipping the idols. Besides, another significant feature of this cult is that it does not believe in celibacy and does not regard that giving up worldly pleasures and the ordinary mode of a house-holder's life are essential for spiritual progress. In fact Vallabha himself lived a house-holder's life and so have all his descendants. This cult does not, therefore, glorify poverty and it teaches its followers that a normal house-holder's life is quite compatible with the practice of Bhakti, provided of course, the devotee goes through the two ceremonies of initiation and lives up to the principles enunciated by Vallabha.

The question which we have to decide is whether there is anything in the philosophical doctrines or tenets or religious practices which are the special features of the Vallabha school, which prohibits the existence of public temples or worship in them. The main object underlying the requirement that devotees should assemble in the Haveli of the Guru and worship the idol obviously was to encourage collective and congregational prayers. Presumably

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

it was realised by Vallabha and his descendants that worship in Hindu public temples is apt to clothe the images worshipped with a formal and rigid character and the element of personality is thereby obliterated; and this school believes that in order that Bhakti should be genuine and passionate, in the mind of the devotee there must be present the necessary element of the personality of God. It is true that Vaishnava temples of the Vallabha sect are generally described as Havelis and though they are grand and majestic inside, the outside appearance is always attempted to resemble that of a private house. This feature can, however, be easily explained if we recall the fact that during the time when Vithalnathji with his great missionary zeal spread the doctrine of Vallabha, Hindu temples were constantly faced with the danger of attack from Aurangzeb. In fact, the traditional story about the foundation of the Srinathji temple at Nathdwara itself eloquently brings out the fact that owing to the religious persecution practised during Aurangzeb's time, Srinathji himself had to give up his abode near Mathura and to start on a journey in search of a place for residence in more hospitable and congenial surroundings. Faced with this immediate problem Vithalnathji may have started building the temples in the form of Havelis so that from outside nobody should know that there is a temple within.

It may also be true historically that when the first temple was built in the life time of Vallabha it may have been a modest house where the original image was installed and during the early years just a few devotees may have been visiting the said temple. Appropriately enough, it was then called a Haveli. Later, even when the number of devotees increased and the temples built by the Vallabha sect began to collect thousands of visitors, traditional adherence to time-honoured words described all subsequent temples also as Havelis however big and majestic

they were. Therefore, we are satisfied that neither the tenets nor the religious practices of the Vallabha school necessarily postulate that the followers of the school must worship in a private temple. Some temples of this cult may have been private in the past and some of them may be private even today. Whether or not a particular temple is a public temple must necessarily be considered in the light of the relevant facts relating to it. There can be no general rule that a public temple is prohibited in Vallabha School. Therefore, the first argument urged by the learned Attorney-General in challenging the finding of the High Court that the Srinathji temple at Nathdwara is a public temple, cannot be accepted.

The question as to whether a Hindu temple is private or public has often been considered by judicial decisions. A temple belonging to a family which is a private temple is not unknown to Hindu law. In the case of a private temple it is also not unlikely that the religious reputation of the founder may be of such a high order that the private temple founded by him may attract devotees in large numbers and the mere fact that a large number of devotees are allowed to worship in the temple would not necessarily make the private temple a public temple. On the other hand, a public temple can be built by subscriptions raised by the public and a deity installed to enable all the members of the public to offer worship. In such a case, the temple would clearly be a public temple. Where evidence in regard to the foundation of the temple is not clearly available, sometimes, judicial decisions rely on certain other facts which are treated as relevant. Is the temple built in such an imposing manner that it may *prima facie* appear to be a public temple ? The appearance of the temple of course cannot be a decisive factor; at best it may be a relevant factor. Are the members of the public entitled to an entry

1963

Tilkayat Shri Govindlolji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

in the temple? Are they entitled to take part in offering service and taking Darshan in the temple? Are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple? Are their offerings accepted as a matter of right? The participation of the members of the public in the Darshan in the temple and in the daily Acts of worship or in the celebrations of festival occasions may be a very important factor to consider in determining the character of the temple. In the present proceedings, no such evidence has been led and it is, therefore, not shown that admission to the temple is controlled or regulated or that there are other factors present which indicate clearly that the temple is a private temple. Therefore, the case for the Tilkayat cannot rest on any such considerations which, if proved, may have helped to establish either that the temple is private or is public.

There are, however, certain ancient documents which show that the temple cannot be a private temple. We have already referred to the Firmans issued by Akbar and Shahjahan. These Firmans are strictly not material for the purpose of the present dispute because they have no relation to the temple at Nathdwara. However, as a matter of history, it may be worthwhile to recall that the Firman issued by Akbar on May 31, 1593 A. D. shows that Vithalrai had represented to the Darbar that he had purchased on paying its price land from the owners thereof in the Mowzah of Jatipura, situated in the Paraganah, adjoining Gordhan and had caused to be built thereon buildings, gardens, cowsheds and Karkhanas (workshops) for the temple of Gordhan Nath and that he was residing there. Having received this representation, Akbar issued an order that the above-mentioned Mowzah had been given over tax-free into the possession of the above-mentioned Goswami from descendant to descendant. It would thus be seen that though the grant by which the land

in question was exempted from payment of taxes is in the name of the Goswami, there can be no doubt that it was so named on the representation made by the Goswami that he had purchased the land and built structures on it for the temple of Gordhan Nath. Thus, in substance, the grant was made to the Goswami who was managing the temple of Gordhan Nath. The grant of Shah Jahan made in 1633 A. D. is to the same effect. These grants are in reference to the temple built by Vithalrai in Jatipura. We have already seen that the idol of Shrinathji was removed from the said temple and brought to Nathdwara in about 1671.

The earliest document in regard to Siarh is of the year 1672 A. D. The document has been issued by the Rana of Udaipur and it says that "Be it know that Shrinathji residing at Sihod Let uncultivated land as may desire be cultivated till such time. When Shrinathji goes back to Brij the land of those to whom it belongs will be returned to them. If any one obstructs in any way he will be rebuked." The next document is of 1680 A. D. It has been issued by Rana of Udaipur and is in similar terms. It says that when Shrinathji goes back to Brij from Singhad Brahmins will get the land which is of the Brahmins. They will get the land as is entered in previous records. So long as Shrinathji stays here, no Brahmin shall cultivate towards the West of Shah Jagivan's wall up to and across the foot of the hillock. If any one cultivates a fine of Rs. 225/- shall be realised collectively. Fortunately, for Nathdwara, the temple which was then built for Shrinathji for a temporary abode has turned out to be Shrinathji's permanent place of residence. These two documents clearly show that after Shrinathji was installed in what is now known as Nathdwara, the land occupied for the purpose of the temple was given over for that purpose and the actual occupants and cultivators were told that they would get the land back when Shrinathji goes back to Brij.

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Rajendragadkar, J.

We have already cited the extract from Col. Todd's 'Annals of Rajasthan' in which he has graphically described the traditional belief in regard to the choice of Siarh for the abode of Shrinathji. That extract shows that as soon the chariot wheel of Shrinathji stopped and would not move, the chief hastened to make a perpetual gift of the village and its lands which was speedily confirmed by the patent of the Rana. Nathji was removed from his car and in due course of time a temple was erected for his reception. That is how the hamlet of Siarh became the town of Nathdwara. This assurance given by the chief was confirmed by the two grants to which we have just referred. Thus, there can be no doubt that the original grants were for the purpose of the temple.

A deed of dedication executed by Maharana Shri Bhim Singhji in favour of Gusainji in Sambat 1865 also shows that the lands therein described had been dedicated to Shriji and Shri Gusainji and that all the income relating to those lands would be dedicated to the Bhandar of Shriji.

A letter written by the Maharana on January 17, 1825, speaks to the same effect. "Our ancestors," says the letter, "kept the Thakurji Maharaj and the Gosainji Maharaj at the village of Shinhad which is near Udaipur and presented that village to the Thakurji. After this, our ancestors became followers of that religion and agreed to obey orders. They all granted lands and villages for the expenses of the God. Besides these certain lands were granted for the grazing of the cows belonging to the Thakurji." This letter contains certain orders to the officers of the State to respect the rights of the temple and Gosainji.

Consistently with this record, we find a declaration made by Tilkayat Gordhanji in 1932 in which he

stated that "the money of Shri Thakurji as is the practice now, that it is not spent in our private expenditure the same will be followed", though along with this declaration he added that the proprietary right was his own from the time of the ancestors. In conformity with the same, the entry will continue as usual in the accounts of credit and debit as is the continuing mutation. Even though the Tilkayat set up the claim that the temple was private, it is consistently adhered to that the income derived from the properties of the temple is not intended to be and has never been used for the personal requirements of the Tilkayat.

It is true that there are other grants which have been produced on the record by the Tilkayat for the purpose of showing that some gifts of immovable property were made in favour of the Tilkayat. Such grants may either show that the gifts were made to the Tilkayat because he was in the management of the temple, or they may have been made to the Tilkayat in his personal character. Grants falling in the former category would constitute the property of the temple, whilst those falling in the latter category would constitute the private property of the Talikayat. These grants, however, would not affect the nature of the initial grants made to the temple soon after Shrinathji came to Nathdwara. Therefore in our opinion, having regard to the documentary evidence adduced in the present proceedings, it would be unreasonable to contend that the temple was built by the Tilkayat of the day as his private temple and that it still continues to have the character of a private temple. From outside it no doubt has the appearance of a Haveli, but it is common ground that the majestic structure inside is consistent with the dignity of the idol and with the character of the temple as a public temple.

We have referred to these aspects of the matter because they were elaborately argued before us by

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Rajendragadkar, J.

the learned Attorney-General. But as we will presently point out, the Firman issued by the Udaipur Darbar in 1934 really concludes the controversy between the parties on these points and it shows that the Shrinathji Temple at Nathdwara is undoubtedly a public temple. It is therefore, now necessary to consider this Firman. This Firman consists of four clauses. The first clause declares that according to the law of Udaipur, the shrine of Shrinathji has always been and is a religious institution for the followers of the Vaishnava Sampradaya and that all the property immovable and movable dedicated, offered or presented to or otherwise coming to the Deity Shrinathji has always been and is the property of the shrine and that the Tilkayat Maharaj for the time being is merely a Custodian, Manager and Trustee of the said property for the shrine of Shrinathji and that the Udaipur Darbar has absolute right to supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine. The second clause deals with the question of succession and it provides that the law of Udaipur has always been and is that the succession to the Gaddi of Tilkayat Maharaj is regulated by the law of Primogeniture, and it adds that the Udaipur Darbar has the absolute right to depose any Tilkayat Maharaj for the time being if in its absolute discretion such Maharaj is considered unfit and also for the same reason and in the same way to disqualify any person who would otherwise have succeeded to the Gaddi according to the law of primogeniture. The third clause provides that in case the Tilkayat Maharaj is a minor, the Darbar always had and has absolute authority to take any measures for the management of the shrine and its properties during such minority. The last clause adds that in accordance with the said law of Udaipur, the Rana had declared Shri Domodarlalji unfit to occupy the Gaddi and had approved of the succession of Goswami Govindlalji to the Gaddi of Tilkayat

Maharaj, and it ends with the statement that the order issued in that behalf on October 10, 1933, was issued under his authority and is lawful and in accordance with the law of Udaipur.

In appreciating the effect of this Firman, it is first necessary to decide whether the Firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur, it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. This position is covered by decisions of this Court and it has not been disputed before us, Vide *Madhaorao Phalke* v. *The State of Madhya Bharat* (1). *Ammer-un-Nisa Begum* v. *Mahboob Begum* (2), and *Director of Endowments, Government of Hyderabad* v. *Akram Ali* (3).

It is true that in dealing with the effect of this Firman, the learned Attorney-General sought to raise before us a novel point that under Hindu law even absolute monarch was not competent to make a law affecting religious endowments and their administration. He suggested that he was in a position to rely upon the opinions of scholars which tended to show that a Hindu monarch was competent only to administer the law as prescribed by Smritis and the oath which he was expected to take at the time of his coronation enjoined him to obey the Smritis and to see that their injunctions were obeyed by his subject. We do not allow the learned Attorney-General to develop this point because we hold that this novel point cannot be accepted in view of the well-recognised principles of jurisprudence. An

(1) [1960] 1 S.C.R. 957. (2) A.I.R. 1955 S.C. 352.
(3) A.I.R. 1956 S. C. 60.

1962

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

absolute monarch was the fountain-head of all legislative, executive and judicial powers and it is of the very essence of sovereignty which vested in him that he could supervise and control the administration of the public charity. In our opinion, there is no doubt whatever that this universal principle in regard to the scope of the powers inherently vesting in sovereignty applies as much to Hindu monarchs as to any other absolute monarch. Therefore, it must be held that the Firman issued by the Maharana of Udaipur in 1934 is a law by which the affairs of the Nathdwara temple and succession to the office of the Tilkayat were governed after its issue.

Then the learned Attorney-General contended that in judging about the effect of this Firman we should not ignore the background of events which necessitated its issue. Damodarlalji had been deposed by Maharana and it was more in anger that the Firman was issued to meet the challenge of the said incident. Damodarlalji had filed certain suits in the Bombay High Court and it appeared as if a doubt would arise in the minds of the followers and devotees of the temple as to whether the deposition of Damodarlalji was valid or not. It was with a view to meet this specific particular situation that the Firman was issued and so, it need not be treated as a law binding for all times. In our opinion, this argument is clearly misconceived. Whatever may be the genesis of the Firman and whatever may be the nature of the mischief which it was intended to redress, the words used in the Firman are clear and as provisions contained in a statute they must be given full effect. There can be little doubt that after this Firman was issued, it would not be open to anyone to contend that the Shrinathji temple was a private temple belonging to the Tilkayat Maharaj of the day. This law declares that it has always been and would always be a public temple. The validity of this law was not then and is not now open to any

challenge when it seeks to declare that the temple in question has always been a public temple. We have already seen that the original grants amply bear out the recital in cl. 1 of the Firman about the character of this temple. The Firman then clearly provides that the Tilkayat Maharaj is merely a Custodian, Manager and Trustee of the said property and that finally determines the nature of the office held by the Tilkayat Maharaj. He can claim no better and no higher rights after the Firman was issued. The said clause also declares that the Darbar has absolute right to see to it that the property is used for legitimate purpose of the shrine. This again is an assertion which is validly made to assert the sovereign's rights to supervise the administration of public charity. Clause 2 lays down the absolute right of the Darbar to depose the Tilkayat and to disqualify anyone from claiming the succession to the Gaddi. It shows that succession to the Gaddi and continuing in the office of the Tilkayat are wholly dependent on the discretion of the Darbar. The Right of the Darbar to depose the Tilkayat and to recognise a successor or not is described by this clause as absolute. The third and the fourth clauses are consistent with the first two clauses. Reading this Firman as a whole, there can be no doubt that under the law of Udaipur, this temple was held to be a public temple and the Tilkayat was held to be no more than the Custodian, Manager and Trustee of the property belonging to the said temple. It is on the basis of this law that the vires of the Act must inevitably be determined.

The learned Attorney-General has invited our attention to some decisions in which the temples of this cult were held to be private temples. We would now very briefly refer to these decisions before we proceed to deal with the other points raised in the present appeals. In *Gossamee Sree Greedhareejee* v. *Rumanlolljee Gossamee*, (1), the Privy Council held that when the worship of a Thakoor has been

(1) 16 I. A. 137.

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Rajendragadkar, J.

founded under Hindu law, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or that there has been some usage, course of dealing, or circumstances to show a different mode of devolution. Greedhareejee who as the plaintiff appeared before the Privy Council as the appellant had been deposed by the Rana of Udaipur in 1876. He claimed the rights of shebaitship of a certain consecrated idol and as incident thereto to the things which had been offered to the idol. This claim was based on the allegation that by the rule of primogeniture he had preferential right and not his opponent Rumanlolljee Gossamee. The High Court of Calcutta by a majority judgment had held that Greedhareejee's title as a founder had been established and that the bar of limitation pleaded by the respondent applied to the temple and the land on which it was built but not to the image and the movable property connected with it. In the result, Greedhareejee got a decree for so much of his claim as was not barred by lapse of time. This conclusion was confirmed by the Privy Council. It would be noticed that since the dispute was between two rival claimants neither of whom was interested in pleading that the temple was a public temple, that aspect of the matter did not fall to be considered in the said litigation, and so, this decision can be regarded as an authority only for the proposition which it laid down in regard to the succession of the Shebaitship. The learned Attorney-General no doubt invited our attention to the fact that in the course of his judgment, Lord Hobhouse has mentioned that all the male members of the Vallabh's family are in their lifetime esteemed by their community as partaking of the Divine essence, and as entitled to veneration and worship. This observation, however, can be of little help to the Tilkayat in the present proceedings where we have to deal with the matter on the basis of the Firman to which we have just referred. Besides, we

may incidentally add that the Tilkayat's claims to property rights in the present proceedings based on the allegation that the members of the denomination regard all successors of Vallabha with the same respect which they had for Vallabha himself, sounds incongruous with the essential tenets of Vallabha's philosophy.

In *Mohan Lalji* v. *Gordhan Lalji Maharaj* (1), the dispute which was taken before the Privy Council was in regard to the right claimed by the sons of a daughter to the shebaitship of the temple of Vallabha sect, and in support of the said right the sons of the daughter relied upon the earlier decision of the Privy Council in the case of *Gossammee Sree Girdhareejee* (2). In rejecting the plea made by the said sons, the Privy Council observed that the principle laid down in the earlier case cannot be applied so as to vest the shebaitship in persons who, according to the usages of the worship, cannot perform the rites of the office. In that case it was found that the sons of the daughter who were Bhats and who did not belong to the Gosain Kul were incompetent to perform the "diurnal rites for the deity worshipped by the sect" and so, the decision of the High Court which had rejected their claim was confirmed. In this case again neither party was interested in pleading the public character of the temple and so, that point did not arise for decision.

The same comment falls to be made about the decision of the Allahabad High Court in *Gopal Lalji* v. *Girdhar Lalji* (3). It is true that in that case the plaintiff challenged a gift deed executed by one Goswami of the Vallabha sect in favour of another Goswami and in doing so he alleged that the donor Goswami was a Trustee and not the owner of the property. But in the course of the evidence, it was virtually conceded by him that the property belonged to the donor Goswami, and so, the case was

(1) 40 I.A. 97. (2) 16 I.A. 137.

(3) A.I.R 1915 All. 44.

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Gajendragadkar, J.

decided on that basis. In its judgment, the High Court observed that there can be no doubt that if we must regard the property as "trust property" in the strict sense, dedicated for a charitable or religious purpose in the hands of duly constituted trustees of the charitable or religious object, one or more of such trustees would have no power to alienate the trust property or delegate their powers and duties contrary to the trust. But the High Court found that the evidence adduced conclusively established that the property in question was private property and so, the challenge to the validity of the gift was repelled. This decision also cannot be of any assistance in deciding the question as to whether the temple with which the present proceedings concerned is a private or a public temple. Besides, as we have already indicated, this question is really concluded by the Firman of 1934 and so, the temple must be held to be a public temple and in consequence the challenge to the validity of the Act on the basis that the Act has interfered with the Tilkayat's rights of ownership over his private property cannot succeed.

Let us now examine the material provisions of the Act before dealing with the contentions of the Tilkayat that the said provisions contravene his fundamental rights under Art. 19 (l) (f) and Arts. 14 and 31(2) even on the basis that the temple is a public temple. The Act was passed to provide for the better administration and governance of the temple of Shri Shrinathji, at Nathdwara. It consists of 38 sections. Section 2 is a definition section; under s. 2(i) "Board" means the Nathdwara Temple Board established and constituted under the Act, and s. 2 (ii) defines "Endowment" as meaning all property, movable or immovable belonging to or given or endowed in any name for the maintenance or support of the temple or for the performance of any service or charity connected therewith or for the benefit, convenience or comfort of the pilgrims visiting the temple, and

includes—

(a) the idols installed in the temple.

(b) the premises of the temple.

(c) all jagirs, muafis and other properties, movable or immovable, wherever situate and all income derived from any source whatsoever and standing in any name, dedicated to the temple or placed for any religious, pious or charitable purposes under the Board or purchased from out of the temple funds and all offerings and bhents made for and received on behalf of the temple.

but shall not include any property belonging to the Goswami personally although the same or income thereof might hitherto have been utilised in part or in whole in the service of the temple.

Section 2 (viii) defines "temple" as meaning the temple of Shri Shrinathji at Nathdwara in Udaipur District and includes the temple of Shri Navnitpriyaji and Shri Madan Mohanlalji together with all additions thereto or all alterations thereof which may be made from time to time after the commencement of the Act.

Sections 3 and 4 are important provisions of the Act. Section 3 provides that the ownership of the temple and all its endowments including all offerings which have been or may hereafter be made shall vest in the deity of Shri Shrinathji and the Board constituted under the Act shall be entitled to their possession. In other words, all property of the temple vests in the temple and the right to claim possession of it vests in the Board. As a corollary to

1963

Tilkayat Shri Govindla'ji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

the provisions of s. 3, s. 4(1) provides that the administration of the temple and all its endowments shall vest in the Board constituted in the manner hereinafter provided. Sub-section (2) lays down that the Board shall be a body corporate by the name of the Nathdwara Temple Board and shall have perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and may sue or be sued in the said name. The composition of the Board has been prescribed by s. 5: it shall consist of a President, the Collector of Udaipur District and nine other members. The proviso to the section is important: it says that the Goswami shall be one of such members if he is not otherwise disqualified to be a member and is willing to serve as such. Section 5 (2) prescribes the disqualifications specified in clauses (a) to (g)—unsoundness of mind adjudicated upon by competent Court, conviction involving moral turpitude; adjudication as an insolvent or the status of an undischarged insolvent; minority, the defect of being deaf-mute or leprosy; holding an office or being a servant of the temple or being in receipt of any emoluments or perquisites from the temple; being interested in a subsisting contract entered into with the temple; and lastly, not professing the Hindu religion or not belonging to the Pushti-Margiya Vallabhi Sampradaya. There can be no doubt that "or" in clause (g) must mean "and", for the context clearly indicates that way. There is a proviso to s. 5 (2) which lays down that the disqualification as to the holding of an office or an employment under the temple shall not apply to the Goswami and the disqualification about the religion will not apply to the Collector; that is to say, a Collector will be a member of the Board even though he may not be a Hindu and a follower of the denomination. Section 5 (3) provides that the President of the Board shall be appointed by the State Government and shall for all purposes be deemed to be a member. Under s. 5 (4) the

Collector shall be an ex-officio member of the Board. Section 5 (5) provides that all the other members specified in sub-cl. (1) shall be appointed by the State Government so as to secure representation of the Pushti-Margiya Vaishnavas from all over India. This clearly contemplates that the other members of the Board should not only be Hindus, but should also belong to the denomination, for it is in that manner alone that their representation can be adequately secured. Section 6 gives liberty to the President or any member to resign his office by giving a notice in writing to the State Government. Under s. 7 (1), the State Government is given the power to remove from office the President or any member, other than the ex-officio member, including the Goswami on any of the three grounds specified in clauses (a), (b) & (c); ground (a) refers to the disqualification specified by s. 5 (2), ground (b) refers to the absence of the member for more than four consecutive meetings of the Board without obtaining leave for absence; and ground (c) refers to the case where a member is guilty of corruption or misconduct in the administration of the endowment. Section 7 (2) provides a safeguard to the person against whom action is intended to be taken under sub-cl. (1) and it lays down that no person shall be removed unless he has been given a reasonable opportunity of showing cause against his removal. It would be noticed that by operation of s. 7 (1), the Goswami is liable to be removed, but that removal would, in a sense, be ineffective because the proviso to s. 5 requires that the Goswami has to be a member of the Board so that even though he is removed for causes (b) and (c), he would automatically be deemed to be a member under the proviso to s. 5. It would be a different matter if the Goswami is removed by reason of the fact that he is disqualified on any of the grounds described in s. 5 (2). Such a disqualification may presumably necessitate the appointment of a successor, Goswami in lieu of the disqualified

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

one and then it would be the successor Goswami who will be a member of the Board under the proviso to s. 5 (1). This position is made clear if we look at s. 11 which provides that any person ceasing to be a member shall, unless disqualified under s. 5 (2) be eligible for re appointment, whereas other members who are removed under s. 7 (1) for causes specified in clauses (b) and (c) may not be eligible for re-appointment, the Goswami would be entitled to such re-appointment. Section 8 prescribes the term of office at 3 years. Section 9 provides for the filling up of casual vacancies. Section 10 empowers the State Government to dissolve the Board and reconstitute it if it is satisfied that the existing Board is not competent to perform or persistently makes default in performing the duties imposed on it under this Act, or exceeds or abuses its powers; and this power can be exercised after due enquiry. This section further provides that if a Board is dissolved, immediate action should be taken to reconstitute a fresh Board in accordance with the provisions of this Act. Section 10 (2) provides a safeguard to the Board against which action is proposed to be taken under sub-s. (1) inasmuch as it requires that before the notification of the Board's dissolution is issued, Government will communicate to the Board the grounds on which it proposes so to do, fix a reasonable time for the Board to show cause and consider its explanation or objections, if any. Section 10 (3) empowers the State Government, as a provisional and interim measure, to appoint a person to perform the functions of the Board until a fresh Board is reconstituted, and under s. 10 (4), the State Government is given the power to fix the remuneration of the person so appointed. Section 12 makes every member of the Board liable for loss, waste or misapplication of any money or property belonging to the temple, provided such loss, waste or misapplication is a direct consequence of his wilful act or omission, and it allows a suit to be instituted to

obtain such compensation. Under s. 13, members of the Board as well as the President are entitled to draw travelling and halting allowances as may be prescribed. Section 14 deals with the office and meetings of the Board and s. 15 provides that any defect or vacancy in the constitution of the Board will not invalidate the acts of the Board. Section 16 is important. It lays down that subject to the provisions of this Act and of the rules made thereunder, the Board shall manage the properties and affairs of the temple and arrange for the conduct of the daily worship and ceremonies and of festivals in the temple according to the customs and usage of the Pushti-Margiya Vallabhi Sampradaya. Section 17 (1) provides that the jewelleries or other valuable moveable property of a non-perishable character the administration of which vests in the Board shall not be transferred without the previous sanction of the Board, and if the value of the property to be transferred exceeds ten thousand rupees, the previous approval of the State Government has to be obtained. Section 17 (2) requires the previous sanction of the State Government for leasing the temple property for more than five years, or mortgaging, selling or otherwise alienating it. Section 18 imposes a ban on the borrowing power of the Board. Section 19 (1) provides for the appointment of the Chief Executive Officer of the temple, and the remaining four subsections of s. 19 deal with his terms and conditions of service. Section 20 speaks of the powers and duties of the Chief Executive Officer which relate to the administration of the temple properties. Section 21 provides that the Board may appoint, suspend, remove, dismiss or reduce in rank or in any way punish all officers and servants of the Board other than the Chief Executive Officer, in accordance with rules made by the State Government. Section 22 is very important. It provides that save as otherwise expressly provided in or under this Act, nothing

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

herein contained shall affect any established usage of the temple or the rights, honours, emoluments and perquisites to which any person may, by custom or otherwise, be entitled in the temple. Section 23 deals with the budget, s. 24 with accounts and s. 25 with the Administration Report. Section 26 confers on the State Government power to call for such information and accounts as may, in its opinion, be reasonably necessary to satisfy it that the temple is being properly maintained, and its administration carried on according to the provisions of this Act. Under this section, the Board is under an obligation to furnish forthwith such information and accounts as may be called for by the State Government. Under s. 27, the State Government may depute any person to inspect any movable or immovable property, records, correspondence, plans, accounts and other documents relating to the temple and endowments, and the Board and its officers and servants shall be bound to afford all facilities to such persons for such inspection. Section 28(1) specifies the purposes for which the funds of the temple may be utilised and s. 28(2) provides that without prejudice to the purposes referred to in sub-s. (1), the Board may, with the previous sanction of the State Government, order that the surplus funds of the temple be utilised for the purposes mentioned in clauses (a) to (e). Section 28(3) requires that the order of the Board under sub-s. (2) shall be published in the prescribed manner. Section 29 deals with the duties of trustee of specific endowment; s. 30(1) confers the power on the State Government to make rules for carrying out all or any of the purposes of the Act; s. 30(2) provides that in particular and without prejudice to the generality of the foregoing power, the State Government shall have power to make rules with reference to matters covered by clauses (a) to (i). Under sub-section (3) it is provided that the rules made under this Act shall be placed before the House of the State

Legislature at the session thereof next following. Section 31 provides that the State Government or any person interested may institute a suit in the Court of District Judge to obtain a decree for the reliefs mentioned in clauses (a) to (e). These reliefs correspond to the relief which may be obtained in a suit under s. 92 Code of Civil Procedure. In consequence, s. 31(2) provides that ss. 92 and 93 and O. I, r. 8, of the First Schedule to the Code of Civil Procedure shall have no application to any suit claiming any relief in respect of the administration or management of the temple and no suit in respect thereof shall be instituted except as provided by this Act. In other words, a suit which would normally have been filed under ss. 92 and 93 and O. I, r. 8, of the Code has now to be filed under s. 31. Section 32 deals with the resistance or obstruction in obtaining possession and it provides that the order which may be passed by the Magistrate in such matters shall, subject to the result of any suit which may be filed to establish the right to the possession of the property, be final. Section 33 deals with the costs of the suit, etc. Section 34 provides that this Act shall have effect notwithstanding anything to the contrary contained in any law for the time being in force or in any scheme of management framed before the commencement of this Act or in any decree, order, practice, custom or usage. Section 35 contains a transitional provision and it empowers the State Government to appoint one or more persons to discharge all or any of the duties of the Board after the Act comes into force and before the first Board is constituted. Under s. 36 it is provided that if any difficulty arises in giving effect to any of the provisions of this Act, the State Government may, by order, give such directions and make such provisions as may appear to it to be necessary for the purpose of removing the difficulty. Section 37 prescribes a bar to suit or proceeding against the State Government for anything done or purported to be done by

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Gajendragadkar, J.

it under the provisions of this Act. The last section deals with repeal and savings. The Rajasthan Ordinance No. 2 of 1959 which had preceded this Act has been repealed by this section. That in brief, is the scheme of the Act.

Later, we will have occasion to deal with the specific sections which have been challenged before us, but at this stage, it is necessary to consider the broad scheme of the Act in order to be able to appreciate the points raised by the Tilkayat and the denomination in challenging its validity. For the purpose of ascertaining the true scope and effect of the scheme envisaged by the Act it is necessary to concentrate on sections 3, 4, 16, 22 and 34. The scheme of the Act, as its preamble indicates, is to provide for the better administration and governance of the temple of Shri Shrinathji at Nathdwara. It proceeds on the basis that the temple of Shrinathji is a public temple and having regard to the background of the administration of its affairs in the past, the legislature thought that it was necessary to make a more satisfactory provision which will lead to its better administration and governance. In doing so, the legislature has taken precaution to safeguard the performance of religious rites and the observance of religious practices in accordance with traditional usage and custom. When the validity of any legislative enactment is impugned on the ground that its material provisions contravene one or the other of the fundamental rights guaranteed by the Constitution, it is necessary to bear in mind the primary rule of construction. If the impugned provisions of the Statute are reasonably capable of a construction which does not involve the infringement of any fundamental rights, that construction must be preferred though it may reasonably be possible to adopt another construction which leads to the infringement of the said fundamental rights. If the impugned

provisions are reasonably not capable of the construction which would save its validity, that of course is another matter; but if two constructions are reasonably possible, then it is necessary that the Courts should adopt that construction which upholds the validity of the Act rather than the one which affects its validity. Bearing this rule of construction in mind, we must examine the five sections to which we have just referred. Section 3 no doubt provides for the vesting of the temple property and all its endowments including offerings in the deity of Shrinathji, and that clearly is unexceptionable. If the temple is a public temple, under Hindu Law the idol of Shrinathji is a juridical person and so, the ownership of the temple and all its endowments including offerings made before the idol constitute the property of the idol. Having thus stated what is the true legal position about the ownership of the temple and the endowments, s. 3 proceeds to add that the Board constituted under this Act shall be entitled to the possession of the said property. If the legislature intended to provide for the better administration of the temple properties, it was obsolutely essential to constitute a proper Board to look after the said administration, and so, all that s. 3 does is to enable the Board to take care of the temple properties and in that sense, it provides that the Board shall be entitled to claim possession of the said properties. In the context, this provision does not mean that the Board would be entitled to dispossess persons who are in possession of the said properties : it only means that the Board will be entitled to protect its possession by taking such steps as in law may be open to it and necessary in that behalf. Section 4 is a mere corollary to s. 3 because it provides that the administration of the temple and all its endowments shall vest in the Board. Thus, the result of reading ss. 3 and 4 is that the statute declares that the properties of the temple vest in the deity of Shrinathji and provides for the administration of the said

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

properties by appointing a Board and entrusting to the Board the said administration.

The true scope and effect of these provisions can be properly appreciated only when they are co-related to ss. 16 and 22. Section 16 prescribes the duties of the Board; it requires that subject to the provisions of the Act and the rules framed under it, the Board has to manage the properties and affairs of the temple and arrange for the conduct of the daily worship and ceremonies and of festivals in the temple according to the customs and usages of the Pushti-margiya Vallabhi Sampradaya. It would be noticed that two different categories of duties are imposed upon the Board. The first duty is to manage the properties and secular affairs of the temple. This naturally is a very important part of the assignment of the Board. Having thus provided for the discharge of its important function in the matter of administering the properties of the temple, the section adds that it will be the duty of the Board to arrange for the religious worship, ceremonies and festivals in the temple, but this has to be done according to the customs and usages of the denomination. It is thus clear that the duties of the Board in so far as they relate to the worship and other religious ceremonies and festivals, it is the traditional customs and usage which is of paramount importance. In other words, the legislature has taken precaution to safeguard the due observance of the religious ceremonies, worship and festivals according to the custom and usage of the denomination. Section 22 makes this position still clearer; it provides that save as otherwise expressly provided in or under the Act, nothing herein contained shall affect any established usage of the temple or the rights, honours, emoluments and perquisites to which any person may, by custom or otherwise, be entitled in the temple. The saving provisions of s. 22 are very wide; unless there is an express provision to the contrary in the

Act, all matters which have been saved by s. 22 will be governed by the traditional usage and custom. If only we consider the very wide terms in which the saving clause under s. 22 has been drafted, it will be clear that the legislature was anxious to provide for the better administration of the temple properties and not to infringe upon the traditional religious ceremonies, worship and festivals in the temple and the rights, honours, emoluments and the perquisites attached thereto. Section 34 which provides for the over-riding effect of the Act must be read along with s. 22 and so, when it provides that the Act shall have effect notwithstanding practice, custom or usage, it only means that practice, custom and usage will not avail if there is an express provision to the contrary as prescribed by s. 22.

Reading these five sections together, it seems to us clear that the Legislature has provided for the appointment of a Board to look after the administration of the property of the temple and manage its secular affairs as well as the religious affairs of the temple, but in regard to these religious affairs consisting of the worship, services, festivals and other ceremonies, the custom prevailing in the temple consistently with the tenets of Vallabha philosophy are to be respected. The learned Attorney-General no doubt attempted to read ss. 3 and 4 in a very wide manner and he sought to place a narrow construction on s. 22, thereby indicating that even religious ceremonies and rites and festivals would remain within the exclusive jurisdiction of the Board without reference to the traditional custom or usage. We do not think that it would be appropriate to adopt such an approach in construing the relevant provisions of the Act. We have no doubt that when rules are framed under s. 30 of the Act, they would be framed bearing in mind these essential features of the material provisions of the Act and will help to carry out the object of the Act in keeping the religious part of the services and wor-

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

ship at the temple apart from the secular part of the administration of the temple properties. Broadly stated, the former will be carried out according to the traditional usage and custom and the latter according to the provisions of the Act.

On behalf of the Tilkayat, the main contention which has been raised before us by the learned Attorney-General is that his right of property has been infringed under Art. 19 (1) (f) and Mr. Pathak has added that the relevant provisions infringed the Tilkayat's rights under Art. 31 (2) of the Constitution. As we have already indicated this latter contention is raised in the writ petition filed by the Tilkayat in this Court. Now in deciding the validity of these contentions it is necessary to revert to the Firman issued by the Rana of Udaipur in 1934, because the rights of the Tilkayat have to be judged in the light of the said Firman. We have already noticed that the said Firman clearly declares that the Tilkayat is merely a Custodian, Manager and Trustee of the property of the shrine Shrinathji and that the Udaipur Darbar has the absolute right to supervise that the property dedicated to the shrine is used for legitimate purpose of the shrine. Having regard to the unambiguous and emphatic words used in clause 1 of the Firman and having regard to other drastic provisions contained in its remaining clauses, we are inclined to think that this Firman made the Tilkayat for the time being a Custodian, Manager and Trustee, and nothing more. As a Custodian or Manager, he had the right to manage the properties of the temple, subject, of course, to the overall supervision of the Darbar, the right of the Darbar in that behalf being absolute. He was also a Trustee of the said property and the word "trustee" in the context must mean trustee in the technical legal sense. In other words, it is not open to the Tilkayat to claim that he has rights of a Mahant or a Shebait; his rights are now defined and he cannot claim any higher rights after the Firman was issued. There can be no doubt that the right to

have the custody of the property such as the Custodian has, or the right to manage the property such as the Manger possesses, or the right to administer the trust property for the benefit of the beneficiary which the Trustee can do, cannot be regarded as a right to property under Art. 19 (1)(f) and for the same reason, it does not constitute property under Art. 31(2). If it is held that the Tilkayat was no more than a Custodian, Manager and Trustee properly so called, there can be no doubt that he is not entitled to rely either on Art. 19(1)(f) or on Art. 31(2). Therefore, on this construction of clause 1 of the Firman, the short answer to the pleas raised by the Tilkayat under Arts. 19(1)(f) and 31(2) is that the rights such as he possesses under the said clause cannot attract Art. 19(1)(f) or Art. 31(2).

It has, however, been strenously urged before us that the words "Custodian, Manager or Trustee" should be liberally construed and the position of the Tilkayat should be taken to be similar to that of a Mahant of a Math or a Shebait of a temple. Under Hindu Law, idols and Maths are both juridical persons and Shebaits and Mahants who manage their properties are recognised to possess certain rights and to claim a certain status. A Shebait by virtue of his office is the person entited to administer the property attached to the temple of which he is a Shebait. Similarly a Mahant who is a spiritual head of the Math or religious institution is entitled to manage the said property for and on behalf of the Math. The position of the Mahant under Hindu law is not strictly that of a Trustee. As Mr. Ameer Ali delivering the judgment of the Board observed in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1), "called by whatever name he is only the manager and custodian of the idol or the institution." When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. In almost every case the Mahant is given the right to a

(1) (1921) L. R. 48 I.A. 302, 311.

1963

Tilkayat
hri Govindlalji
Maharaj
v.
te of Rajasthan

jendragadkar, J.

part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, though in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration.

This position has been accepted by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.* (1). Speaking for the unanimous Court in that case, Mukherjea, J., observed, "Thus in the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together, and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right." On this view, this Court held that the right of this character vesting in a Mahant is a right to property under Art. 19(1)(f) of the Constitution. Relying on this decision, it is urged that the Firman should be construed to make the Tilkayat a Mahant or a Shebait and as such, clothed with rights which amount to a right to property under Art. 19(1)(f) and which constitute property under Art. 31(2).

Assuming that the construction of clause 1 of the Firman suggested by the learned Attorney-General is possible, let us examine the position on the basis that the Tilkayat can, in theory, be regarded as a Mahant of the temple. What then are the rights to which, according to the relevant evidence produced in this case, the Mahant is entitled in respect of the temple? As a Tilkayat, he has a right to reside in

(1) [1954] S.C.R. 1005.

the temple; as such Mahant he has a right to conduct or arrange for and supervise the worship of the idol in the temple and the services rendered therein in accordance with the traditional custom and usage. He has also the right to receive bhents on behalf of the idol and distribute *Prasad* in accordance with the traditional custom and usage. So far as these rights are concerned, they have not been affected by the Act, and so, no argument can be raised that in affecting the said rights the Act has contravened either Art. 19(1)(f) or Art. 31(2). It is, however, argued that as a Mahant, the Tilkayat had the right to manage the properties of the temple, to lease them out and in case of necessity, to alienate them for the purpose of the temple; and it is suggested that these rights constitute a right to property under Art. 19(1)(f) and property under Art. 31(2). The learned Attorney-General fairly conceded that there was no evidence to show that the right to alienate had ever been exercised in this case, but he contends that the existence of the right cannot be denied. It is also conceded that the right to manage the properties was subject to the strict and absolute supervision of the Darbar, but it is suggested that even so, it is a right which must be regarded as a right to property. In dealing with this argument, it is necessary to bear in mind that the extent of the rights available to the Tilkayat under clause 1 of the Firman cannot be said to have become larger by virtue of the fact that the Constitution came into force in 1950. It is only the rights to property which subsisted in the Tilkayat under the said Firman that would be protected by the Constitution, provided, of course, they are rights which attract the provisions of Art. 19(1)(f) or Art. 31(2).

This branch of the argument urged on behalf of the Tilkayat naturally rests on the decision of this Court in the case of the *Commissiner, Hindu Religious Endowments, Madras* (1), that right of a Mahant

(1) [1954] S.C.R. 1005.

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

does amount to "a genuine legal right" and that the said right must be held to fall under Art. 19(1)(f) because the word "property" used in the said clause ought to receive a very liberal interpretation. It will be recalled that in the said case, this Court in terms and expressly approved of the decision of Mr. Ameer Ali in *Vidya Viruthi Thirtha's* case (1), which exhautively dealt with the position of the Mahant or the Shebait under Hindu law. We have already quoted the relevant observations made in that judgment and it would be relevant to repeat one of those observations in which the Privy Council stated that in almost every case the Mahant is given the right to a part of the usufruct, the mode of enjoyment and the amount of usufruct depending again on usage and custom. It is true that in the passage in Mr. Justice Mukherjea's judgment in the case of the *Commissioner, Hindu Religious Endowments, Madras* (2), this particular statement has not been cited; but having referred to the rights which the Mahant can claim, the learned Judge has added that these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right. It is clear that when this Court held that the rights vesting in the Mahant as a manager of the Math amount to a genuine legal right to property, this Court undoubtedly had in mind the fact that usually, the Mahant or Shebait is entitled to be maintained out of the property of the Math or the temple and that the extent of the right to a part of the usufruct and the mode of enjoyment and the amount of the usufruct always depended on usage and custom of the Math or the temple. It is in the light of these rights, including particularly the right to claim a part of the usufruct for his maintenance that this Court held that the totality of the rights amount to a right to property under Art. 19 (1) (f).

(1) (1921) L.R. 48 I.A. 302, 311. (2) [1954] S.C.R. 1005.

That takes us to the question as the nature and extent of the Tilkayat's rights in regard to the temple property. It is clear that the Tilkayat never used any income from the property of the temple for his personal needs or private purpose. It is true that the learned Attorney-General suggested that this consistent course of conduct spreading over a large number of years was the result of what he described as self-abnegation on the part of the Tilkayats from generation to generation and from Tilkayat's point of view, it can be so regarded because the Tilkayat thought and claimed that the temple and his properties together constituted his private property. But once we reach the conclusion that the temple is a public temple and the properties belonging to it are the properties of the temple over which the Tilkayat has no title or right, we will have to take into account the fact that during the long course of the management of this temple, the Tilkayat has never claimed any proprietary interest to any part of the usufruct of the properties of the temple for his private personal needs, and so, that proprietary interest of which Mr. Ameer Ali spoke in dealing with the position of the Mahant and the Shebait and to which this Court referred in the case of *Commissioner, Hindu Religious Endowments, Madras* (1), is lacking in the present case. What the Tilkayat can claim is merely the right to manage the property, to create leases in respect of the properties in a reasonable manner and the theoretical right to alienate the property for the purpose of the temple; and be it noted that these rights could be exercised by the Tilkayat under the absolute and strict supervision of the Darbar of Udaipur. Now, the right to manage the property belonging to the temple, or the right to create a lease of the property on behalf of the temple, or the right to alienate the property for the purpose of the temple under the supervision of the Darbar cannot, in our opinion, be equated with the totality of the powers generally possessed by the Mahant or

(1) [1954] S.C.R. 1005.

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

even the Shebait, and so, we are not prepared to hold that having regard to the character and extent of the rights which can be legitimately claimed by the Tilkayat even on the basis that he was a Mahant governed by the terms of the Firman, amount to a right to property under Art. 19 (1)(f) or constitute property under Art. 31 (2).

Besides, we may add that even if it was held that these rights constituted a right to hold property their regulation by the relevant provisions of the Act would undoubtedy be protected by Art. 19 (5). The temple is a public temple and what the legislature has purported to do is to regulate the administration of the properties of the temple by the Board of which the Tilkayat is and has to be a member. Having regard to the large estate owned by the Tilkayat and having regard to the very wide extent of the offerings made to the temple by millions of devotees from day to day; the legislature was clearly justified in providing for proper administration of the properties of the temple. The restrictions imposed by the Act must, therefore, be treated as reasonable and in the interests of the general public.

Turning to Mr. Pathak's argument that the rights constitute property under Art. 31 (2) and the Act contravenes the said provision because no compensation had been provided for, or no principles have been prescribed in connection therewith, the answer would be the same. The right which the Tilkayat possesses cannot be regarded as property for the purpose of Art. 31 (2). Besides, even if the said rights are held to be property for the purpose of Art. 31 (2), there are some obvious answers to the plea which may be briefly indicated.

After Art. 31 (2) was amended by the Constitution (Fourth Amendment) Act, 1955, the position with regard to the scope and effect of the provisions of

Art. 31 (1) and 31 (2) is no longer in doubt. Article 31 (2) deals with the compulsory acquisition or requisition of a citizen's property and it provides that a citizen's property can be compulsorily acquired or requisitioned only for a public purpose and by authority of law which provides for compensation and either fixes the amount of the compensation or specifies the principles on which and the manner in which, the compensation is to be determined and given; and it adds that no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate. Art. 31 (2A) which is expressed in a negative form really amounts to this that where a law provides for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall be deemed to provide for the compulsory acquisition or requisition of property. If, on the other hand, the transfer of the ownership or the right to possession of any property is not made to the State or to a corporation owned or controlled by the State, it would not be regarded as compulsory acquisition or requisition of the property, notwithstanding that it does deprive any person of his property. In other words, the power to make a compulsory acquisition or requisition of a citizen's property provided for by Art. 31(2) is what the American lawyers described as "eminent domain"; all other cases where a citizen is deprived of his property are covered by Art. 31(1) and they can broadly be said to rest on the police powers of the State. Deprivation of property falling under the latter category of cases cannot be effected save by authority of law; this Court has held that the expression "save by authority of law" postulates that the law by whose authority such deprivation can be effected must be a valid law in the sense that it must not contravene the other fundamental rights guaranteed by the Constitution.

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

The argument which has been urged before us by Mr. Pathak is that the right to administer the properties of the temple which vested in the Mahant has been compulsorily acquired and transferred to a Board constituted under the Act which Board is controlled by the State. We will assume that the Board in question is controlled by the State; but the question still remains whether the right which is allowed to vest in the Tilkayat has been compulsorily acquired and has been transferred to the Board. In our opinion, what the Act purports to do is to extinguish the secular office vesting in the Tilkayat by which he was managing the properties of the temple. It is well-known that a Mahant combines in himself both a religions and a secular office. This latter office has been extinguished by the Act, and so, it cannot be said that the rights vesting in the Tilkayat to administer the properties have been compulsorily acquired. Acquisition of property, in the context, means the extinction of the citizen's rights in the property and the conferment of the said rights in the State or the State owned corporation. In the present case, the Act extinguishes the Mahant's rights and then creates another body for the purpose of administering the properties of the temple. In other words, the office of one functionary is brought to an end and another functionary has come into existence in its place. Such a process cannot be said to constitute the acquisition of the extinguished office or of the rights vesting in the person holding that office.

Besides, there is another way in which this question may perhaps be considered. What the Act purports to do is not to acquire the Tilkayat's rights but to require him to share those rights with the other members of the Board. We have already seen that the Act postulates that the Mahant for the time being has to be a member of the Board and so, the administration of the properties which was so long carried on by the Mahant alone would here after

have to be carried on by the Mahant along with his colleagues in the Board. This again cannot, we think, be regarded as a compulsory acquisition of the Tilkayat's rights. It is not suggested that the effect of the relevant provisions of the Act is to bring about the requisitioning of the said rights. Therefore, even if it is assumed that the rights claimed by the Tilkayat constitute property under Art. 31(2), we do not think that the provisions of Art. 31(2) apply to the Act. But as we have already held, the rights in question do not amount to a right to hold property under Art. 19(1)(f) or to property under Art. 31(2).

That takes us to the argument that the Act is invalid because it contravenes Art. 14. In our opinion, there is no substance in this argument. We have referred to the historical background of the present legislation. At the time when Ordinance No. II of 1959 was issued, it had come to the knowledge of the Government of Rajasthan that valuables such as jewelleries, ornaments, gold and silver-ware and cash had been removed by the Tilkayat in the month of December 1957, and as the successor of the State of Mewar, the State of Rajasthan had to exercise its right of supervising the due administration of the properties of the temple. There is no doubt that the shrine at Nathdwara holds a unique position amongst the Hindu shrines in the State of Rajasthan and no temple can be regarded as comparable with it. Besides, the Tilkayat himself had entered into negotiations for the purpose of obtaining a proper scheme for the administration of the temple properties and for that purpose, a suit under s. 92 of the Code had in fact been filed. A Commission of Enquiry had to be appointed to investigate into the removal of the valuables. If the temple is a public temple and the legislature thought that it was essential to safeguard the interests of the temple by taking adequate legislative action in that behalf, it is difficult to appreciate how the Tilkayat can seriously

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Gajendragadkar, J.

contend that in passing the Act, the legislature has been guilty of unconstitutional discrimination. As has been held by this Court in the case of *Shri Ram Krishna Dalmia* v. *Shri Justice S. R. Tendolkar* (1), that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself. Therefore, the plea raised under Art. 14 fails.

The next point to consider is in regard to the pleas raised more by the denomination than by the Tilkayat himself under Arts. 25 and 26 of the Constitution. The attitude adopted by the denomination in its writ petition is not very easy to appreciate. In the writ petition filed on behalf of the denomination, it was urged that the Tilkayat himself is the owner of all the properties of the temple and as such, was entitled to manage them in his discretion and as he liked. This plea clearly supported the Tilkayat's stand that the temple in question was a private temple belonging to himself and as such, all the temple properties were his private properties. The denomination was clearly in two minds. It was inclined more to support the Tilkayat's case than to put up an alternative case that the denomination was interested in the management of these properties. Even so, some allegations have been made in the writ petition filed on behalf of the denomination from which it may perhaps be inferred that it was the alternative case of the denomination that the temple and the properties connected therewith belonged to the denomination according to its usages and tradition, and therefore, the management of the said temple and the properties cannot be transferred to the Board. It is this latter alternative plea which is based on Art. 25 (1) and Art. 26(b) of the Constitution. The argument is that the Act contravenes the right guaranteed to the denomination by

(1) [1959] S.C.R. 279, 297.

Art. 25(1) freely to practise its religion and that it also contravenes the denomination's right guaranteed under Art. 26(b) and (d) to manage its own affairs in matters of religion, and to administer its property in accordance with law. For the purpose of dealing with these arguments, we will assume that the denomination has a beneficial interest in the properties of the temple.

Articles 25 and 26 constitute the fundamental rights to freedom of religion guaranteed to the citizens of this country. Article 25 (1) protects the citizen's fundamental right to freedom of conscience and his right freely to profess, practise and propagate religion. The protection given to this right is, however, not absolute. It is subject to public order, morality and health as Art. 25 (1) itself denotes. It is also subject to the laws, existing or future, which are specified in Art. 25 (2). Article 26 guarantees freedom of the denominations or sections thereof to manage their religious affairs and their properties. Article 26 (b) provides that subject to public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion; and Art. 26 (d) lays down a similar right to administer the property of the denomination in accordance with law. Article 26 (c) refers to the right of the denomination to own and acquire movable and immovable property and it is in respect of such property that clause (d) makes the provision which we have just quoted. The scope and effect of these articles has been considered by this Court on several occasions. "The word "religion" used in Art. 25 (1)," observed Mukherjea, J., speaking for the Court in the case of the *Commissioner, Hindu Religious Endowments, Madras* (1), "is a matter of faith with individuals and communities and it is not necessarily theistic. It undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess

(1) [1954] S.C.R. 1005.

1963

Tilkayat Shri Govindlalji Maharaj v. ate of Rajasthan

ajendragadkar, J.

that religion as conducive to their spiritual well being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress."

In *Shri Venkataramana Devara* v. *The State of Mysore* (1), Venkatarama Aiyar, J., observed "that the matter of religion in Art. 26 (b) include even practices which are regarded by the community as parts of its religion." It would thus be clear that religious practice to which Art. 25 (1) refers and affairs in matters of religion to which Art. 26 (b) refers, include practices which are an integral part of the religion itself and the protection guaranteed by Art. 25 (1) and Art. 26 (b) extends to such practices.

In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites while dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question ? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which

(1) [1958] S.C.R. 895, 909.

practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It is in the light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of *The Durgah Committee, Ajmer* v. *Syed Hussain Ali* (1), and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part ; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 25 (1).

In this connection, it cannot be ignored that what is protected under Arts. 25 (1) and 26 (b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Art. 25 (1) or Art. 26 (b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individul citizen that the impugned statute contravenes his fundamental right to practise religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in

(1) [1962] 1 S.C.R. 383, 411.

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matters of religion, then, of course, the rights guaranteed by Art. 25 (1) and Art. 26 (b) cannot be contravened.

It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Arts. 25 (1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Arts. 25(1) and 26(b), Latham, C. J.,'s. observation in *Adelaide Company of Jehovah's witnesses Incorporated* v. *The Commonwealth* (1), that "what is religion to one is superstition to another", on which Mr. Pathak relies, is of no relevance. If an obviously

(1) 67 C.L.R. 116, 123.

secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Art. 25(1) and Art. 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Art. 25(1) or Art. 26(b). This aspect of the matter must be borne in mind in dealing with the true scope and effect of Art. 25(1) and Art. 26(b).

Let us then enquire what is the right which has been contravened by the relevant provisions of the Act. The only right which, according to the denomination, has been contravened is the right of the Tilkayat to manage the property belonging to the temple. It is urged that throughout the history of this temple, its properties have been managed by the Tilkayat and so, such management by the Tilkayat amounts to a religious practice under Art. 25(1) and constitutes the denomination's right to manage the affairs of its religion under Art. 26(b). We have no hestitation in rejecting this argument. The right to manage the properties of the temple is a purely secular matter and it cannot, in our opinion, be regarded as a religious practice so as to fall under Art. 25(1) or as amounting to affairs in matters of religion. It is true that the Tilkayats have been respected by the followers of the denomination and it is also true that the management has remained with the Tilkayats, except on occasions like the minority of the Tilkayat when the Court of Wards stepped in. If the temple had been private and the properties of the temple had belonged to the Tilkayat, it was another matter,

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

But once it is held that the temple is a public temple, it is difficult to accede to the argument that the tenets of the Vallabha cult require as a matter of religion that the properties must be managed by the Tilkayat. In fact, no such tenet has been adduced before us. So long as the denomination believed that the property belonged to the Tilkayat like the temple, there was no occasion to consider whether the management of the property should be in the hands of anybody else. The course of conduct of the denomination and the Tilkayat based on that belief may have spread for many years, but, in our opinion, such a course of conduct cannot be regarded as giving rise to a religious practice under Art. 25(1). A distinction must always be made between a practice which is religious and a practice in regard to a matter which is purely secular and has no element of religion associated with it. Therefore, we, are satisfied that the claim made by the denomination that the Act impinges on the rights guaranteed to it by Art. 25(1) and 26(b) must be rejected.

That leaves one more point to be considered under Art. 26(d). It is urged that the right of the denomination to administer its property has virtually been taken away by the Act, and so, it is invalid. It would be noticed that Art. 26(d) recognises the denomination's right to administer its property, but it clearly provides that the said right to administer the property must be in accordance with law. Mr. Sastri for the denomination suggested that law in the context is the law prescribed by the religious tenets of the denomination and not a legislative enactment passed by a competent legislature. In our opinion, this argument is wholly untenable. In the context, the law means a law passed by a competent legislature and Art. 26(d) provides that though the denomination has the right to administer its property, it must administer the property in accordance with law. In other words, this clause emphatically

brings out the competence of the legislature to make a law in regard to the administration of the property belonging to the denomination. It is true that under the guise of regulating the administration of the property by the denomination, the denomination's right must not be extinguished or altogether destroyed. That is what this Court has held in the case of the *Commissioner, Hindu Religious Endowments Madras* (1) and *Ratilal Panachand Gandhi* v. *The State of Bombay* (2).

Incidentally, this clause will help to determine the scope and effect of the provisions of Art. 26(b). Administration of the denomination's property which is the subject-matter of this clause is obviously outside the scope of Art. 26 (b). Matters relating to the administration of the denomination's property fall to be governed by Art. 26(d) and cannot attract the provisions of Art. 26(b). Article 26 (b) relates to affairs in matters of religion such as the performance of the religious rites or ceremonies, or the observance of religious festivals and the like; it does not refer to the administration of the property at all. Article 26(d) therefore, justifies the enactment of a law to regulate the administration of the denomination's property and that is precisely what the Act has purported to do in the present case. If the clause "affairs in matters of religion" were to include affairs in regard to all matters, whether religious or not the provision under Art. 26 (d) for legislative regulation of the administration of the denomination's property would be rendered illusory.

It is however, argued that the constitution of the Board in which the administration of the property now vests is not the denomination, and since the administration is now left to the Board, the denomination has been wholly deprived of its right to administer the property. It is remarkable that this plea should be made by the representatives of the

(1) [1954] S.C.R. 1005. (2) [1954] S.C.R. 1055.

1963

Tilkayat
ri Govindlalji
Maharaj
v.
e of Rajasthan.

endragadkar, J.

denomination who in their writ petition were prepared to support the Tilkayat in his case that the temple and the properties of the temple were his private property. That apart, we think that the constitution of the Board has been deliberately so prescribed by the legislature as to ensure that the denomination should be adequately and fairly represented on the Board. We have already construed s. 5 and we have held that s. 5 (2) (g) requires that the members of the Board other than the Collector of Udaipur District should not only profess Hindu religion but must also belong to the Pushti-Margiya Vallabhi Sampradaya. It is true that these members are nominated by the State Government, but we have not been told how else this could have been effectively arranged in the interests of the temple itself. The number of the devotees visiting the temple runs into lacs ; there is no organisation which comprehensively represents the devotees as a class ; there is no register of the devotees and in the very nature of things, it is impossible to keep such a register. Therefore, the very large mass of Vallabh's followers who constitute the denomination can be represented on the Board of management only by a proper nomination made by the State Government, and so, we are not impressed by the plea that the management by the Board constituted under the Act will not be the management of the denomination. In this connection, we may refer to clause 1 of the Firman which vested in the Darbar absolute right to supervise the management of the property. As a successor-in-interest of the Darbar, the state of Rajasthan can be trusted to nominate members on the Board who would fairly represent the denomination. Having regard to all the relevant circumstances of this case; we do not think that the legislature could have adopted any other alternative for the purpose of constituting the Board. Therefore, we must hold that the challenge to the validity of the Act on the

ground that it contravenes Arts. 25 (1), 26 (b) and 26 (d) must be repelled.

It still remains to consider the provisions of the Act which have been challenged by the Tilkayat and the denomination as well as those which have been struck down by the High Court and in respect of which the State has preferred appeals. We will take these sections in their serial order. We have considered ss. 3, 4, 16, 22 and 34 and have held that these sections are valid because the scheme envisaged by the said sections clearly protects the religious rites, ceremonies and services rendered in the temple and the Tilkayat's status and powers in respect thereof. The said scheme merely allows the administration of the properties of the temple which is a purely secular matter to be undertaken by the Board, and so, it is not necessary to refer to the said sections again.

Section 2 (viii) which defines a temple as including the temple of Shri Navnitpriyaji and Shri Madan Mohanlalji has been struck down by the High Court in regard to the said two subsidiary deities. The High Court has held that the two deities Navnitpriyaji and Madan Mohanlalji are the private deities of the Tilkayat and it was not competent to the legislature to include them within the definition of the temple under s. 2 (viii). It was urged before the High Court that the said two idols had been transferred by the Tilkayat to the public temple and made a part of it, but it has held that there was no gift or trust deed by the Tilkayat divesting himself of all his rights in those two idols and its property and so, the validity of the section could not be sustained on the ground of such transfer. The correctness of this conclusion is challenged by the learned Solicitor-General on behalf of the State. In dealing with this question, the conduct of the Tilkayat needs to be examined. On October 15, 1956 a report

1963

Tilkayat Shri Govindlolji Maharaj v. State of Rajasthan

Gajendragadkar, J.

was made by Mr. Ranawat to the Tilkayat in respect of these two idols. It appears that the grant of some villages in respect of these idols stood in the name of the Tilkayat and after the said villages were resumed by the State, a question arose as to the compensation payable to the owner of the said villages. In that connection, Mr. Ranawat reported to the Tilkayat that it would be to the advantage of the two idols if the said lands along with the idols were treated as a part of the public temple. He cited the precedent of the lands belonging to the Nathdwara Temple in support of his plae. On receiving this report, the Tilkayat was pleased to transfer the ownership of Shri Thakur Navnitpriyaji, Shri Madan Mohanji and Bethaks to the principal temple of Shri Shrinathji. Of course, he retained to himself the right and privilege of worship over those temples and Bethaks as in the case of Shrinathji temple. The Tilkayat also expressed his concurrence with the proposal made in this report and signed in token of his agreement. It appears that after orders were issued in accordance with the decision of the Tilkayat, the two temples were treated as part of the bigger temple of Shrinathji. This is evidenced by the resolution which was passed at the meeting of the Power of Attorney Holders of the Tilkayat on the same day i.e., 15-10-1956. One of the resolutions passed at the said meeting shows that the proposal regarding the temples and Bethaks owned by His Holiness stating therein that His Holiness had been pleased to transfer the ownership thereof to Shrinathji, was considered. That proposal along with the list of temples and Bethaks was produced before the Committee. The Tilkayat was present at the meeting and he confirmed the proposal and put his signature thereon before the Committee. Thereupon, the Committee accepted the proposal with thanks and instructed the Executive Officer to do the needful in that behalf. Thus, the Tilkayat proposed to the Committee of his Power of Attorney

Holders that the two idols and their Bethaks should be transferred from his private estate to the principal temple of Shrinathji and that proposal was accepted and thereafter the two idols were treated as part of the principal temple.

After this transfer was thus formally completed it appears that the Tilkayat was inclined to change his mind and so, in submitting to the Committee a list of temples and Bethaks transferred by him to the principal temple of Shrinathji, he put a heading to the list which showed that the said transfer had been made for management and administration only and was not intended to be an absolute transfer. This was done on or about November 23, 1956.

This conduct on the part of the Tilkayat was naturally disapproved by the Committee and the heading of the list was objected to by it in a letter written on December 31, 1956. To this letter theTilkayat gave a reply on January 7, 1957, and he sought to explain and justify the wording adopted in the heading of the list. It is thus clear that the heading of the list forwarded by the Tilkayat to the Committee must be ignored because that heading clearly shows a change of mind on the part of the Tilkayat and the question as to whether the two idols form part of the principal temple of Shrinathji must be decided in the light of what transpired on October 15, 1956. Judged in that way, there can be no doubt that the Tilkayat solemnly transferred the two idols to the principal temple and in that sense, gave up his ownership over the idols and a formal proposal made in that behalf was accepted by the Committee. In our opinion, the High Court was in error in not giving effect to this transfer on the ground that no gift or trust deed had been duly executed by the Tilkayat in that behalf. A dedication of private property to a charity need not be made by a writing; it can be made orally or even can

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

be inferred from conduct. In the present case, there is much more than conduct in support of the State's plea that the two idols had been transferred. There is a formal report made by the Manager to the Tilkayat which was accepted by the Tilkayat; it was followed by a formal proposal made by the Tilkayat to the Committee and the Committee at its meeting formally accepted that proposal and at the meeting when this proposal was accepted, the Tilkayat was present. Therefore, we must hold that the two idols now form part of the principal temple and have been properly included within the definition of the word "temple" under s. 2 (viii). We should accordingly set aside the decision of the High Court and uphold the validity of s. 2 (viii).

The proviso to s. 5 (2) (g) has been attacked by the learned Attorney-General. He contends that in making the Collector a statutory member of the Board even though he may not be a Hindu and may not belong to the denomination, the legislature has contravened Arts. 25 (1) and 26 (b). We have already dealt with the general plea raised under the said two articles. We do not think that the provision that the Collector who is a statutory member of the Board need not satisfy the requirements of s. 5 (2) (g), can be said to be invalid. The sole object in making the Collector a member of the Board is to associate the Chief Executive Officer in the District with the administration of the property of the temple. His presence in the Board would naturally help in the proper administration of the temple properties and in that sense, must be treated as valid and proper. This provision is obviously consistent with the State's right of supervision over the management of the temple properties as specified in the Firman of 1934.

Sections 5, 7 and 11 have already been considered by us with particular reference to the possible

removal of the Tilkayat under s. 7 and its consequences. It may be that in view of the fact that even if the Tilkayat is removed under s. 7 (1) (b) and (c) he has to be again nominated to the Board, the legislature may well have exempted the Tilkayat from the operation of s. 7 (1) (b) and (c). That, however, cannot be said to make the said provision invalid in law.

Sections 10 and 35 have been attacked on the ground that they empower the State Government to leave the administration of the temple property to a non-Hindu. It will be noticed that s. 10 contemplates that if a Board is dissolved for the reasons specified in it. the Government is required to direct the immediate reconstitution of another Board and that postulates that the interval between the dissolution of one Board and the constitution of a fresh Board would be of a very short duration. If the legislature thought it necessary to provide for the management of the temple properties for such a short period on an ad hoc basis, the provision cannot be seriously challenged. What is true about this provision under s. 10, is equally true about the transitional provision in s. 35.

A part of s. 16 has been struck down by the High Court in so far as it refers to the affairs of the temple. This section authorises the Board to manage the properties and affairs of the temple. The High Court thought that the expression "affairs of the temple" is too wide and may include religious affairs of the temple; and since in managing these affairs of the temple, the section does not require that the management should be according to the customs and usages of the denomination, it came to the conclusion that the clause "affairs of the temple" is invalid and should, therefore, be struck down.

We are not satisfied that this view is correct. In the context the expression "affairs of the temple"

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Gajendragadkar, J.

clearly refers to the purely secular affairs in regard to the administration of the temple. Clearly, s. 16 cannot be construed in isolation and must be read long with s. 22. That is why it has been left to the Board to manage the properties of the temple as well as the purely secular affairs of the temple, and so, this management need not be governed by the custom and usage of the denomination. If the expression "affairs of the temple" is construed in this narrow sense as it is intended to be, then there is no infirmity in the said provisions. We may add that the expression "affairs of the temple" has been used in s. 28 (1) of the Madras Hindu Religious and Charitable Endowments Act No. 22 of 1959 in the same sense. Therefore, we would hold that the High Court was in error in striking down the clause "affairs of the temple" occuring in s. 16.

The next section to consider is s. 21. This section gives to the Board complete power of appointment, suspension, removal, dismissal, or imposition of any other punishment on the officers and servants of the temple or the Board, the Chief Executive Officer being exempted from the operation of this section. It has been urged before us that this section might include even the Mukhia and the Assistant Mukhia who are essentially religious officers of the temple concerned with the performance of religious rites and services to the idols; and the argument is that if they are made the servants of the Board and are not subjected to the discipline of the Tilkayat, that would be contrary to Art. 25 (1) and 26 (b) of the Constitution. In considering this argument, we must have regard to the fact that the Mukhia and the Assistant Mukhia are not only concerned with the religious worship in the temple, but are also required to handle jewellery and ornaments of a very valuable order which are put on the idol and removed from the idol every day, and the safety of the said valuable jewellery is a secular matter within

the jurisdiction of the Board. That is why it was necessary that the Board should be given jurisdiction over those officers in so far as they are concerned with the property of a temple. We have no doubt that in working out the Act, the Board will act reasonably and fairly by the Tilkayat and nothing will be done to impair his status or to affect his authority over the servants of the temple in so far as they are concerned with the religious part of the worship in the temple. Since the worship in the temple and the ceremonies and festivals in it are required to be conducted according to the customs and usages of the denomination by s. 16, the authority of the Tilkayat in respect of the servants in charge of the said worship and ceremonies and festivals will have to be respected. It is true that soon after the Act was passed and its implementation began, both parties appeared to have adopted unhelpful attitudes. We were referred at length to the correspondence that passed between the Tilkayat and the Committee in respect of some of these matters. We do not think it necessary to consider the merits of that controversy because we are satisfied that once the Act is upheld, it will be implemented by the Board consistently with the true spirit of the Act without offending the dignity and status of the Tilkayat as a religious head in charge of the temple and the affairs in matters of religion connected with the temple. Therefore, we do not think it would be right to strike down any part of s. 21 as suggested by the learned Attorney-General.

The validity of s. 27 has been challenged by the learned Attorney-General on the ground that it empowers the State Government to depute any person to enter the premises of the temple, though, in a given case, such a person may not be entitled to make such an entry. Even a non-Hindu person may be appointed by the State Government to inspect the properties of the temple and if he insists upon making an entry in the temple, that would contravene the provisions

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Gajendragadkar, J.

of Art. 25 (1) and 26 (b) of the Constitution; that is the argument urged in support of the challenge to the validity of s. 27. We do not think there is any substance in this argument. All that the section does is to empower the State Government to depute a person to inspect the properties of the temple and its records, correspondence, plans, accounts and other relevant documents. We do not think that the section constitutes any encroachment of the rights protected by Art. 25 (1) or Art. 26 (b). If the administration of the properties of the temple has been validly left to the Board constituted under the Act, then the power of inspection is necessarily incidental to the power to administer the properties, and so in giving the power to the State Government to depute a person to inspect the properties of the temple, no effective complaint can be made against the validity of such a power. The fear expressed by the learned Attorney-General that a non-Hindu may insist upon entering the temple in exercise of the authority conferred on him by the State Government under s. 27 is, in our opinion, far-fetched and imaginary. We are satisfied that the power of inspection which the State Government may confer upon any person under s. 27 is intended to safeguard the proper administration of the properties of the temple and nothing more. Therefore, we do not think that s. 27 suffers from any constitutional infirmity. In this connection, we may add that a similar provision contained in the Madras Religious Endowments Act has been upheld by this Court in the case of *The Commissioner, Hindu Religious Endowments, Madras* (1).

That takes us to s. 28 (2) and (3). These two sub-sections have been struck down by the High Court because it thought that they were inconsistent with the view expressed by this Court in the case of *Ratilal Panachand Gandhi* (2). While discussing the validity of these two sub-sections, the High Court has observed "that without entering into an elaborate

(1) [1954] S.C.R. 1005. (2) [1954] S.C.R. 1055.

discussion on the point, we may point out that such provision has been held to be invalid by the Supreme Court in the case of *Ratilal Panachand Gandhi*" (1). The learned Solicitor-General contends and we think, rightly, that the observations on which the High Court has relied support the validity of the two sub-sections and are inconsistent with the decision of the High Court itself. In the case of *Ratilal Panachand Gandhi* (1), this Court was dealing with the validity of ss. 55 and 56 of the Bombay Public Trusts Act. 1950 (No. 29 of 1950). Section 55 of the said Act purported to lay down the rule of *cy pres* in relation to the administration of religious and charitable trust; and s. 56 dealt with the powers of the courts in relation to the said application of *cy pres* doctrine. This Court observed that these two sections purported to lay down how the doctrine of *cy pres* is to be applied in regard to the administration of public trust of a religious or charitable character; and then it proceeded to examine the doctrine of *cy pres* as it was developed by the Equity Courts in England and as it had been adopted by our Indian Courts since a long time past. In the opinion of this Court, the provisions of ss. 55 and 56 extended the said doctrine much beyond its recognised limits and further introduced certain principles which ran counter to well-established rules of law regarding the administration of charitable trusts. It is significant that what the impugned sections purported to authorise was the diversion of the trust property or funds for purposes which the Charity Commissioner or the court considered expedient or proper although the original objects of the founder could still be carried out and that was an unwarrantable encroachment on the freedom of religious institutions in regard to the management of their religious affairs. In support of this view, the tenets of the Jain religion were referred to and it was observed that apart from the tenets of the Jain religion, it would be a violation of the freedom of religion and of the right which a religious

(1) [1953] S.C.R. 1055.

1963

Tilkayat Shri Govindlalji Maharaj
v.
State of Rajasthan

Gajendragadkar, J.

denomination has, to manage its own affairs in matters of religion, to allow any secular authority to divert the trust money for purposes other than those for which the trust was created. On this view, s. 55 (3) which contained the offending provision, and the corresponding provision relating to the powers of the Court occurring in the latter part of s. 56 (1) were struck down. In this connection, it is, however, necessary to bear in mind that in dealing with this question, this Court has expressly observed that the doctrine of *cy pres* can be applied where there is a surplus left after exhausting the purposes specified by the settler. In other words, the decision of this Court in the case of *Ratilal Panachand Gandhi* (1), cannot be applied to the provisions of s. 28 (2) and (3) which deal with the application of the surplus in fact after this decision was pronounced, the relevant provision of the Bombay Act has been amended and the application of the doctrine of *cy pres* is now confined to the surplus available after the purposes of the trust have been dealt with. The High Court has not noticed the fact that s. 28 (2) and (3) dealt with the application of the surplus funds and that postulates that these two sub-sections can be invoked only if and after the main purposes of the public temple have been duly satisfied. Therefore, we hold that the High Court was in error in striking down s. 28 (2) and (3) on the ground that they are inconsistent with the decision of this Court in the case of *Ratilal Panachand Gandhi* (1). We may add that this position was not seriouly disputed before us by the learned Attorney-General.

The next section is 30 (2) (a). It confers on the State Government the power to make rules in respect of the qualifications for holding the office of and the allowances payable to the Goswami. This sub-section has been struck down by the High Court and the learned Solicitor-General does not quarrel with the conclusion of the High Court. He has, however, fairly conceded that though the first part of

(1) [1954] S.C.R. 1055.

s. 30 (2) (a) may be struck down, the latter part need not be struck down. This latter part allows rules to be framed by the State Government in regard to the allowances payable to the Goswami. We think it is but fair that this part should be upheld so that a proper rule can be made by the State Government determining the quantum of allowances which should be paid to the Goswami and the manner in which it should be so paid. We would, therefore strike down the first part of s. 30 (2) (a) and uphold the latter part of it which has relation to the allowances payable to the Goswami. The two parts of the said sub-section are clearly severable and so, one can be struck down without affecting the other.

In regard to s. 36, the High Court thought that it gives far too sweeping powers to the Government and so, it has struck it down. Section 36 merely empowers the Government to give such directions as may be necessary to carry out the objects of the Act in case a difficulty arises in giving effect to the provisions of the Act. We may, in this connection, refer to the fact that a similar provision is contained in s. 36 of the Jagannath Temple Act (Orissa 11 of 1955). The object of s. 36 in the Act is merely to remove difficulties in the implementation of the Act. It is in that sense that the section must be narrowly construed and the scope and ambit of the power conferred on the State Government be circumscribed. If the section is so construed, it would not be open to any serious objection. Therefore, we are satisfied that the High Court was in error in striking down this section on the ground that the powers conferred on the State Government are too wide.

That takes us to s. 37 which has been struck down by the High Court on the ground that it can be utilised as a defence to a suit under s. 31. We have already noticed that s. 31 empowers a person having an interest to institute a suit for obtaining any of the

1963

Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan

Rajendragadkar, J.

reliefs specified in clauses (a) to (e) of that section. The High Court thought that s. 37 may introduce an impediment against a suit brought by a private individual under s. 31. We are satisfied that the High Court was in error in taking this view. All that this section purports to do is to provide for a bar to any suits or proceedings against the State Government for any thing done or purported to be done by it under the provisions of the Act. Such provisions are contained in many Acts, like, for instance, Acts in regard to Local Boards and Municipalities. It is true that s. 37 does not require that the act done or purported to be done should be done bona fide, but that is presumably because the protection given by s. 37 is to the State Government and not to the officers of the State. The effect of the section merely is to save acts done or purported to be done by the State under the provisions of the Act; it cannot impinge upon the rights of a citizen to file a suit under s. 31 if it is shown that the citizen is interested within the meaning of s. 31 (1). We are inclined to hold that the High Court has, with respect, misjudged the true scope and effect of the provisions of s. 37 when it struck down the said section as being invalid. We must accordingly reverse the said conclusion of the High Court and uphold the validity of s. 37.

The result is that the appeals preferred by the Tilkayat, the denomination and Ghanshyamlalji fail and are dismissed. So does the writ petition filed by the Tilkayat fail and the same is dismissed. The appeals preferred by the State substantially succeed and the decision of the High Court striking down as *ultra vires* part of s. 2 (viii) in relation to the idols of Navnitpriyaji and Madan Mohanlalji; part of s. 16 in so far as it refers to the affairs of the temple; s. 28 (2) and (3), s. 36 and s. 37 is reversed. We however, confirm the decision of the High Court in so far as it has struck down s. 30 (2) (a) in regard to

the qualifications for holding the office of the Goswami but we reverse its decision in so far as it relates to the latter part of s. 30 (2) (a) which deals with the allowances payable to the Goswami. In the circumstances of this case, we direct that parties should bear their own costs throughout.

Appeal dismissed.

CHANDRA DEO SINGH

v.

PROKASH CHANDRA BOSE & ANR.

(S.J. IMAM, K. SUBBA RAO, N. RAGHUBAR DAYAL, and J. R. MUDHOLKAR, JJ.)

Criminal Law—Proceeding under s. 202 Criminal Procedure Code—Revision petition by respondent No. 1 and the other persons—Whether respondent No. 1 has locus standi to contest criminal case before issue of process—Procedural defect—Powers of Magistrate in committal proceedings and in considering evidence—Recording of reasons—Code of Criminal Procedure, 1898 (Act 5 of 1898), ss. 202, 203.

A first information report was filed stating that the respondent No. 1 and some others committed murder. Thereafter a person claiming to be a relative of the deceased filed a complaint alleging that the first information report was false and that certain persons other than those stated in the first information report had committed the murder. It was prayed that process be issued against these persons. The Sub-Divisional Magistrate before whom this complaint was filed directed the First Class Magistrate to inquire into the allegation and to make a report. Subsequently the nephew of the deceased filed a complaint alleging that respondent No. 1 had committed the murder. The Sub-Divisional Magistrate directed the First Class Magistrate to enquire into this complaint also and to report. During the enquiry apart from the witness produced

17

TAB-17

THE DURGAH COMMITTEE, AJMER AND ANOTHER

v.

SYED HUSSAIN ALI AND OTHERS

1961

March 17.

(P. B. GAJENDRAGADKAR, A. K. SARKAR, K. N. WANCHOO, K. C. DAS GUPTA and N. RAJAGOPALA AYYANGAR, JJ.)

Durgah Endowment — Enactment for administration and management of property—If violative of denominational rights of Chishtia Soofies—Provisions, if infringe fundamental rights—Durgah Khwaja Saheb Act, 1955 (XXXVI of 1955), ss. 2(d)(v), 4, 5, 11(f) and (h), 13, 14, 16, 18—Constitution of India, Arts. 25, 26, 19(1)(f) and (g), 14, 32.

The respondents, who were the Khadims of the tomb of Hazrat Khwaja Moin-ud-din Chishti of Ajmer challenged the constitutional validity of the Durgah Khwaja Saheb Act, 1955 (XXXVI of 1955) and certain specified sections by a petition filed under Art. 226 of the Constitution in the Rajasthan High Court. The High Court substantially found in their favour and made a declaration that the impugned provisions of the Act were *ultra vires* and restrained the appellants from enforcing them. The respondents claimed to represent the Chishti Soofies who, according to them, constituted a religious denomination or a section thereof to whom the Durgah belonged and their case was that the impugned Act had interfered with their fundamental right to manage its affairs. Their further case was that the Nazars (offerings) of the pilgrims constituted their customary and main source of income and were their property, recognised by judicial decisions including that of the Privy Council in *Syed Altaf Hussain* v. *Dewan Syed Ali Rasul Ali Khan*, A.I.R. 1938 P. C. 71, that the impugned Act and its material provisions violated their fundamental rights guaranteed by Arts. 14, 19(1) (f) and (g), 25, 26, 30(1) and (2) and 32 of the Constitution. It was contended that ss. 4 and 5 of the Act, which provided for the setting up and composition of the Durgah Committee consisting of Hanafi Muslims none of whom might belong to the Chishtia order, infringed the rights of the denomination guaranteed by Art. 26(b), (c) and (d) that cl. (v) of s. 2(d) of the Act, by which all such Nazars as were received on behalf of the Durgah by the Nazim or any person authorised by him were to be included in the Durgah Endowment, infringed their fundamental right to property, that ss. 11(f) and (h) which empowered the committee to determine the privileges of the Khadims and the functions and powers of the Sajjadanashin and s. 13(1) which authorised the committee to make provisional interim arrangement in case the office of Sajjadanashin fell vacant, infringed

1961

The Durgah Committee, Ajmer & Another v. Syed Hussain Ali & Others

their fundamental rights under Art. 25(1), that s. 14 by creating a statutory right in the Nazim or his agent to solicit and receive offerings on behalf of the Durgah and prohibiting the Khadims and the Sajjadanashin from doing so, violated their right to property and s. 18 which provided for the enforcement of the orders of the committee as orders and decrees of a civil court violated Arts. 14 and 32 of the Constitution. The past history of the Endowment for centuries showed that its management was always vested in Mutawallis appointed by the State, some of whom were Hindus, and that the pilgrims who visited the Durgah and made offering were not confined to Moslems alone but belonged to all communities.

Held, that the contentions of the respondents must be negatived.

Although this Court has laid down what is a religious denomination and what are matters of religion, it must not be overlooked that the protection of Art. 26 of the Constitution can extend only to such religious practices as were essential and integral parts of the religion and to no others.

Commissioner, Hindu Religious Endowments, Madras v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, [1954] S.C.R. 1005 and *Sri Venkataramana Devaru* v. *The State of Mysore*, [1958] S.C.R. 895, discussed.

Assuming that the Chishti order of Soofies constituted such a denomination or section of it whom the respondents represented, it was obvious that cls. (c) and (d) of Art. 26 could not create any rights which the denomination or the section never had; they could merely safeguard and guarantee the continuance of such rights which the denomination or section had. Where right to administer properties had never vested in the denomination or had been surrendered by it or had otherwise been effectively and irretrievably lost to it, Art. 26 could not be successfully invoked.

In the instant case, since Chishti Soofies never had any rights of management over the Durgah Endowment for centuries since it was created, the attack on ss. 4 and 5 of the Act must fail.

Asrar Ahmed v. *Durgah Committee, Ajmer*, A.I.R. 1947 P.C. 1, referred to.

It was not correct to say that ss. 2(d)(v) and 14 of the impugned Act infringed Art. 19(1)(f) and (g) of the Constitution. Those sections, properly construed, meant that offerings earmarked generally for the Durgah belonged to the Durgah and could be received only by the Nazim or his agent. These offerings, as found by judicial decisions, never belonged to the respondents and the impugned sections did not affect what was found to belong to them.

Syed Altaf Hussain v. *Dewan Syed Ali Rasul Ali Khan*, A.I.R. 1938 P.C. 71, referred to.

There could be no doubt as to the competency of the Legislature to regulate matters relating to the property of the Durgah by providing that the said offerings could be solicited by the Nazim or his agent. It was, however, not correct to say that the omission of the word 'explicitly' contained in the definition in the earlier Act from the present Act enlarged the scope of the definition in any way.

The powers conferred on the committee by s. 11(f) and (h), which must be read in the light of the mandatory provisions of s. 15 which made it obligatory on the committee to observe Muslim Law and the tenets of the Chishti saint and which had to be exercised within the limits laid down by s. 16, could not be said to violate Art. 25(1) of the Constitution.

Section 16 in providing for the setting up of a Board of Arbitration, embodied a healthy and unexceptionable principle, obviously in the interest of the institution as well as the parties, and could not be said to infringe Arts. 14 or 32 of the Constitution.

Section 13(1) could not be read apart from the other provisions of s. 13. That section really intended to lay down the procedure for determining disputes relating to succession to the Office of Sajjadanashin and it was, therefore, futile to contend that s. 13(1) offended against Art. 25(1).

Since s. 18 was confined only to such final orders as were within the jurisdiction of the committee and passed against persons who did not object to them but failed to comply with them, it did not contravene Arts. 14 or 32 of the Constitution.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 272 of 1960.

Appeal from the judgment and order dated January 28, 1959, of the Rajasthan High Court in D. B. Civil Writ Petition No. 17 of 1957.

H. N. Sanyal, Additional Solicitor-General of India, R. Ganapathy Iyer, Y. S. Nasarullah Sheriff, J. L. Datta and *K. L. Hathi*, for the appellants.

G. S. Pathak, Syed Anwar Hussain and *B. P. Maheshwari*, for respondents Nos. 1 to 7.

A. G. Ratnaparkhi for *Govind Saran*, for respondents Nos. 8 and 9.

H. N. Sanyal, Additional Solicitor-General of India, R. H. Dhebar and *T. M. Sen*, for the Intervener.

1961. March 17. The Judgment of the Court was delivered by

1961

The Durgah mittee, Ajmer & Another v. d Hussain Ali & Others

endragadkar J.

GAJENDRAGADKAR, J.—In the High Court of Judicature for Rajasthan at Jodhpur a writ petition was filed under Art. 226 of the Constitution by the nine respondents who are Khadims of the tomb of Khwaja Moin-ud-din Chishti of Ajmer challenging the vires of the Durgah Khwaja Saheb Act XXXVI of 1955 (hereafter called the Act). In this petition the respondents alleged that the Act in general and the provisions specified in the petition in particular are ultra vires and they claimed a direction or an appropriate writ or order restraining the appellants the Durgah Committee and the Nazim of the said Committee from enforcing any of its provisions. The writ petition thus filed by the respondents substantially succeeded and the High Court has made a declaration that the impugned provisions of the Act are *ultra vires* and has issued an order restraining the appellants from enforcing them. The appellants then applied for and obtained a certificate from the High Court and it is with the said certificate that they have come to this Court by their present appeal.

According to the respondents the shrine of Nazrat Khwaja Moin-ud-din Chishti which is generally known as the Durgah Khwaja Saheb situated at Ajmer is one of the most important places of pilgrimage for the muslims of India. Since persons following other religions also hold the saint in great veneration a large number of non-muslims visit the tomb every year.

Khwaja Saheb came to India sometime towards the end of the 12th Century A. D. and settled down in Ajmer. His saintly character and his teachings attracted a large number of devotees during his lifetime and these devotees honoured him as a great spiritual leader. Khwaja Saheb belonged to the Chishti Order of Soofies. He died at Ajmer in or about 1236 A. D., and naturally enough after his death his tomb became a place of pilgrimage.

The respondents' case further is that after his death the tomb under which the saint was interred was a kutcha structure and continued to be such for nearly 300 years thereafter. The petition alleged that a pucca structure was built by the Khilji Sultans of

Mandu and over the said pucca structure a tomb was constructed. Thereafter successive Muslim Rulers, particularly the Moghul Emperors, made endowments and added to the wealth and splendour of the shrine.

Khwaja Syed Fukhuruddin and Sheikh Mohammad Yadgar, who originally accompanied the Khwaja Saheb to India, were his close and devoted followers. After the saint's death both of them looked after the grave and attended to the spiritual needs of the pilgrims. The descendants of these two disciples gradually came to be known as Khadims. For generations past their occupation has been that of religious service at the tomb of Khwaja Saheb. The respondents belong to this sect or section of Khadims. They claim that they are members of a religious denomination or section known as Chishtia Soofies. Their petition further avers that throughout the centuries the Khadims had not only looked after the premises of the tomb but also kept the keys of the tomb and attended to the multitude of pilgrims who visited the shrine and acted as spiritual guides in the performance of religious functions to wit the Fateha (act of prayer) for which they received Nazars (offerings). These Nazars were the main source of income for the livelihood of the Khadims and have in fact always constituted their property.

According to the respondents the right of the Khadims to the offerings and Nazars made by pilgrims before the tomb and at the Durgah had been the subject matter of several judicial decisions and the same had been finally decided by the Privy Council in *Syed Altaf Hussain* v. *Dewan Syed Ali Rasul Ali Khan* (1). The petition is substantially based on what the respondents regard to be the effect of the said decision in respect of their rights. According to them the rights recognised by the said decision amount to their fundamental rights to property and their fundamental right to manage the said property, and that in substance is the basis of the petition.

Thus the respondents challenged the vires of the Act on the ground that its material provisions take

(1) A.I.R. 1938 P.C. 71.

1961

The Durgah Committee, Ajmer & Another v. Syed Hussain Al & Others

Gajendragadkar J.

away and/or abridge their fundamental rights as a class and also the fundamental rights of the muslims belonging to the Soofi Chishtia Order guaranteed by Arts. 14, 19 (1) (f) and (g), 25, 26, 31(1) and (2) as well as 32. According to the case set out in the petition all Hanafi muslims do not necessarily believe in Soofism and do not belong to the Chishtia Order of Soofies and it is to the latter sect that the shrine solely belongs; the maintenance of the shrine has also been the sole concern of the said sect. It is this sect which has to maintain the institution for religious purposes and manage its affairs according to custom and usage. That is why the respondents alleged that the material provisions of the Act were violative of their fundamental rights. In regard to s. 5 of the Act under which the Durgah Committee is constituted the respondents' objection is that it can consist of Hanafi muslims who are not members of the Chishtia Order and that introduces an infirmity which makes the said provision inconsistent with Art. 26 of the Constitution. On these allegations the respondents claimed a declaration that certain specified sections of the Act were void and *ultra vires* which made the whole of the Act void and *ultra vires* and they asked for directions or orders or writ in the nature of mandamus or any other appropriate writ to the appellants restraining them from enforcing in any manner the said Act against them.

The claim thus made by the respondents was disputed by the appellants in their detailed written statement. They averred that the circle of devotees of, and visitors to, the shrine was not confined to the Chishtia Order; but it included devotees and pilgrims of all classes of people following different religions. According to them the largest number of pilgrims and visitors were Hindus, Khoja Memons and Parsis. It was denied that the Durgah was looked after by the descendants of Syed Fukhuruddin and Mohammad Yadgar. The allegations made by the respondents in respect of their occupation, duties and rights were seriously challenged and the case made out by them in regard to the receipt of the offerings and Nazars

was disputed. According to the appellants the religious services at the tomb were and are performed by the Sajjadanashin of the Durgah and the respondents had no right to look after the premises, to keep the keys of the tomb, to attend to the pilgrims visiting the shrine or to receive any offerings or Nazars. Their case was that the Khadims were and are no more than servants of the holy tomb and their duties are similar to those of chowkidars.

The appellants further pleaded that according to Islamic belief offerings made at the tomb of a dead saint are meant for the fulfilment of objects which were dear to the saint in his lifetime and they are meant for the poor, the indigent, the sick and the suffering so that the benediction may reach the soul of the departed saint. The averments made by the respondents in regard to their fundamental rights and their infringement were challenged by the appellants and it was urged that the Act in general and the provisions specified in the petition in particular were *intra vires* and constitutional.

On these pleadings the High Court proceeded to consider the history of the institution, the nature of the rights set up by the respondents and the effect of the impugned legislation on those rights. The High Court has found that the offerings made before the tomb for nearly 400 years before the tomb was rebuilt into a pucca structure must have been used by the Khadims for themselves. It also held that the Khadims were performing several duties set out by the respondents and that it was mainly the Khadims who circulated the stories of miracles performed by Khwaja Saheb during his lifetime and thus helped to spread the reputation of the tomb. Even after the tomb was rebuilt and endowments were made to it the Khadims looked after the tomb, performed the necessary rituals and spent the surplus income from the offerings for themselves. In due course Sajjadanashins came to be appointed, but, according to the High Court their emergence on the scene merely enabled them to become sharers in the offerings. It has further been

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J

found by the High Court on a review of judicial decisions pronounced in several disputes between the parties that the offerings made at the tomb are governed by the customary mode of their utilisation and the history of the institution proved that the said offerings have been used according to a certain custom which had been upheld by the Privy Council in the case of *Syed Altaf Hussain* (1). This custom showed that the offerings made before the shrine are divided between the Sajjadanashin and the Khadims in the manner indicated in the said decision. It is in the light of these broad findings that the High Court proceeded to examine the *vires* of the impugned provisions of the Act.

Thus considered the High Court came to the conclusion that the several sections challenged by the respondents in their writ petition are *ultra vires*. It has held that s. 2(b)(v) violates Art. 19(1)(f), s. 5 violates Art. 26, s. 11(f) Arts. 19(1)(g) and 25(1), ss. 11(b) and 13(i) Art. 25, s. 14 Art. 19(1)(f) and ss. 16 and 18 Art. 14 read with Art. 32. Having found that these sections are *ultra vires* the High Court has issued an order restraining the appellants from enforcing the said sections. In regard to s. 5 in particular the High Court has found that the said section is *ultra vires* inasmuch as it lays down that the Committee shall consist of Hanafi muslims without further restricting that they shall be of the Chishtia Order believing in the religous practices and ritual in vogue at the shrine. It may be added that since s. 5 which contains the key provision of the Act has thus been struck down, though in a limited way, the whole of the Act has in substance been rendered inoperative.

Before dealing with the merits of the appeal it would be relevant and useful to consider briefly the historical background of the dispute, because, in determining the rights of the respondents and of the sect which they claim to represent, it would be necessary to ascertain broadly the genesis of the shrine, its growth, the nature of the endowments made to it, the management of the properties thus endowed, the rights of the Khadims and the Sajjadanashin in regard to

(1) A.I.R. 1938 P.C. 71.

the tomb and the effect of the relevant judicial decisions in that behalf. This enquiry would inevitably take us back to the 13th Century because Khwaja Moin-ud-din died either in 1236 or 1233 A.D. and it was then that a kutcha tomb was constructed in his honour. It appears that in the High Court the parties agreed to collect the relevant material in regard to the growth of this institution which has now become scarce and obscure owing to lapse of time from the Imperial Gazetteer dealing with Ajmer, the Report of the Ghulam Hasan Committee (hereafter called the Committee) appointed in 1949 to enquire into and report on the administration of the present Durgah as well as the decision of the Privy Council in *Asrar Ahmed* v. *Durgah Committee, Ajmer* [2]. The Committee's report shows that the Committee examined a large number of witnesses belonging to several communities who were devoted to the shrine, it considered the original Sanads and a volume of other documents produced before it, took into account all the relevant judicial decisions to which its attention was drawn, and passed under review the growth of this institution and its management before it made its recommendations as to the measures necessary to secure the efficient management of the Durgah Endowment, the conservation of the shrine in the interest of the devotees as a whole. Presumbly when the parties agreed to refer to the historical data supplied by the Committee's report they advisedly refrained from adopting the course of producing the original documents themselves in the present enquiry. The political history of Ajmer has been stormy, and through the centuries sovereignty over the State of Ajmer has changed hands with the inevitable consequence that the fortunes of the shrine varied from time to time. It is true that the material which has been thus placed before the Court is not satisfactory, as it could not but be so, because we are trying to trace the history of the institution since the 13th Century for nearly 600 years thereafter; but the picture which emerges as a result of a careful consideration of the

(2) A.I.R 1947 P.C. 1.

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

said material is on the whole clear enough for our purpose in the present appeal.

Khwaja Moin-ud-din was born in Persia in 1143. Later he migrated with his father to Nisharpur near Meshad where Omar Khayyam is buried. Then he moved from place to place until he reached Ajmer about the end of the 12th Century. At Ajmer he died at the ripe old age of 90. It appears that he retired into his cell on the First of Rajab and was found dead in the cell on the Sixth Day when it was opened. That is why his death anniversary is celebrated every year during the six days of Rajab. He received formal theological education at Samarkhand and Bukhara, and in the pursuit of spiritual knowledge he travelled far and wide. Ultimately he became a disciple of Hazrat Khwaja Usman Harooni who was a well known faqir of the Chishti sect. During his lifetime the reputation of Khwaja Moinuddin travelled far and wide and attracted devotees following different religions throughout the country.

At his death the saint could not have left any property and so there was no question of management of the property belonging to his tomb. No doubt the tomb itself was constructed immediately after his death but it was a kutcha structure and apparently for several years after his death there does not appear to have been endowment of property to the tomb, and so its financial position must have been of a very modest order. Persons belonging to the affluent classes were not attracted for many years and so there was hardly any occasion to manage any property of the tomb as such. After his death the family of the saint remained in Ajmer for some time but it appears that the members of the family were driven out of Ajmer for some years and they came back only centuries later. This was the consequence of the change of rulers who exercised sovereign power over Ajmer.

The construction of a pucca tomb was commenced in the reign of one of the Malwa Kings whose dynasty ruled over Ajmer up to 1531. There is no evidence to show that any property was dedicated to the tomb even then. It, however, does appear that one of the

Malwa Kings had appointed a Sajjadanashin to look after the tomb; this Sajjadanashin was in later times called Dewan. The construction of the tomb took a fairly long time but even after it was completed there is no trace of any endowment of property.

In or about 1560 Akbar defeated the Malwa Kings and Ajmer came under Moghul rule and so the Moghul period began. Akbar took great interest in the tomb and that must have added to the popularity of the tomb and attracted a large number of affluent pilgrims. It was about 1567 A. D. that the tomb was rebuilt and re-endowed by Akbar who reigned from 1556 to 1605. A Farman issued by Akbar ascribed to the year 1567 shows that eighteen villages were granted to the Durgah. According to the report of the Committee which had access to the original Sanad and other relevant documents the year of the Sanad was not 1567 but 1575. The report also shows that the object of this first endowment was not one for the general purposes of the Durgah but for a specific purpose, namely, 'langar khana'. It appears that during this period a descendant of the saint functioned as a Sajjadanashin and he also performed the duties of a Mutawalli. There is no reliable evidence in regard to the position of the Sajjadanashin, his duties and functions before the date of Akbar, but it is not difficult to imagine that even if a Sajjadanashin was in charge of the tomb he had really very little to manage because the tomb had not until 1567 attracted substantial grants or endowments. The Committee's report clearly brings out that the appointment of a Sajjadanashin in the time of Akbar was purely on the basis of an appointment by the State because it is pointed out that as soon as Akbar was not satisfied with the work of the Sajjadanashin appointed by him in 1567 he removed him from office in 1570 and appointed a new incumbent in his place. This new incumbent carried on his duties until 1600. Similarly in 1612 Jehangir appointed a Sajjadanashin to function also as Mutawalli. During Jehangir's time (1605-1627) some more villages were endowed to the Durgah.

1961

The Durgah Committee, Ajmer & Another v. Syed Hussain Ali & Others

Gajendragadka J.

During Shahjehan's time (1627-1658) some significant changes took place in the management of the Durgah. The office of the Sajjadanashin was separated from that of the Mutawalli under the name of Darogah, the Mutawalli was put in charge of the management and administration of the secular affairs of the Durgah. It would also appear that some of the Darogahs were Hindus. In his turn Shahjehan endowed several villages in favour of the Durgah. This endowment, unlike that of Akbar, was for the general purposes of the Durgah. According to the Committee Shahjehan's endowment was in supersession of the earlier grants though it is difficult to decide as to whether it was in supersession of Akbar's grant or of an earlier grant made by Shahjehan himself. However that may be, it is quite clear that at the very time when Shahjehan made his endowment he separated the office of the Sajjadanashin from that of the Mutawalli and left it to the sole charge of the Mutawalli appointed by the Ruler to manage the properties endowed to the Durgah. The later history of the institution shows that the separate office of the Mutawalli who was in sole management of the administration of the properties of the Durgah continued ever since, and that throughout its history the Mutawallis have been appointed by the State and were as such answerable to the State and not to the sect represented by the respondents. This state of affairs continued during the reign of Aurangzeb (1659-1707).

After Aurangzeb died there was a change in the political fortunes of Ajmer because Rathor Rajputs seized Ajmer in 1719 and ruled over it for two years thereafter. This change of political sovereignty does not appear to have affected the administration of the Durgah which continued as before. In 1721 the Moghul rule was re-established over Ajmer but that again made no change to the administration of the Durgah and the management of its properties. The Moghul rule in turn was disturbed in 1743 by the Rajput Rathors who were in power for nearly 13 years. The Rathor rule came to an end when the Scindias occupied Ajmer in 1756 and continued in

possession of the city until 1787. In that yea the Rathors came back again and remained in possession till 1791 when Scindias overpowered them and continued to occupy it until 1818. In about 1818, after the Pindari War Ajmer passed into the hands of the East India Company and so its connection with the British Government commenced. Whilst political sovereignty over Ajmer was thus changing hands from time to time the state of affairs in relation t the Durgah remained as it was during the time of Shahjehan. The Sajjadanashin looked after the performance of the religious observances of the rites and the Mutawalli looked after the administration and management of the properties of the Durgah. In this connection it is relevant and significant to note that the Mutawalli has always been an officer appointed by the Government in power. That in brief is the broad picture which emerges in the light of the material placed by the parties before the Court in the present proceedings.

At this stage it would be material to narrate very briefly the relevant history of legislation in regard to the administration of religious endowments which followed the assumption of political power by the British Government. The first Act to which reference must be made is Act XX of 1863. This Act was passed to enable the Government to divest itself of the management of religious endowments which had till then vested in the Revenue Boards. Section 3 of the Act provided, inter alia, that in the case of every mosque to which the earlier regulations applied Government shall as soon as possible after the passing of the Act make special provision for the administration of such mosques as specified in the Act by subsequent sections. Under s. 4 the transfer of the administration of the said mosque and other institutions to trustees is provided with the consequence that the administration by Revenue Boards had to come to an end. Section 6 deals with the rights of the trustees to whom the property is transferred under s. 4; and it also contemplates the appointment of committees which may exercise powers as therein specified. With the rest of

1961

The Durgah mittee, Ajme & Another v. d Hussain Al & Others

endragadkar J

the provisions of this Act we are not concerned. The effect of this Act was that the management of religious endowments which had been taken over by the Government and which vested in the Revenue Boards was entrusted to the trustees as prescribed by s. 4. In accordance with the provisions of s. 6 a committee was appointed to look after the management of the Durgah with which we are concerned and that committee continued to be in such management until 1936.

In 1936 Act XXIII of 1936 was passed specifically with the object of making better provision for the administration of the Durgah and the Endowment of the Durgah of Khwaja Moin-ud-din Chishti known as the Durgah Khwaja Saheb, Ajmer. This Act consisted of twenty sections and in a sense it provided a self-contained code for the administration of the Durgah and its endowments. Section 2(4) defines a Durgah Endowment as including (a) the Durgah Khwaja Saheb, Ajmer, (b) all buildings and movable property within the boundaries of the Durgah Sharif, (c) Durgah Jagir including all land, houses and shops and all landed property wheresoever situated belonging to the Durgah Sharif, (d) all other property and all income derived from any source whatsoever, dedicated to the Durgah or placed for any religious, pious or charitable purposes under the Durgah Administration, and (e) only such offerings as are intended explicitly for the use of the Durgah. It would be noticed that the material provisions of the Act which dealt with the management and administration of the Durgah were intended to operate in regard to the Durgah Endowment thus comprehensively defined. Under s. 4 the administration and control of this endowment had to vest in a committee constituted in the manner prescribed. The powers and duties of this committee are prescribed by s. 11; whereas s. 16 provides for arbitration of disputes that may arise between the committee on the one hand and the Sajjadanashin, the Mutawalli and the Khadim or any of them on the other. With the rest of the provisions of the Act we are not concerned. In pursuance of the material

provisions of this Act a Durgah Committee was appointed and it has been in management of the Durgah Endowment ever since.

As we have already indicated the Government of India appointed the Committee under the Chairmanship of Mr. Justice Ghulam Hasan in 1949 to enquire into and report on the administration of the Durgah Endowment and to make appropriate recommendations to secure the conservation of the shrine by efficient management of the said Endowment. The Committee made its report on October 13, 1949, and that led to the promulgation of Ordinance No. XXIV of 1949 which was followed by Emergency Provisions Act, 1950, and finally by the Act of 1955 with which we are concerned in the present appeal. The Committee held an exhaustive enquiry, considered the voluminous evidence produced before it, reviewed the conduct of the Sajjadanashins and the Khadims, examined the manner in which the offerings were received and appropriated by them, took into account several judicial decisions dealing with the question of the rights and obligations of the said parties and came to the conclusion that "the historical review of the position leads only to the inference that the Sajjadanashins and the Khadims between themselves came to an agreement for mutual benefit and to the detriment of the Endowment and adopted a kind of a practice to realise offerings from visitors to the Durgah on a show of some charitable object and led the ignorant and the unwary into the trap" (1). The Committee has observed that most of the spokesmen before it candidly admitted the existence of many malpractices indulged in by Khadims and a majority of them showed a keen desire to introduce radical social reform in the community provided they are backed by the authority of law (2). The Committee then commented on the agreement entered into between the Sajjadanashins and the Khadims as amounting to an unholy alliance among unscrupulous persons to trade for their

(1) Report of the Durgah Khwaja Saheb (Ajmer) Committee of Enquiry dated October 13, 1949, published by Government of India in 1950, p. 63.

(2) Ibid, p. 56.

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

personal aggrandisement in the name of the holy saint, and it noticed with regret that the interest of the community had suffered more from the superstitious, ignorant and the reactionary hierarchy than from the doings of zealous reformers (1). According to the Committee "tinkering with the problem will be a remedy worse than the disease and it had no doubt that no narrow and technical considerations should stop us from marching forward". As a result of the findings made by the Committee it made specific recommendations as to the manner in which reform should be introduced in the management and administration of the Durgah Endowment by legislative process. Speaking generally, the Act has been passed in the light of the recommendations made by the Committee.

Thus it would be clear that from the middle of the 16th Century to the middle of the 20th Century the administration and management of the Durgah Endowment has been true to the same pattern. The said administration has been treated as a matter with which the State is concerned and it has been left in charge of the Mutawallis who were appointed from time to time by the State and even removed when they were found to be guilty of misconduct or when it was felt that their work was unsatisfactory. So far as the material produced in this case goes the Durgah Endowment which includes movable and immovable property does not appear to have been treated as owned by the denomination or section of the devotees and the followers of the saint, and its administration has always been left in the hands of the official appointed by the State.

In this connection it may be relevant to refer to the decision of the Privy Council in the case of *Asrar Ahmed* (2). The appeal before the Privy Council in that case arose from a suit filed by Syed Asrar Ahmed against the Durgah Committee in which he claimed a declaration that the office of the Mutawalli of the Durgah Khwaja Saheb, Ajmer, was hereditary in his family and that the Durgah Committee was not competent to question his status as a hereditary Mutawalli in succession to the last holder of that office.

(5) Ibid, p. 64. (2) A.I.R. 1947 P.C. 1.

The District Judge who tried the said suit passed a decree in favour of Asrar Ahmed but on appeal the Judicial Commissioner set aside the decree and dismissed Asrar Ahmed's suit. On appeal by Asrar Ahmed to the Privy Council the decision of the Judicial Commissioner was confirmed. In dealing with this dispute the Privy Council has considered the genesis and growth of the shrine along with the stormy history of the State of Ajmer to which we have already referred. In the course of his judgment Lord Simonds observed that it was not disputed that in the reign of Emperor Shahjehan the post of Mutawalli was separated from that of Sajjadanashin and had become a Government appointment, whereas the Sajjadanashin remained and continued to be the hereditary descendant of the saint. Then he referred to the firman of Shahjehan issued in 1629 by which the Emperor ordered that the Mutawalli appointed by the State was to sit on the left of the Sajjadanashin at the Mahfils. Similarly the firman issued by Aurangzeb in 1667 directed the order of sitting at the Mahfils by laying down that Daroga Balgorkhana, i.e., Mutawalli of the Durgah or anyone who is appointed by the State do sit on the left of the Sajjadanashin. It is significant to note that Daroga Balgorkhana was a Hindu in Akbar's time. Having thus held that the office of the Mutawalli was an office created by the State and the holder of the office was a State servant the Privy Council examined the evidence on which Asrar Ahmed relied in support of his plea that by custom the office was hereditary and held that the said evidence did not justify the claim. This decision supports the conclusion that the Durgah Endowment and its administration have always been in charge of the Mutawalli appointed by the State and that on occasions the post of the Mutawalli was held by a Hindu as well.

Having thus reviewed broadly the genesis of the shrine, its growth and the story of its endowments and their management, it may now be relevant to enquire what is the nature of the tenets and beliefs to which Soofism subscribes. Such an enquiry would serve to

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

assist us in determining whether the Chishtia sect can be regarded as a religious denomination or a section thereof within Art. 26. According to Murray T. Titus (1) "Islam, like Christianity, has its monastic orders and saints, the underlying basis of which is the mystic interpretation of the religious life known as Sufiism". According to this author, the men imbued with soofi doctrine came very early to India is not disputed; but who those earliest comers were or when they arrived cannot be definitely ascertained. He also expresses the opinion that though Soofism is found so extensively "it is not the religion of a sect, it is rather a natural revolt of the human heart against the cold formalism of a ritualistic religion, and so while Sufis have never been regarded as a separate sect of muslims they have nevertheless tended to gather themselves into religious orders". These have taken on special forms of organisation, so that today there is a great number of such orders, which, curiously enough, belong only to the Sunnis. The author then enumerates fourteen orders or families (khandan); amongst them is the Chishtia Order.

According to the report of the Committee, however, the Soofies are divided into four main silsilas; amongst them are Chishtias. The report expresses the definite opinion that the Soofi silsilas are not sects (p. 13). The characteristic feature of a particular silsila is confined to a few spiritual practices, like Aurad or Sama, to certain festivals, institutions like veneration of shrines and the devotion to certain leading personalities of the order. Soofism really denotes the attitude of mind, that is to say, a Soofi, while accepting all that orthodox Islam has to offer, finds lacking in it an emotive principle. According to Soofies a clear distinction has to be drawn between the real and the apparent, and they believed that the ultimate reality could be grasped only intuitively (Ma'arifat or gnosis). A special feature of Soofi belief is divine love. An intellect, according to Soofies, performs a restricted function. The centre of spiritual life is the Qalb or the Rooh (p. 16).

(1) "Indian Islam", a Religious History of Islam in India, by Murray T. Titus, published by Oxford University Press in the Series "The Religious Quest of India", pp. 110, 111.

In *Piran* v. *Abdool Karim* (1), Ameer Ali, J., had occasion to consider the functions of the Sajjadanashin and the Mutawalli. He observed that the Sajjadanashin has certain spiritual functions to perform. He is not only a Mutawalli but also a spiritual preceptor. He is the curator of the Durgah where his ancestor is buried and in him he is supposed to continue the spiritual line (silsila). As is wellknown these Durgahs are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established Khamkahs where they lived and their disciples congregated. These dervishes professed esoteric doctrines and followed distinct systems of initiation. They were either Soofies or the disciples of Mian Roushan Bayezid who flourished about the time of Akbar and who had founded an independent esoteric brotherhood in which the chief occupied a peculiarly distinct position. The preceptor is called the pir, the disciple a murid. On the death of the pir his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or Soofism. This privilege of initiation is one of the functions of the Sajjadanashin (p. 220-221). Thus on theoretical considerations it may not be easy to hold that the followers and devotees of the saint who visit the Durgah and treat it as a place of pilgrimage can be regarded as constituting a religious denomination or any section thereof. However, for the purpose of the present appeal we propose to deal with the dispute between the parties on the basis that the Chishtia sect whom the respondents purport to represent and on whose behalf—(as well as their own)—they seek to challenge the *vires* of the Act is a section or a religious denomination. This position appears to have been assumed in the High Court and we do not propose to make any departure in that behalf in dealing with the present appeal.

The next point which needs to be considered is the duties of the Khadims and their rights on which their claim for an appropriate writ is based in the present

(1) (1891) I.L.R. 19 Cal. 204.

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

proceedings. In the High Court the question about the duties of the Khadims was settled by calling upon the respondents to file an affidavit in that behalf. In accordance with the order passed by the High Court Syed Mohammed Hanis, who is one of the Khadims, made a detailed affidavit, setting forth the duties of the Khadims and the statements made in this affidavit do not appear to have been traversed at the trial. According to this affidavit, every day one Khadim in rotation opens the first gate of the dome containing the shrine at 4 a. m. after pronouncing the sacred call named the "Azan". Accompanied by a few others he then proceeds to open the second gate pronouncing certain sacred formulae in adulation of Khwaja Saheb. Then the Khadims remove the old flowers from the Mazar and put fresh flowers on it. This ceremony is called "Sej". The dome premises are then cleaned, 'Loban' is burnt and the withered flowers are deposited in a sacred depository. This is followed by general prayer whereupon the Mazar is thrown open for the pilgrims. One Khadim remains on duty inside the dome while others guide the pilgrims. The Khadim who is present inside the dome helps the pilgrims to kiss the Mazar and prays for them, after putting the Daman, that is to say, the cloth covering of the grave over the pilgrims' heads. At this stage the pilgrims offer Nazar. At 3 p. m. the dome gates are closed and the flowers are changed once again. At this time the dome is given a paint of sandal paste and the Kabr Posh is also changed. The Khadim offers prayers for all the four silsilas of the Soofies and all other human beings, and this is followed by the opening of the Mazar again. At sunset there is a beat of Nakkara which gathers the pilgrims at the dome. At this time the Khadims carry lamps inside the dome, and while so doing they touch the heads of devotees with their lamps and then the lamps are placed on lamp posts. Madha (song in praise of Khwaja Saheb) is recited followed by the recitation of Dua and all pilgrims join by saying Amin. The Mazar remains open in this way until 10 p. m. when three Khadims give a ceremonial sweep

thrice inside the dome and lock it for the night. Besides these daily duties the Khadims perform a special ceremony during Urs and it is called Ousl. On the day of Basant Panchami Kavvals bring fresh green plants and flowers as presents to the Mazar and they are placed on the Mazar by the Khadims on duty. That in brief is the nature of the duties performed by the Khadims in the Durgah Khwaja Saheb.

Let us now consider the rights which according to the respondents have been held established by judicial decisions. In this connection the respondents rely mainly on the judgment of the Judicial Commissioner in the litigation which went before him in 1931 as well as the decision on appeal to the Privy Council in the matter. The contending parties in this litigation were the Dewan (i.e., Sajjadanashin), the Khadims and the Durgah Committee. It is not necessary for our present purpose to set out the respective contentions of the parties. It would be enough if we recite the conclusions reached by the Judicial Commissioner and mention the final decision of the Privy Council in respect of them. This is how the Judicial Commissioner recorded his conclusions at the end of his judgment in paragraph 14:

"(a) The rights of the Diwan in respect of offerings made at the Durgah are declared to be as follows:—

(i) All offerings or presents made to the Diwan at the Diwan's Khanqah or sitting place within the precincts of the Durgah are the exclusive property of the Diwan.

(ii) Offerings or presents of gold or silver vessels or implements or Qabarposhes for the use of the Durgah are the property of the Durgah Committee as trustees for the Durgah irrespective of the payment of Tawan to the Khadims, and irrespective of the spot at which they are presented.

(iii) Other offerings if made outside the dome of the Shrine are the perquisites of the Khadims, with the exception that offerings of animals or such bulky articles as cannot conveniently be brought within the dome shall, if made at the steps of the Shrine

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

be divided between the Diwan and the Khadims respectively in equal shares.

(iv) Other offerings if made within the dome of the Shrine shall be divisible between the Diwan and the Khadims respectively in equal shares irrespective of the spot at which they are deposited within the dome, provided that the following class of offerings shall be the perquisites of the Khadims exclusively:

(a) Copper coins and cowries and gold or silver articles (other than coins) of a value less than 8 Annas, and cotton cloth of inferior quality.

(b) All offerings made between the hours of 4 a.m. and 4 p.m. on 'Qul' day i.e. the last day of the 'Urs'.

(v) Cash or other offerings sent by post shall be deemed to be offerings made at the Shrine, i.e. within the dome, unless addressed specifically to the Durgah Committee, the Diwan or the Khadims for their exclusive use.

(vi) In the case of articles falling within the scope of clause (ii) the payment of Tawan shall be deemed conclusive proof that an article is presented for the use of the Durgah and in case in which no Tawan is paid in respect of an article falling within the scope of clause (ii) the Durgah Committee shall be the authority to decide whether such article is required or should be retained for the use of the Durgah.

(b) The defendant Khadims are enjoined to refrain from any interference with plaintiff's rights as above declared."

It has been strenuously urged before us by Mr. Pathak on behalf of the respondents that the only offerings to which the Durgah Committee can lay a claim under this judgment are those specified in cl. (a) (ii), and he contends that these offerings are none other than the presents of specified articles as therein indicated; in other words, the argument is that it is only offerings of certain articles for certain specific uses of the Durgah that constitute the property of the Durgah; all other offerings fall to be distributed either

under cl. (a)(iii) or cl. (a)(iv). If the offerings are made outside the dome with the exceptions there specified they go to the Khadims exclusively; if they are made within the dome they are to be divided between the Dewan and the Khadims in equal shares, but even in respect of such offerings those that fall within cl. (a)(iv)(a) or cl. (a)(iv)(b) have to be paid to the Khadims. Mr. Pathak thus suggests that cl. (a)(ii) refers only to specific presents given for specific purposes and the opening word "offerings" in the said clause really refers to the said presents and nothing else. We would read this clause as confined to specific presents and as excluding every other offering altogether. In our opinion, this contention is unsound. In dealing with the effect of the finding recorded by the Judicial Commissioner we cannot lose sight of the fact that we are not construing terms of a statute but we are attempting to find out the effect of the findings made in judicial proceedings. The said findings cannot therefore be divested from the rest for the reasons given in the judgment, and those reasons do not support the construction suggested by Mr. Pathak. Besides, cl. (v) specifically refers to cash or other offerings sent by post, and it provides, inter alia, that if the said cash or other offerings are addressed specifically to the Durgah Committee they would belong to the Durgah just as if they are addressed specifically to the Dewan or the Khadims they would belong to them respectively to the exclusion of anyone else. Clause (v) thus clearly postulates that cash or other offerings may be sent by the devotees to the Durgah Committee specifically for the purposes of the Committee, and that must inevitably mean that offering may be made in cash or may take other forms, and if it is earmarked even generally for the Durgah Committee it would go to the Durgah Committee, and neither the Sajjadanashin nor the Khadim can claim any share in it. Construing the word "offerings" in cl. (a)(ii) in the light of cl. (a)(v) we are disposed to take the view that the word "offerings" includes also an offering besides presents which are specifically referred to in that clause; and so it follows that even according to the findings

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

considered as a whole, if any offerings in cash or kin are made in favour of the Durgah and in that sens earmarked for its general purposes they would belon only to the Durgah and neither the Khadim nor th Sajjadanashin can make any claim in regard to it.

This matter had gone before the Privy Council i *Syed Altaf Hussain* v. *Diwan Syed Ali Khan* (1 Dealing with the question of the offerings and th rights of the respective parties thereto the Priv Council observed that it was conceded by the partie before the Court of Appeal that a distinction must b drawn inter alia between those articles such as Qaber poshes which are presented for the use of the Durgah and the other offerings which are made at the Durgah and it added that while the offerings belonging to the latter category may be divisible between the Dewan and the Khadims those made for the specific use of the Durgah are the property of the Durgah. In appreciating the effect of this observation it must be remembered that the controversy between the parties at that stage was not as to whether offerings made otherwise than in the form of specific articles but earmarked to the Durgah would belong to the Durgah or not. Even in respect of the articles specifically given to the Durgah for specific purposes the Khadims made a claim and that was rejected. This background of the dispute cannot be overlooked in judging the effect of the decision itself and observations made in the course of the judgment. Even so, it is significant that the Privy Council specifically observed that "it appears that the offerings which are not intended for the use of the Durgah are made at various places of the buildings attached to the shrine". In other words, it would appear that the offerings which were intended for the use of the Durgah were treated as constituting a class of offerings apart from the other offerings which were divisible between the Khadims and the Sajjadanashins, and that clearly is consistent with the view which we have taken in regard to the effect of the findings recorded by the Judicial Commissioner in appeal. The Privy Council found that Khadims who

(1) A.I.R. 1938 P.C. 71.

work as the servants of the Shrine were no doubt entitled to the offerings as already indicated but that they can make no claim in regard to the offerings which are intended for the use of the Durgah.

At this stage we ought to examine the scheme of the Act and read its material provisions the *vires* of which is challenged by the respondents. The Act consists of 22 sections, and like its predecessor Act XXIII of 1936 it provides a self-contained Code for the administration of the Durgah and the Endowment of the Durgah. Section 2(d) defines Durgah Endowment in five clauses. The first three clauses are exactly in the same terms as the corresponding clauses of s. 2(4) of the earlier Act XXIII of 1936. Clause (iv) of s. 2(d) is substantially similar to the corresponding clause in the earlier section except that it includes the Jagirdari villages of Hokran and Kishanpur in Ajmer expressly, whereas cl. (v) is somewhat differently worded. Under cl. (v) all such nazars or offerings as are received on behalf of the Durgah by the Nazir or any person authorised by him are included in the Durgah Endowment. By s. 3 the provisions of the Act are given overriding effect even though they may be inconsistent with the provisions contained in Act XX of 1863. Section 4(1) deals with the appointment of the Committee in which the administration, control and management of the Durgah Endowment shall be vested. This Committee shall be called the Durgah Committee, Ajmer; that is the effect of s. 4(2). Section 5 prescribes the composition of the Committee. It provides that the Committee shall consist of not less than five and not more than nine members all of whom shall be Hanafi Muslims and shall be appointed by the Central Government. Section 6 deals with the terms of office and resignation and removal of members and casual vacancies. Section 7 provides for the election of the President and the Vice-President of the Committee. Section 8 prescribes the conditions under which the Committee may be superseded. Section 9 provides for the power of the Central Government to appoint a Nazim, and s. 10 contemplates the appointment of an Advisory Committee to advise the

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

Nazim. Under s. 11 the powers and duties of the Committee are specified. All of these powers are in regard to the administration, control and management of the Durgah Endowment. Two of these ought to be specified because they are the subject-matter of challenge. Section 11(f) refers to the power of the Committee to determine the privileges of the Khadims and to regulate their presence in the Durgah by the grant to them of "licences in that behalf if the Committee thinks it necessary so to do", and under s. 11(h) power is given to the Committee to determine the functions and powers, if any, which the Sajjadanashin may exercise in relation to the Durgah. Under s. 12 provision is made for the remuneration of the Sajjadanashin. Succession to the office of the Sajjadanashin is the subject-matter of s. 13. Section 13(1) provides that as soon as the office of the Sajjadanashin falls vacant, the Committee shall, with the previous approval of the Chief Commissioner, make such interim arrangements for the performance of the functions of the Sajjadanashin as it may think fit and immediately thereafter publish a notice in such form and manner as may be determined by the Committee, inviting applications for the office of the successor as therein specified. Four other sub-sections of s. 13 deal with the appointment of the successor but they are not the subject matter of any controversy and so it is unnecessary to refer to them. Section 14 is important. It makes it lawful for the Nazim or any person authorised by him in this behalf to solicit and receive on behalf of the Durgah any nazars or offerings from any person, and it adds that notwithstanding anything contained in any rule of law or decision to the contrary no person other than the Nazim or any person authorised by him in this behalf shall receive or be entitled to receive nazars or offerings on behalf of the Durgah. This section prohibits the Khadims or the Sajjadanashins to solicit offerings on behalf of the Durgah and is the subject-matter of dispute. Section 15 enjoins upon the Committee to observe Muslim law and tenets of the Chishti saint in conducting and regulating the established rites and

ceremonies at the tomb. Section 16 provides for the appointment of a Board of Arbitration. If any dispute arises between the Committee on the one part and the Sajjadanashin, any Khadim and any person claiming to be the servant of the Durgah on the other part provided such dispute does not, in the opinion of the Committee, relate to any religious usage or custom or to the performance of any religious office, it has to go before the Board of Arbitration which consists of a nominee of the Committee and a nominee of the other party to the dispute and a person who holds or has held the office or is acting or has acted as a district judge to be appointed by the Central Government. This section provides that an award of the Board shall be final and shall not be questioned in any court. Section 16(2) lays down that no suit shall lie in any court in respect of any matter which is required by sub-s. (1) to be referred to a Board of Arbitration. Section 17 then lays down that any defect in the constitution of, or vacancy in, the Committee would not invalidate its acts and proceedings; and s. 18 provides for the enforcement of the final orders passed by the Committee in the same manner and by the same procedure as if the said orders were a decree or order passed by a civil court in a suit. Section 19 provides for the audit of accounts and annual report, and s. 20 empowers the Committee to make bye-laws to carry out the purposes of this Act. Section 21 deals with transitional provisions, and s. 22 repeals the earlier Act of 1936. That in brief is the nature and scope of the material provisions of the Act.

The challenge to the *vires* of the Act rests broadly on two principal grounds. It is urged that its impugned provisions are inconsistent with Art. 26(b), (c), (d) of the Constitution and thereby violate the right to freedom of religion and to manage denominational institutions guaranteed by the said Article. It is also argued that some of its provisions are violative of the respondents' fundamental right guaranteed under Art. 19(1)(f) and (g). It would be convenient to deal with these two principal grounds of attack before

52

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

examining the other arguments urged against the validity of different sections.

We will first take the argument about the infringement of the fundamental right to freedom of religion. Articles 25 and 26 together safeguard the citizen's right to freedom of religion. Under Art. 25(1), subject to public order, morality and health and to the other provisions of Part III, all persons are equally entitled to freedom of conscience and their right freely to profess, practise and propagate religion. This freedom guarantees to every citizen not only the right to entertain such religious beliefs as may appeal to his conscience but also affords him the right to exhibit his belief in his conduct by such outward acts as may appear to him proper in order to spread his ideas for the benefit of others. Article 26 provides that subject to public order, morality and health every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

The four clauses of this Article constitute the fundamental freedom guaranteed to every religious denomination or any section thereof to manage its own affairs. It is entitled to establish institutions for religious purposes, it is entitled to manage its own affairs in the matters of religion, it is entitled to own and acquire movable and immovable property and to administer such property in accordance with law. What the expression "religious denomination" means has been considered by this Court in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1). Mukherjea, J., as he then was, who spoke for the Court, has quoted with approval the dictionary meaning of the word "denomination" which says that a

(1) [1954] S.C.R. 1005, 1023, 1024.

"denomination" is a collection of individuals classed together under the same name, a religious sect or body having a common faith and organisation and designated by a distinctive name". The learned Judge has added that Art. 26 contemplates not merely a religious denomination but also a section thereof. Dealing with the questions as to what are the matters of religion, the learned Judge observed that the word "religion" has not been defined in the Constitution, and it is a term which is hardly susceptible of any rigid definition. Religion, according to him, is a matter of faith with individuals or communities and it is not necessarily theistic. It undoubtedly has its basis in a system of pleas or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. Dealing with the same topic, though in another context, in *Sri Venkataramana Devaru* v. *The State of Mysore* (1), Venkatarama Aiyar, J. spoke for the Court in the same vein and observed that it was settled that matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion, and in support of this statement the learned Judge referred to the observations of Mukherjea, J. which we have already cited. Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the

(1) [1958] S.C.R. 895.

1961

Ajmer Durgah Committee, Ajmer and Another v. Syed Hussain Ali and Others

Gajendragadkar J.

meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.

In the present appeal we are concerned with the freedoms guaranteed under Art. 26(c) and (d) in particular. The respondents contend that the appointment of the Committee contemplated by ss. 4 and 5 has effectively deprived the section of the denomination represented by them of its right to own the endowment properties and to administer them. We have already stated that we propose to deal with this appeal on the assumption that the respondents have filed the present writ petition not only for the Khadims but also for and on behalf of the Chishtis and that the Chishtis constitute a section of a religious denomination. Considered on this basis the contention of the respondents is directed against the powers conferred on the Committee for the purpose of administering the property of the Durgah and in substance it amounts to a challenge to the validity of the whole Act, because according to them it is for the section of the denomination to administer this property and the Legislature cannot interfere with the said right.

In dealing with this argument it is necessary to recall the fact that the challenge to the *vires* of s. 5 has been made by the respondents in their petition on a very narrow ground. They had urged that since the Committee constituted under the Act was likely to include Hanafi muslims who may not be Chishti muslims the provision authorising the appointment of the Committee was *ultra vires*, and in fact the decision of the High Court is also based on this narrow ground. Now, it is clear that the *vires* of s. 5 cannot be effectively challenged on any such narrow ground. If the right of the denomination or a section of such denomination is adversely affected by the statute the relevant

provision of the statute must be struck down as a whole and in its entirety or not at all. If respondents could properly invoke Art. 26(d) it would not be open to the statute to constitute by nomination a Committee for the management and administration of the property of the denomination at all. In other words, the infirmity or the vice in the statute cannot be cured by confining the members of the proposed Committee to the denomination itself. This no doubt is a serious weakness in the basis on which they levelled their attack against the validity of s. 5 in the court below.

Besides, it is significant that the property in respect of which the claim has been made by the respondents is only the property consisting of offerings made either in or outside the shrine. We have already seen that the Durgah Endowment contains several other items of property and none of these items except the offerings has been referred to in the petition, and that reasonably suggests that the respondents were conscious that the other items of property though they formed part of the Durgah Endowment were never in the management of the denomination as such and so as to which they could legally make no claim. That is another infirmity in the claim made by the respondents in challenging the *vires* of s. 5.

However, we have allowed Mr. Pathak to argue this part of the respondents' case on the broad and general ground that the Chishtia Soofies constitute either a denomination or a section of a denomination and as such they are entitled to administer and manage all the properties of the Durgah including the offerings to which specific reference has been made in the petition by the respondents. The challenge thus presented to the *vires* of s. 5 and other subsidiary sections dealing with the powers of the Committee cannot succeed for the simple and obvious reason that the denomination never had the right to administer the said property in question. We have already seen how the history of the administration of the Durgah Endowment from the time the first endowment was made down to the date of the Act clearly shows that the endowments

have always been made on such terms as did not confer on the denomination the right to manage the properties endowed. The management of the properties endowed was always in the hands of officers appointed by the State who were answerable to the State and who were removable by the State at the State's pleasure. We have already seen that until Akbar made his endowment in favour of the Durgah the position of the Durgah and its properties was very modest and there was hardly any property to manage or administer. Ever since the first endowment was made and subsequent additions by similar endowments followed the administration and management of the property has been consistent with the same pattern and the said pattern excludes any claim that the administration of the property in question was ever in the hands of the said denomination. It is obvious that Art. 26(c) and (d) do not create rights in any denomination or its section which it never had; they merely safeguard and guarantee the continuance of rights which such denomination or its section had. In other words, if the denomination never had the right to manage the properties endowed in favour of a denominational institution as for instance by reason of the terms on which the endowment was created it cannot be heard to say that it has acquired the said rights as a result of Art. 26(c) and (d), and that the practice and custom prevailing in that behalf which obviously is consistent with the terms of the endowment should be ignored or treated as invalid and the administration and management should now be given to the denomination. Such a claim is plainly inconsistent with the provisions of Art. 26. If the right to administer the properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it Art. 26 cannot be successfully invoked. The history of the administration of the property endowed to the tomb in the present case which is spread over nearly Four Centuries is sufficient to raise a legitimate inference about the origin of the terms on which the endowments were founded,

an origin which is inconsistent with any rights subsisting in the donominations to administer the properties belonging to the institution. It was because the respondents were fully conscious of this difficulty that they did not adopt this broad basis of challenge in their writ petition. In considering this question it is essential to remember that the pilgrims to the tomb have at no time been confined to Chishtia Soofies nor to muslims but that in fact a large number of Hindus, Khoja Memons and Parsis visit the tomb out of devotion for the memory of the departed saint and it is this large cosmopolitan circle of pilgrims which should in law be held to be the circle of beneficiaries of the endowment made to the tomb. This fact inevitably puts a different complexion on the whole problem. We must, therefore, hold that the challenge to the *vires* of s. 5 and the subsidiary sections which deal with the powers of the Committee on the ground that the said provisions violate the fundamental right guaranteed to the denomination represented by the respondents under Art. 26(c) and (d) fails.

That takes us to the other principal challenge based on Art. 19(1)(f) and (g). This challenge is directed partly against cl. (v) in s. 2(d) which defines a Durgah Endowment. We have already seen that by this clause all such Nazars or offerings as are received on behalf of the Durgah by the Nazim or any other person authorised by him are included in the Durgah Endowment. Section 14 may be read along with this definition. This section confers power on the Nazim or his agent to solicit or receive offerings on behalf of the Durgah and prohibits any other person from soliciting such offerings. The respondents contend that these provisions infringe their fundamental right to property inasmuch as offerings or Nazars which under the custom judicially recognised would have gone to them are now sought to be diverted to the Durgah to their detriment. This argument proceeds on the assumption that it is only particular presents made for certain specific purpose of the Durgah that would belong to the Durgah and that the rest of the offerings

1961

The Durgah Committee, Ajmer & Another v. Syed Hussain Ali & Others

Rajendragadkar J.

would be divisible between the Khadims and the Sajjadanashins as directed in the earlier litigation to which we have already referred. If the assumption made by the respondents was well founded that the effect of the said decision was to limit the right of the Durgah only to the receipt of the specific articles for specific purposes then of course there would have been considerable force in the argument that s. 2(d)(v) and s. 14 seek to augment that right and to that extent diminish or prejudicially affect the rights of the respondents. But, as we have already indicated, the decision of the Judicial Commissioner as well as that of the Privy Council do not support the claim made on behalf of the respondents. Even under the said decisions, specific articles given for specific purposes as well as offerings made for the general purposes of the Durgah and earmarked for it always belonged to the Durgah and it is only these offerings which are included within the definition of the Durgah Endowment by s. 2(d)(v). Offerings or Nazars which are paid to the Durgah and as such received *on behalf of the Durgah* constitute Durgah Endowment and s. 14 authorises the Nazim or his agent to receive such offerings and prohibit any other person from receiving them. In other words, the effect of the two provisions is that when offerings are made earmarked generally for the Durgah they belong to the Durgah and such offerings can be received only by the Nazim or his agent and by nobody else. It is clear that these offerings never belonged to the respondents and they can therefore have no grievance against either s. 2(d)(v) or s. 14. That is a matter concerning the property of the Durgah and it is open to the Legislature to regulate by providing that the said offerings can be solicited by the Nazim or his agent and by no one else. The Khadims' right to receive offerings which has been judicially recognised is in no manner affected or prejudiced by the impugned provisions. Even after the Act came into force pilgrims might and would make offerings to the Khadims and there is no provision in the Act which prevents them from accepting such offerings when made. Therefore, in our opinion, the challenge to the *vires* of these two provisions must also fail.

Before we part with s. 2(d)(v) it may be pertinent to observe that in substance the relevant portion of the definition of the Durgah Endowment is the same as in the earlier Act. Under the earlier Act only such offerings as were intended explicitly for the use of the Durgah were included in the Durgah Endowment, while under s. 2(d)(v) all Mazars and offerings which are received on behalf of the Durgah are so included. The omission of the word "explicitly" from the present definition is merely intended to make it clear that if from the nature of the offering or the circumstances surrounding the making of the offering or from other relevant facts it appears that the offering was made for the purpose of the Durgah and was accepted on behalf of the Durgah as such it would be an item of the Durgah Endowment though the offering may not have been explicitly made for the Durgah as such; but the broad idea underlying both the definitions is that where offerings are made apart from the gift of specific articles intended for specific purposes of the Durgah and it is found that they are earmarked or intended for the Durgah for the general purposes of the institution they would constitute a part of the Durgah Endowment. Therefore the contention that by enlarging the definition of Durgah Endowment s. 2(d)(v) has made an encroachment on the fundamental rights of the respondents is not at all well founded.

That takes us to s. 11(f) and (h). The challenge to the *vires* of these two provisions proceeds on the assumption that they encroach upon the fundamental right of the respondents under Art. 25(1). It is urged that the Committee has been given power by these provisions to determine the privileges of the Khadims as well as the functions and powers, if any, which the Sajjadanashin may exercise in relation to the Durgah and that means infringement of the freedom of the Khadims to practice their religion according to the custom and according to their concept. We are not impressed by this argument. What the relevant provisions intend to achieve is the regulation of the discharge of duties by the Khadims and the discharge

53

1961

The Durgah Committee, Ajmer & Another
v.
Syed Hussain Ali & Others

Gajendragadkar J.

of functions and powers by the Sajjadanashin. It is common ground that the Khadims discharged their duties by rotation and that itself proves that some regulation is necessary, and so the impugned provisions merely provide for the regulation of the discharge of the duties by the Khadims and nothing more, and so the plea that the freedom to practice religion guaranteed by Art. 25(1) has been violated does not appear to be well founded.

In this connection we ought to refer to s. 15 which makes it obligatory for the Committee in exercise of its powers and discharge of its duties to follow the rules of Muslim law applicable to Hanafi muslims in India, and so all the ceremonies in the Durgah have necessarily to be conducted and regulated in accordance with the tenets of the Chishti saint. The powers conferred on the Committee by s. 11 (f) and (h) must be read in the light of the mandatory provisions of s. 15. Thus read the apprehension that the fundamental right to freedom of religion is infringed by the said provisions will clearly appear to be wholly unjustified.

There is yet another section which is relevant in dealing with the present point, and that is s. 16. Under s. 16 arbitration is provided for when disputes arise between the Committee on the one part and the Khadims and others on the other. This provision applies to all disputes except those that relate to any religious usage or custom or to the performance of any religious office. In other words, disputes in regard to secular matters are left for the decision of the arbitrators, and that, in our opinion, is a very sensible provision. The composition of the Board of Arbitration is based on well recognised principles; the two parties to the dispute name their respective nominees and an impartial member is required to be appointed on the Board with the qualifications specified by s. 16(1)(iii). The argument that s. 16 offends against the fundamental right guaranteed by Art. 14 read with Art. 32 seems to us to be wholly untenable. The policy underlying s. 16 is in our opinion healthy and unexceptionable and so the provisions of s. 16 can be sustained

on the ground that they are obviously in the interest of the institution as well as the parties concerned. The provisions for compulsory adjudication by arbitration are not unknown and it would be idle to contend that they offend against Art. 14 read with Art. 32.

If a dispute arises between the Committee and the Khadims in regard to a religious matter it would necessarily have to be decided in accordance with the ordinary law and in ordinary civil courts of competent jurisdiction. Such a dispute is outside the purview of s. 16; and indeed, in respect of such a dispute the Committee is not authorised to make any orders or issue any directions at all. Therefore the conclusion appears to us to be inescapable that the provisions of s. 11(f) and (h) are valid and do not suffer from any constitutional infirmity.

The next section which is challenged is s. 13(1). The validity of this section has not been specifically attacked in the petition but even so since the whole of the Act has in a general way been challenged we have allowed Mr. Pathak to urge his arguments against the validity of s. 13(1). Section 13(1) authorises the Committee to make provisional interim arrangement if a vacancy occurs in the office of the Sajjadanashin. Now, in considering the scope and effect of this provision it cannot be read apart from the provisions of the remaining sub-sections of s. 13. Section 13 is really intended to lay down the procedure for determining disputes as to the succession to the office of the Sajjadanashin. That is the main object of the section, but if a vacancy occurs suddenly as it always will in the case of death for instance some interim arrangement must obviously be made; and all that s. 13(1) empowers the Committee to do is to make an appropriate interim arrangement in that behalf and to proceed to take the necessary steps for the appointment of a permanent successor as prescribed by the other provisions of s. 13. Therefore it is futile to contend that s. 13(1) offends against Art. 25(1) of the Constitution.

Section 14 is attacked on the ground that it violates the respondents' right to property under Art. 19(1)(f). We have already discussed this question in dealing

1961

The Durgah Committee, Ajmer & Another
v.
Sy a Hussain Ali & Others

Gajendragadkar J

with s. 2 (d)(v). As we have pointed out all that s. 14 does is to create a statutory right in the Nazim or his agent to solicit and receive offerings on behalf of the Durgah. That does not affect the right of the respondents to receive offerings paid to them by the pilgrims visiting the Durgah. The respondents cannot possibly claim a right to solicit or receive offerings intended for the benefit of the Durgah. In fact no such claim has been made in the petition and no such claim can be made at all. Therefore the validity of s. 14 is not shaken by the challenge made by the respondents under Art. 19(1)(f).

That leaves only one section to be considered, and that is s. 18. It is urged that s. 18 also violates the fundamental rights guaranteed to the respondents under Arts. 14 and 32 of the Constitution. It is difficult to appreciate the argument. It may be conceded that s. 18 is somewhat clumsily worded. The final orders whose enforcement is provided for by s. 18 would appear to be final orders passed in matters within the competence of the Committee as to which no dispute is raised by the persons against whom the said orders are passed. We have already seen that if disputes arise in respect of any matters left to the jurisdiction of the Committee and they are not of a religious character then they have to be referred to arbitration provided for by s. 16, and in that case it is the award passed by the Board of Arbitration that would be in force. If disputes arise between the parties on any religious matters they will have to be decided in accordance with law in the ordinary civil courts of competent jurisdiction and so decisions in these disputes are also outside s. 18. Thus considered the scope of s. 18 would be confined only to such final orders as are passed by the Committee within its jurisdiction against persons who do not object to them but who fail to comply with them. If that is the scope of s. 18, as we hold it is, it is idle to contend that either Art. 14 or Art. 32 or the two read together are contravened.

During the course of his argument Mr. Pathak emphasised the fact that though the provisions of the

enactment may be within the four corners of the Constitution and none of the impugned provisions may be found to be *ultra vires* his clients were apprehensive that in fact and in practice their rights to receive offerings would be prejudicially affected. That is a matter on which we propose to express no opinion. All that we are concerned to see is whether the legal rights of the respondents or of the section of the denomination they seek to represent are prejudicially affected by the impugned legislation contrary to the provisions of the Constitution; and a careful examination of the relevant sections in the light of the criticisms made by Mr. Pathak against them has satisfied us that none of the impugned sections can be said to be unconstitutional. If as a result of the enforcement of the present Act incidentally more offerings are paid to the Durgah and are received on behalf of the Durgah that is a consequence which the respondents may regard as unfortunate but which introduces no infirmity in the validity of the Act.

In the result the appeal is allowed, the order issued by the High Court is set aside and the petition filed by the respondents dismissed with costs throughout.

Appeal allowed.

TAB-18

2 M.I.A. 390=8 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206.

JEWUN DOSS SAHOO,—*Appellant*; *v.* SHAH KUBEER-OOD-DEEN,—*Respondent*.* [December 8 and 9, 1840.]

On Appeal from the Sudder Dewanny Adawlut in Bengal.

Mahomedan Law (Wukf)—Use of term "wukf," if necessary to constitute endowment to religious and charitable uses—"Altamgha or altamgha-inam," Use of term in royal grant, if conveys absolute proprietary right—Alienation of endowed property, such endowment being perpetual—Reg. XIX of 1810 (Bengal Charitable Endowments, Public Buildings and Escheats)—Reg. II of 1805 (Limitation), S. 2—Suit for recovery of endowed property, if subject to law of limitation.

The term *Altamgha* or *Altamgha-inam*, in a royal grant, does not, of itself, convey an absolute proprietary right to the grantee; where, from the general tenor of the grant, it is to be inferred, that a *Wukf*, or endowment to religious and charitable uses, was intended, and property so endowed cannot be alienated by the grantee or his representatives.

According to the Mahomedan Law, it is not necessary, in order to constitute a *Wukf*, or endowment to religious and charitable uses, that the term *Wukf* be used in the grant; if, from the general nature of the grant, such tenure can be inferred.

An endowment for charitable and public purposes being a perpetual endowment, it is by Regulation XIX of 1810, the duty of the Government to preserve its application; and being excepted by sec. 2 of Regulation II of 1805 from the general operation of the Regulation of Limitation, no suit for its recovery is barred, until at least the officer entitled to administer it has been in possession of his office for twelve years.

By a *Firman* or royal grant, of the 14th of *March* 1717, in the fifth year of *Mahomed Feroksir*, one lac [391] of *dams* from *Pergunnah Havilly Suhseram* in the *sooba Bahar*, being equal to about 1,197 rupees, was granted in *Altamgha*, or royal free gift, in perpetuity, for the purpose of defraying the expenses of the *Khankah*, a religious establishment of *Sheikh Kubeer*, *Dervish*, to descend to his heirs in succession.

In pursuance of this grant, *Sheikh Kubeer* received the revenue during his life, applying it for the purpose of meeting the charges of travellers frequenting the *Khankah*, of which he was the *Sijjada-nashin*, or superior. Upon his death he was succeeded in his office by his son, *Sheikh Khulleel-oolla*.

By a *Sunud* from *Nawab Fukhr-ood-deen Bahadur*, on the 16th *Sheban* and the fourteenth year of the reign of *Mahomed Shah Badshah*, (21st *January* 1733,) certain *Mouzas* or villages in the *Pergunnah Suhseram*, in the *Sircar* or division *Rowtas*, *sooba Bahar*, with some *Tuiera* and

* Present: Members of the *Judicial Committee*,—Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

Privy Councillor,—*Assessor*, Sir Edward Hyde East, Bart.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

Khankah lands, were appropriated for the purpose of meeting the expenses of travellers, and of *Sheikh Khulleel-oolla*, and freed from the Government charges and revenues. Upon the death of *Sheikh Khulleel-oolla*, he was succeeded, as *Sijjada-nashin*, by *Gholam Shurfood-deen*, his son, who, on the 6th of *July* 1744, obtained a royal *Sunud*, and on the 4th of *December* in the same year a royal *Perwannah*, confirming him in the dams originally granted to his paternal grandfather, *Sheikh Kubeer*.

Shah Kaim-ood-deen succeeded his father, *Gholam Shurf-ood-deen* as *Sijjada-nashin*, and obtained a like *Perwannah* to those granted to his father and grandfather, and by a *Firman* of *Shah Alum*, dated the 13th of *October* 1762, a further grant of 2,81,000 *dams* from the *Pergunnah Suhseram* was made to him in *Altamgha*-[392]*inam*, for the purpose of defraying the expenses of the frequenters to and from him, and all ranks were enjoined "always to maintain and uphold the august order, and to relinquish the aforesaid *dams* to them to descend to the offspring in succession, to be enjoyed by them," free from all Government and revenue charges.

On the 10th of *January* 1764, *Mahomed Jafir Khan* augmented the revenues of the *Khankah* by the grant of certain *Ayeema* * *Dehauts*, consisting of fourteen *Mouzas* in the same *Pergunnah*; and he executed a *Sunud* for that purpose.

Shah Kiam-ood-deen was succeeded as *Sijjada-nashin* of the *Khankah* by his son, *Shah Shumsh-ood-deen*, who, on the 27th of *January* 1807, some time after he had been in possession, entered into a contract with the Appellant, *Jewun Doss Sahoo*, for the loan of rupees 23,501, and, as security for the repayment thereof, transferred sixteen *Mouzas*, comprised in and constituting part of the above-mentioned grants. As the revenue authorities do not register mortgages or conditional conveyances, *Shah Shumsh-ood-deen* at the same time executed an absolute bill of sale, conveying the *Mouzas* to the Appellant, and the Appellant, as is usual in such transactions, executed a *Meadi Ikrar-namah*, or defeazance; which provided, that if *Shah Shumsh-ood-deen* repaid the sum advanced on or before a particular day, the sale should be void, but if he did not repay that sum within the stipulated period, then the *Mouzas* should become the absolute property of the Appellant. Shortly after the execution of these [393] instruments, the Appellant entered into possession of the *Mouzas*.

The loan was not repaid within the stipulated period; but in consequence of the Appellant not having taken the course provided for by Regulation XVII of 1806, the *Mouzas* still remained in the possession of

* Charitable grants made by the Sovereign to religious Mahomedans.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

the Appellant, according to the terms of the conveyance above referred to, subject to the right of redemption by *Shah Shumsh-ood-deen*, the mortgagor.

On the 13th of *Magh* 1217 *Fusly*, (2nd *February* 1810, A.D.,) *Shah Shumsh-ood-deen*, in consideration of a further sum of rupees 5,000, executed another *Ikrar-namah*, conveying the *Mouzas* to the Appellant absolutely.

On the 3rd of *February* 1810, the day after the execution of the above *Ikrar-namah*, *Shah Shumsh-ood-deen*, died, leaving *Mussumat Kadira*, his widow, and *Shah Kubeer-ood-deen*, the present Respondent, his son, an infant of the age of twelve years, hereditary successor to the *Sijjada-nashin*.

Shah Shumsh-ood-deen attained the age of eighteen in the year 1816, when he preferred a petition to Mr. *John Deane*, the Commissioner of *Bahar* and *Benares*, asserting his right and title to the whole of the lands above stated. Mr. *Deane* directed inquiries to be made by the local agents, who, on the 10th of *December* 1818, reported in his favour, and thereupon, orders were issued by the Governor-General in Council, on the 29th of *February* 1819, and the 8th *September* 1822, that the Respondent *Shah Shumsh-ood-deen* should recover possession of the property by assistance of the officers of the Government.

In consequence of these proceedings, the Respondent commenced two suits in the Provincial Court of *Patna* [394] for the recovery of the villages which had been alienated from the *Khankah*. Some of these villages being in the possession of one *Mussumat Kadira*, or *Beeby Ismut*, a suit was instituted against her; and for the recovery of the *Mouzas* taken possession of by *Jewun Doss Sahoo*, under the circumstances above stated, a suit was brought against him on the 17th of *April* 1822. In the plaint filed in this latter suit, the Plaintiff set forth his title as already detailed, and insisted that the *Mouzas* in question were *Wukf** property, of which, neither a conditional or *bona fide* sale could be made: he insisted also that the sale was in itself illegal, not being perfected according to Regulation XVII of 1806; and he prayed to be put in possession of the annual produce, being rupees 3,678. 10., the eighteen-fold of which was rupees 66,179. 4 anas.

On the 28th of *June* 1822, and before any answer had been put in by the Defendant in this suit, the Provincial Court of *Patna* made a Decree in the other suit against *Mussumat Kadira*, or *Beeby Ismut*, whereby they declared, that it appeared from the documents, among which were the two royal *Firmans* above stated, and the evidence and opinions of the law-officers of the Sudder Dewanny in a cause therein

* In Mahomedan Law, a bequest for pious uses.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

referred to, that lands, which were *Wukf*, could not be alienated to any other person by sale or gift, nor could they be inherited as heritable property, or mortgaged or sold conditionally. The Court went on to declare that it was not in the power of any of the former *Sijjada nashins* to alienate the *Altamgha* and other *dams*, or the *Dehauts*, in favour of any one, or to sell [395] or otherwise dispose of the property: a Decree was therefore passed in that suit in favour of the Plaintiff, the present Respondent, from which Decree the said *Mussumat Kadira* afterwards appealed to the Sudder Dewanny Adawlut; but the Decree was, on the 24th of *August* 1824, affirmed by the Sudder Dewanny Adawlut.

On the 9th of *March* 1824, the present Appellant put in his answer, insisting upon the legality of the sale to him, that it was a *bona fide* sale, and not within Regulation XVII, A.D. 1806, and that, had not the *Dehauts* been alienable, the collector would not have entered the name of the Defendant in the public books, and he also set up the lapse of time as a bar to the Plaintiff's claim. He contended moreover, that the conditional sale had become absolute, and that a further advance of 5,000 rupees having been made, a new conveyance was executed to the Appellant, and the power of redemption extinguished, and insisted that the property in question was legally saleable.

In his replication the Respondent relied upon his minority, to prevent the lapse of time from barring the claim.

The suit between the parties to the present appeal being at issue, evidence was produced by the Respondent, consisting of the several documents already stated, forming and establishing his title, and proving the nature of the *Dehauts* or villages in question, and the objects for which they were granted; the different *Perwannahs* and *Sunuds* confirming the Respondent's ancestors in the possession; two opinions of the law officers upon the tenure of the lands, showing, that by the Mahomedan law the sale or mortgage of *Wukf* lands were illegal, and that the lands in question were [396] of that description. The Defendant also produced documentary evidence, consisting of the instruments by which the conditional sale in 1809 was effected, and the document which he purported to be the absolute conveyance and sale relied upon.

On the 29th *December* 1825, the cause came on for hearing before Mr. *Fleming*, the Third Judge of the Provincial Court of *Patna*, when the following judgment was given:—"That the Defendant (present Appellant) admits, that the disputed *Dehauts* were sold to him conditionally, and yet he did not fulfil the conditions of Regulation XVII, 1806 A.D., to render the transactions a *bona fide* sale: and as to the second *Ikrarnamah*, executed by *Shah Shumsh-ood-deen*, the date of the execution of

which is one day only before the death of the said *Shah*, which fact the Defendant does not deny, is invalid; in addition to which, according to the decision pronounced by the Sudder Dewanny Adawlut, a conveyance like this is not legal. Upon a consideration therefore of all the circumstances attendant on this transaction, the conditional sale stands in the character of a mortgage; it therefore becomes necessary to take up an account of the produce of the said *Dehauts*, and the principal and interest that is receivable by the Defendant;" for which reason it was ordered, that the Defendant should, within fifteen days, file the *Wasilaut** papers from the *Fusly* year 1814 to 1832, agreeably to the intent and meaning of Regulation XV of 1793.

The Appellant, *Jewun Doss Sahoo*, dissatisfied with this decision, presented a petition to the Provincial Court, praying that witnesses might be examined touching the execution of the second *Ikrar-namah*, [397] which the Court had in its Decree held to be illegal; but this application was refused, as the ground on which the *Ikrar-namah* had been deemed invalid had been recorded in the previous proceedings of the Court.

The Appellant took no steps to bring these Decrees under Appeal; but the subsequent proceedings in the Provincial Court, up to the Decree of Mr. *Steer*, of the 25th *June* 1827, related to the inquiries into the annual value of the property. The Appellant filed certain revenue papers, called *Jumma-bundi* and *Jumma-khurch*, to show the collections received by him whilst he was in possession; and these papers were referred to the Provincial Court of Benares, (where the Defendant resided,) in order that they might take the Defendant's acknowledgment of their genuineness and accuracy. In pursuance of this reference, the Provincial Court of *Benares* summoned the Appellant, who, after procuring a delay of fifteen days, put in a petition, wherein he again insisted on the genuineness and legality of the *Ikrar-namah*, but did not produce any evidence in support of the *Jumma-bundi* and *Jumma-khurch* papers, though he swore to the entries therein being just and true.

On the 19th *September* 1826, the cause came on again before the Provincial Court of *Patna*, when an order was made to suspend the proceedings for one week, to allow the Plaintiff to produce evidence to falsify the *Jumma-bundi*.

During the prosecution of this cause in the Provincial Court, the Respondent had also been prosecuting against *Sultan* and *Ruheem-ood-deen* and others, a cause (No. 803) in the same Court, relating to the *Talook Ahunpore*, which contained some of the [398] *Mouzas* originally granted for the expenses of the *Khankah*, and which were claimed by the Defendants in that suit, under an alleged sale by the Plaintiff's father.

* Accounts showing the mesne profits.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Sath. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

That cause (No. 803) came on to be heard before *William Steer*, Esq., the Fourth Judge of the Provincial Court, on the 25th of *June* 1827, when deeming the case to be of the same nature as the present appeal, he proceeded to take both suits into consideration, and after stating the various documents already set forth, pronounced the following judgment:—"That if the conditional sale writing had stood, in that case a *bona fide* sale could not have been effected without acting up to the provisions of Regulation XVII, A.D. 1806; but as the conditional sale did not stand, but *Shah Shumsh-ood-deen* having taken a further sum of rupees 5,000, returned to the Defendant the *Ikrar-namah* which this individual had executed, purporting to be a conditional sale, and even executed in the Defendant's favour, another statement upon the subject thereof, which transaction made the affair terminate in a *bona fide* sale, and that circumstance took place more than fifteen years, reckoning to the period the suit was brought,—justice now demands, that after the lapse of so long a time, the Defendant shall not be deprived of the full and *bona fide* sale, and be dispossessed. As to the plea of the Plaintiff adduced at this time, after the period of limitation has gone by, that the *Ikrar-namah* dated the 13th of *Magh* 1217, F. S., (2nd of *February* 1810,) was written only one day before the demise of *Shah Shumsh-ood-deen*, because of the return of the *Ikrar-namah* executed by the Defendant under date the 3rd of the month of *Magh* 1214, F.S., (27th *January* 1807,) that cannot be admitted by the Court. Had [399] the assertion been founded on fact, it is certain that the objection would have been made at about the termination of the period of limitation, or before that time. There can be no doubt, besides, that in the manner the *Dehauts* and lands that were litigated in cause 803 have been sold, the *Dehauts* litigated in the present suit have been sold, in the character of a *bona fide* sale after the period of the conditional sale expired, and the grounds on which those lands were deemed not to be a *Wukf* endowment have been recorded in the proceedings holden in that cause. For the above reason it is ordered, that the Plaintiff's claim is dismissed, and he is rendered liable to pay the whole of the costs of suit."

The Respondent appealed from this decision to the Sudder Dewanny Adawlut, and filed his petition on the 23rd of *September*, 1829.

The Appellant, *Jewun Doss Sahoo*, after objecting to the security of the Respondent, which was overruled, put in his answer to the appeal on the 30th *December* 1829.

On the 18th of *February* 1830, the cause, after some preliminary proceedings, came on for judgment before the Sudder Dewanny Adawlut, when the Court ordered and decreed that the claim and appeal of the Appellant (the present Respondent) should be decreed to him, and the

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

decision of the *Patna* Provincial Court reversed; that the Appellant, (the present Respondent,) without being subject to the payment of the purchase-money, should be put in possession of the *Mahal* in dispute, and that the costs of both parties should be defrayed respectively by each.

From this Decree the present Appellant appealed to his late Majesty in Council.

[400] Mr. *Miller*, Q.C., Mr. *Wigram*, Q.C., and Mr. *Jackson*, for the Appellants.

This is a question of considerable importance, involving one of the most difficult points of Mahomedan law: it is the first of this nature that has been appealed to *England*. It resolves itself into three heads: *first*, whether the property which was purchased by the Appellant from the Respondent's father was of that description called *Wukf*, which is altogether inalienable, inasmuch as it is given to an institution of a religious nature for charitable purposes; *secondly*, assuming it to have been of that nature, whether the Respondent was competent to institute a suit for the recovery of the lands so alienated; and, *lastly*, whether the Respondent was not precluded and barred by the Appellant having held possession under a fair title, he being a purchaser for a valuable consideration without notice, for twelve years before the commencement of the suit.

I. It is necessary, in order to arrive at a true conclusion of the tenure of this property, to look at the language of the *Firmans* and *Sunuds*, by virtue of which the lands are held. The words of the first grant by *Mahomed Feroksir*, dated the 14th of *March* 1717, are, "that one lac of *dams* from *Pergunna Havilly Suhseram* in *sooba Bahar* are endowed and bestowed for the purpose of defraying the expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*," as an *Altamgha* grant, for "him to manage and control, and to descend to his heirs in succession from remove to remove." Now it is clear that the expression contained in this grant, "for the purpose of defraying the expenses of the *Khankah*," &c., is altogether destroyed by the limitation to the heirs: the grant is to *Sheikh Kubeer*, in the same way of limitation from remove to [401] remove. It seems strange that lands limited to heirs should have been treated by the Courts below as lands necessarily given for charitable purposes. The second grant of the third year of *Shah Alum* is in terms nearly similar, being granted as an "*Altamgha-inam* to *Sheikh Kiam-ood-deen*," "to descend to the offspring in succession to be enjoyed by them." It is apparent therefore that none of these grants establish the fact that the property in dispute is *Wukf*: on the contrary, the very instruments themselves show that they were granted to different

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

persons "as an *Altamgha-inam*," which is a royal grant, perpetual and hereditary, "to descend to his (the grantee's) heirs in succession,"—terms which clearly convey a proprietary right. The term *Wukf* does not once occur in the grants; which moreover contain no declaration of trust whatever. The Court below has treated this in a way quite inconsistent with the notion of its being a trust: the doctrine of a Court of Equity is this—that if you want to fix a trust upon a property, you must show that the object is certain, and that it is given in such a way that the person to whom it is given upon trust shall not have power to dispose of it for his own benefit. In the grant of the third year of *Shah Alum*, it is said to be for the purpose of defraying the expenses of the frequenters to and from him, the grantee. Now this expression is perfectly appropriate in a grant to a *Dervish* for his personal benefit, without implying a perpetual foundation for eleemosynary uses: indeed, the words are mere common-place terms, and, in the absence of any other expression, not sufficient to render the donation a *Wukf* endowment. No proof whatever has been adduced, that the property in question was *Wukf* property.

[402] II. Now admitting this to have been *Wukf*, or endowed property, and to have been inalienable, still there is a fatal objection to the Respondent's claim; it never can be said that if property is improperly alienated, the party to undo the transaction is the person who conveyed it, or even those claiming under him, still more so when the Appellant insists that he is a purchaser for a valuable consideration without notice. The Respondent had no right to sue at all, for if this property was granted for charitable purposes, and really is of the nature of *Wukf*, the Government, whose duty is to provide that the endowments for pious and charitable purposes be applied according to their real intentions, alone can sue for the recovery of the *Mouzas*.

III. The claim of the Respondents is barred by section xiv. Regulation III. of 1793, and clauses first and third, section iii. of Regulation II. of 1805; inasmuch as the property in dispute has been held under a fair title within the meaning of those Regulations for upwards of twelve years before the institution of the suit. These Regulations are analogous to our Statute of Limitations, and by section ii. of Regulation II. of 1805, it is perfectly clear that twelve years is an absolute bar to every body except the Government, who may claim for sixty years. As there was no authority from the Government for the Respondent to sue for recovery of the *Mouzas*, and the property was held, and possession had, by the Appellant for upwards of twelve years before the commencement of the suit, his claim is barred and concluded by the Regulations.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

Mr. Serjeant *Spankie*, Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

The first question raised by the Appellant is, whe[403]ther this property is *Wukf*: that must be governed by the principles applying to grants of this nature provided for by the Mahomedan law.

I. In reading the grant by *Mahomed Feroksir* of the 14th of *March* 1717, no one for a moment can doubt but that the land was given for religious purposes: the words are, "A dignified and imperative *Firman* has been issued, that one lac of *dams* from *Pergunah Havilly Suhseram* in *sooba Bahar*, which yields the sum of about 1,179 rupees to the Royal Treasury, are endowed and bestowed for the purpose of defraying the expenses of the *Khankah* of *Sheikh Kubeer*, as an *Altamgha* grant." The expressions in the second grant are much stronger, and show that the royal donor and founder, who was a Mahomedan, intended it for religious purposes: it states that a certain sum is to "be fixed as an *Altamgha-inam* to the sanctified *Sheikh Kiam-ood-deen* for the purpose of defraying the expenses of the frequenters to and from him, exempting the lands from the present assessment." The words, "to descend to the offspring in succession, to be enjoyed by them," does not convey a proprietary right, for it clearly is a mere trust, "for the purpose of defraying the expenses of the *Khankah*," which specifies the object and purposes for which it was granted to the offspiring in succession as the mode in which it was to be held, as the establishment could not take care of itself. It is a grant for the *Khankah*, and the frequenters of it; a distinct appropriation to religious and charitable purposes, very common in *India*, to the memory of some eminently religious or holy person. Here an actual trust is created: the grant is to *Sheikh Kiam-ood-deen* as *Sijjada-nashin*, the superior of the endowed establishment, a corporation sole, in the nature [404] of a trustee; he has no right to apply a portion to his own use; he is a corporation sole to carry on the establishment; he is not the person to be benefited, he is only to give to it the effect which the founder intended, he is only entitled to participate in its benefit as *Sijjada-nashin*.

The objection next raised by the Appellants, namely, that the specification *Wukf* is not to be found in the grants, is of an extremely strict and refined nature. In Macnaghten's Mahomedan Law, *Wukf* is defined to be endowment, that is, appropriation of certain property to religious or useful, or what we should call, generally, charitable purposes:* if land, as in this case, is the subject-matter, the profits are

* Macnaghten, Mah. Law, pp. 69, 329 and 338.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

dedicated to religious objects. The *Hidaya*,* a book of authority on the Mahomedan law, treats largely upon *Wukf*, or appropriation, as it is there termed, which is declared, "in the language of the law, to signify the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures." But it is unnecessary to pursue this argument further, as the case of *Mussumat Qadira, alias Mussummaut Usmut*, v. *Shah Kubeer-ood-deen*,† has already decided that this very property now under dispute was *Wukf*, or property appropriated to religious purposes; that by the use of the word *Inam* in a royal grant, it did not necessarily follow that the property specified was con- [405] veyed in absolute proprietary right, if from the general tenor of the instrument it could be inferred that a *Wukf*, or religious endowment, was intended. *Kulb Ali Hoossein* v. *Syf Ali*‡ was to the same effect. These cases dispose of the whole question; they are most distinct authorities that the word *Wukf*, in a grant, is not necessary in order to constitute a religious appropriation for charitable purposes, provided the nature of the tenure be to be inferred from the nature of the grant. The same principles prevail in the *Hindoo* law. § This then being the law applicable to this species of tenure, it follows that the *Ikrar-namah* or deed of conveyance, whether conditional by way of mortgage, or absolute by sale, by *Shah Shumsh-ood-deen* was illegal, and consequently void.

II. The point raised, that the Appellant's father was a purchaser for valuable consideration without notice of the trusts, is untenable, and cannot be insisted upon here, inasmuch as it was never raised in any of the pleadings in the Courts below. The Appellant's father had every opportunity of investigating the title of the lands, and seeing the nature of the grants creating the trusts; if we can succeed in showing that this property is *Wukf*, or property devoted to charitable use, and impressed with a charitable trust; if the Appellant purchased without notice of the trusts, even supposing he gave a valuable consideration for the subject of the purchase, he could only take it subject to the trusts, and would himself become a trustee.

III. The remaining question is the limitation, which is also untenable; for it is obvious that this property, [406] being *Wukf*, comes

* *Hidaya*, vol. II., pp. 334 and 344, translated by Hamilton. See also Col. Galloway's book on the Law and Constitution of India, p. 75.

† 3 Mac. Sud. Dew. R. 407. ‡ 2 Mac. Sud. Dew. R. 110.

§ 4 Mac. Sud. Dew. R. 343. 2 Macnaghten's Hindoo Law, 305. 1 Strange's Hindoo Law, 151.

within the exceptions contained in Regulation II. of 1805. It is important to consider the character of the Respondent, which makes, as to him, the question of time immaterial: the Respondent was not proprietor of the *Mouzas*, his appointment of *Mutwaly* or trustee of the *Khankah* by Government was not till the year 1819, when he alone became competent to sue for the recovery of these lands; therefore, the ordinary limitation of twelve years does not apply, as there was no one before that time competent to fulfil the trusts. It is clearly laid down, with reference to English suits, that if there is no party competent to entertain a suit, no time will run. *Murray* v. *The East India Company*.* Nothing appears in the proceedings to negative the presumption that the Respondent, the Plaintiff below, was duly authorized to institute the suit on his appointment as *Mutwaly*; and being so authorized, he was competent to institute the proceedings in his own name as *Mutwaly*, or procurator of the donor. Regulation XIX of 1810.

Mr. Justice BOSANQUET (February 15, 1841):

The Respondent in this case, on the 17th of *September* 1822, commenced a suit against the Appellant by plaint in the Provincial Court of *Patna*, to recover certain villages, alleged to have been inalienably appropriated by royal grant to the support of a *Khankah* or religious house, of which the Plaintiff was the superior or *Sijjada-nashin*.

These villages, on the 27th of *January* 1807, were transferred to the Defendant by *Shah Shumsh-ood-deen*, the Plaintiff's father, then the *Sijjada-nashin*, as a security for the repayment of a loan of rupees [407] 23,501, which transfer was absolute in form, but of which a defeazance (*Meadi-ikrar-namah*) was executed on the same day by the Defendant, and provided, that if the sum advanced should be repaid on or before *May* 1809, the sale should be void; if not, that the villages should become the absolute property of the Defendant. On the 2nd of *February* 1810, *Shah Shumsh-ood-deen*, in consideration of a further sum of rupees 5,000, executed another instrument, *Ikrar-namah*, purporting to convey the villages to the Defendant absolutely, and on the 5th of the same month *Shah Shumsh-ood-deen* died.

On the part of the Plaintiff it was contended that the property in question being granted for the maintenance of a religious establishment, was to be considered as *Wukf* or appropriated, and therefore inalienable; that if not inalienable, the transfer of 1807 was conditional in the nature of a mortgage, which, by the *Bengal* Regulation XVII. of the year 1806, could not be foreclosed or made absolute without taking certain proceedings, which were admitted not to have been taken in this case;

* 5 B. and A. 204.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

that the transfer of 1810, which purported to be absolute, in consideration of the payment of rupees 5,000, was fraudulent and void, having been made by *Shah Shumsh-ood-deen* in his last illness, and shortly before his death, and consequently that the transfer of 1807, which was originally conditional, had never become absolute.

On the part of the Defendant, it was contended that the property in question was not *Wukf*, but a proprietary interest given by royal authority to the grantees and their heirs as hereditary property, which they were at liberty to dispose of; that the transfer of 1807, admitted to be conditional, had, by the sale of [408] 1810, become absolute, notwithstanding the omission to take the proceedings prescribed by Regulation XVII. of 1806, such sale of 1810 being *bona fide*; and further, that having been made by *Shah Shumsh-ood-deen*, heir of the persons named in the royal grant as grantees, the right of the Plaintiff to sue for the recovery of the villages was barred by lapse of time, more than twelve years having elapsed from the time of the sale in *February* 1810, to the commencement of the suit in 1822, for which Regulations III. of 1793, and II. of 1805, were relied on.

The Plaintiff appears to have been under age at the death of his father in 1810, but in 1819 he was appointed by the Government to be *Mutwaly* or manager of the establishment, and *Sijjada-nashin* or superior thereof, at which time it is to be presumed that he had attained his majority.

The villages in question were granted by two royal *Firmans*, the first by *Mahomed Feroksir*, 14th *March* 1717, the second by *Shah Alum*, 13th *October* 1762.

The first of these instruments states, that a *Firman* has been issued, that one lac of *dams* from *Pergunnah Havilly Suhseram*, in *sooba Bahar*, which yields the sum of about 1,179 rupees to the Royal Treasury, are endowed and bestowed for the purpose of defraying the expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*, as an *Altamgha* grant, and that it shall be established according to the specification made therein. The children of the Sovereign, the *Amirs*, and those who transact the affairs of state, and the *Jaghiredars* and their successors, are enjoined to relinquish the said *dams* to the aforenamed individual for him to manage and controul, and to descend to his heirs in succession from remove to remove, and they are [409] required to consider the grant in every respect exempt from all contingencies, and not to demand from the said person a fresh *Sunud* annually. Upon this instrument a memorandum is endorsed, that one lac of *dams* have been granted by His Majesty as an *Altamgha*, for the use and expenses of the *Khankah* of *Sheikh Kubeer*, *Dervish*.

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

In 1744, on the petition of *Sheikh Gholam Shurf-ood-deen*, the grandson of *Sheikh Kubeer*, who had succeeded him as the *Sijjada-nashin*, a *Perwannah* was granted by *Mahomed Shah*, enjoining the *Chowdries*, cultivators, &c., to consider the said one lac of *dams* as an *Altamgha-inam*, by virtue of the *Perwannah* of His Majesty, for the purpose of being appropriated to the charges of the travellers to and from the *Khankah* of the said *Sheikh Kubeer*, as it stood before, to descend to the offspring in succession, and to refrain from taking from the said *Gholam Shurf-ood-deen*, as was the rule before, the true and fair revenue payable to the state, and the *Dewanny* taxes, and enjoining them not to deviate from what may be for the benefit of the person in question.

The terms expressing the grant to have been made for the purpose of meeting the charges of the *Khankah*, and the travellers who frequent the *Sheikh Kubeer*, *Dervish*, are repeated several times in the endorsement.

A similar *Perwannah* was granted on the petition of *Sheikh Kiam-ood-deen*, the son of *Sheikh Gholam Shurf-ood-deen*, after the death of his father, and it is declared that *Sheikh Kiam-ood-deen* is established in the *Sijjada-nashin* in the same manner as his father and grandfather were.

The second instrument of the third year of *Shah Alum*, about the 18th of *October* 1762, is a grant, [410] nearly similar in form, of two lacs and eighty-one thousand *dams*, the produce of which is rupees 3,000, to be fixed as an *Altamgha-inam* to the sanctified *Sheikh Kiam-ood-deen*, for the purpose of defraying the expenses of the frequenters to and from him, exempting the lands from the present assessment and from all that may be realized thereout by his good management; and the children and *Viziers*, &c., of the sovereign are enjoined always to maintain and uphold the said order and to relinquish the aforesaid *dams* to them, to descend to the offspring in succession to be enjoyed by them, and deeming this grant free from the contingency of alteration or change, the public officers are not to demand anything from them upon the score of revenues or charges, and to consider the grant free of all *Dewanny* taxes, or for any writings whatever made on account of the state. Deeming this a full and positive injunction, they are not to demand a fresh *Sunud* annually, nor deviate from these royal and munificent orders.

Upon this instrument, a memorandum was endorsed that 281,000 *dams* have been granted by His Majesty in *Pergunnah Suhseram*, &c., as an *Altamgha-inam* to *Sheikh Kiam-ood-deen* for the charges of the *Fakirs*.

The proceedings in another suit commenced by the Plaintiff on the 6th of *April* 1821, against *Mussumat Beeby Ismut*, the widow of *Shah Shumsh-ood-deen*, to recover from her certain other villages comprised in the same royal grants, and claimed as *Wukf* property, were put in with

2 M.I.A. 390=6 W R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

the Decree of the Sudder Dewanny Adawlut of the 24th of *August* 1824, in which proceedings were set forth certain opinions of native law-officers respecting the nature of *Wukf* property taken under the authority of the Court.

[411] The present cause being brought before Mr. *Fleming*, the Third Judge of the Provincial Court of *Patna*, on the 29th of *December* 1825, he determined, that as the disputed villages had been sold conditionally, and the conditions of Regulation XVII. of 1806 not fulfilled, the transaction could not be considered a *bona fide* sale; that the second *Ikrar-namah*, executed by *Shah Shumsh-ood-deen*, the date of which (he said) was one day only before the death of the said *Shah*, which fact, he says, the Defendant does not deny, is invalid, in addition to which, according to the decision pronounced by the Sudder Dewanny Adawlut, (*i.e.*, in the suit against *Beeby Ismut*,) a conveyance like this is not legal. On consideration therefore of all the circumstances, he considered the conditional sale to stand in the character of a mortgage, that it was therefore necessary to take an account of the produce of the villages and of the principal and interest received by the Defendant, and therefore ordered him to file the *Wasilaut* papers.

On the 2nd of *February* 1826, the Defendant presented a petition to the Provincial Court, that witnesses might be examined in regard to the second *Ikrar-namah*. The cause coming on again before Mr. *Fleming* on the 19th of *September* 1826, he determined, that as the grounds on which the *Ikrar-namah* in question had been rendered null and void had been recorded in the proceedings holden on the 29th of *December* 1825, no further orders could be passed on that head; but on the Plaintiffs stating that the accounts of the Defendants were erroneous, it was ordered that the proceedings should be suspended: and Mr. *Fleming* having, on the 18th of *November* 1826, expressed suspicion respecting the genuineness of the accounts, thought proper to [412] give time to the Plaintiff to falsify them, and as he was going the circuit, he directed the cause to be brought on before the Fourth Judge, before whom another cause connected with the present was pending.

On the 25th of *April* 1827, Mr. *Steer*, the Fourth Judge, ordered that an inquiry into the accounts should be made through the Collector of *Zillah Shahabad*, and a return was made by the Collector, the particulars of which it is not necessary to notice.

On the 25th of *June* 1827, Mr. *Steer* pronounced the following judgment:—That if the conditional sale writing had stood, in that case a *bona fide* sale could not have been effected without acting up to the provisions of Regulation XVII. of 1806; but as the conditional sale did not stand, by *Shah Shumsh-ood-deen* having taken a further sum of

2 M.I.A. 390=6 W.R. 3 (P C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

rupees 5,000, and returned to the Defendant the *Ikrar-namah* which this individual had executed, which circumstance had taken place more than fifteen years, reckoning to the period the suit was brought, justice demanded that, after the lapse of so long a time, the Defendant should not be deprived of the full and final *bona fide* sale; that after the period of limitation had gone by, the plea that the *Ikrar-namah*, dated the 2nd of *February* 1810, was written only one day before the demise of *Shah Shumsh-ood-deen*, could not be admitted; that the villages had been sold in the character of a *bona fide* sale after the period of a conditional sale expired; and that the grounds on which these lands were deemed not to be a *Wukf* endowment had been recorded in the proceedings holden in a cause No. 803. For these reasons he ordered that the Plaintiff's claim should be dismissed with costs of suit.

The Plaintiff having appealed from this judgment [413] to the Sudder Dewanny Adawlut, the appeal came on before Mr. *Ross*, Judge of the said Court, on the 30th of *January* 1830, who after stating the conditional and absolute bills of sale to the Defendants, the death of *Shah Shumsh-ood-deen*, and that after his death his widow, *Mussumat Kadira*, (*Beeby Ismut*,) held possession of the villages mentioned in the two *Firmans* till 1819, together with other property of the deceased as *Malikeh* or proprietress; that in 1819, the local agents knowing the villages mentioned in the two *Firmans* to be *Wukf* property, appropriated to religious purposes, appointed the Plaintiff to their management as procurator, who instituted a suit against her for these villages and others acquired by the profits of them; and that having proved their appropriation to religious endowments, (*Wukf*,) he obtained a Decree, which Decree, as proof of the property being an appropriation, (*Wukf*,) was affirmed by the Sudder Dewanny Adawlut; and after stating the proceedings instituted in the present suit, he proceeded thus:—As the villages in dispute were of the number mentioned in the two *Firmans*, according to which *Firmans*, on proof of the villages being *Wukf*, (appropriated,) the case No. 2,340 (*Mussumat Kadira*, Appellant, against *Shah Shumsh-ood-deen*, Respondent,) was decided by this Court on the 24th of *August* 1824, hence in this case two points demand consideration:—

1st. Whether *Shah Shumsh-ood-deen*, the villages in question being *Wukf* (appropriated) property, had or had not the right of alienating such *Wukf* (appropriated) property, either by *Bye-bil-wuffa* (conditional sale), by *Bye-msady* (absolute sale), or by any other sort of assignment. As to which he says, "The *Futwa* (law opinion) of the law-officers of this Court [414] makes this point clear and manifest, viz., that a *Mutwaly* (procurator) has no right to alienate *Wukf* (or appropriated) property by *Bye-bil-wuffa* (conditional sale) or by any other kind of transfer."

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

2ndly. He says, "That from the 2nd of *February* 1810, the date of the *Ikrar-namah* (agreement bond) executed by *Shah Shumsh-ood-deen*, more than twelve years had elapsed; that *Mussumat Kadira* his widow, as *Mal'keh* (proprietress), held possession of the property that had been seized of the aforesaid *Shah*, and that *Shah Kubeer-ood-deen*, in the month of *April* 1819, had been appointed *Mutwaly* (procurator), agreeably to the orders of the local agents."

Under these circumstances, he states the question to be whether the suit of the Plaintiff is or is not worthy of being entertained by the Court; and pronounces his opinion, that if from the date of the seizin by a person who believed the seller to have power to sell, and no usurpation or fraud was imputable to the seller, the right of the person seized would be well founded, agreeably to section iii. of Regulation II. of 1805, and he states that section xiv. of Regulation III. of 1793 would apply to his case; that the absolute sale of the 2nd of *February* 1810 was fully proved, and neither the Plaintiff nor any one for him, during the twelve years, demanded his right, nor did Defendant admit it or promise payment, nor did the Plaintiff advance his claim in any Court; that the Plaintiff did not appear to have been prevented by minority, having attained the age of majority in 1819, when he was appointed the superintendent of the *Wukf* property, three years before the commencement of the suit, and that with reference to section xiv. of Regulation III. of 1793, his claim was beyond the limit of cognizance. [415] As in this case, however, Government was neither Plaintiff, nor had the Appellants its sanction for instituting the suit, hence, in his judgment, section ii. of the Regulation II. of 1805 cannot be applied to this case, still, although the Government was not Plaintiff, yet in consequence of the property in question being *Wukf*, or appropriated property, and the Plaintiff appointed *Mutwaly* (procurator) by Government, for the management of the *Wukf* (appropriated) property, which is consecrated for the entertainment of travellers, he thought there was reason to question whether the provisions of section ii. Regulation II. could affect such a case or not; that up to the present period, no case of the kind had ever been tried by the Court, consequently the passing of a final order in this case by one Judge did not appear expedient. It was therefore ordered, that the papers for a final order should be laid before the two other Judges of the Court.

Mr. *Turnbull*, another Judge of the Sudder Dewanny Adawlut, before whom the cause was brought, having differed in opinion from Mr. *Ross*, on the 11th of *February* ordered the papers to be laid before another Judge. Accordingly it came before Mr. *Leicester* and himself on the 18th of *February* 1830, who after stating their opinion that Mr. *Steer* had no power to decide the case singly in opposition to the opinion of

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

Mr. *Fleming*, but that he ought either to have postponed the case till the return of Mr. *Fleming*, or if he thought the inquiry by Mr. *Fleming*, incomplete, to have recorded his opinion, and referred the case to the final order of another Judge; that his decision, founded on the authenticity of the *Ikrar-namah* of the 2nd *February* 1810, which he pronounced to be authentic, without evidence, and of the verity of which strong [416] suspicions appeared, was indeed extraordinary: since therefore the Decree of the Provincial Court could not be sanctioned, it became necessary to inquire into the merits of the Plaintiff's claim, and with that view to consider, First, whether an inquiry in regard to the *Ikrar-namah* of the 2nd of *February* 1810, in order to remove the objection of the Respondent by calling for evidence of its authenticity, was or was not necessary. As to which they say, "In our opinion, an inquiry in regard to the instrument in question is neither necessary nor beneficial to the cause of the Defendant; for in the event of the instrument in question on inquiry proving valid and authentic, yet the sale by the late *Shah Shumsh-ood-deen* of the villages mentioned in the instrument in question is altogether improper and illegal; for the villages in question are proved to be of the number of the *Wukf* or appropriated villages. In such a case the deceased *Shah* had no power by law to alienate them."

Secondly. Whether the claim of the Plaintiff, considering the lapse of twelve years from the date of the *Ikrar-namah*, was cognizable by the Court. On this question their opinion was, "That independently of the circumstance, that up to the present date the *Ikrar-namah* of *Bye-bat* (absolute sale) has not been proved in such wise as to change the aspect of the first or *Bye-bil-wuffa* (conditional sale), and that there appears no necessity to take evidence in regard to its authenticity, in consideration of *Shah Shumsh-ood-deen* having no power to alienate the villages in dispute, yet the *Ikrar-namah* in question, even if it were proved authentic, could not bar the claim of the Appellant, because the Appellant was appointed by the local agents to the offices of the *Mutwaly* (procurator) [417] and *Sijjada-nashin* (superior) of the *Khankah* or monastery of *Sheikh Kubeer, Dervish* in 1819." It is obvious therefore, they say, that from the date of his appointment, only the superintendence of the *Wukf* (appropriated) villages, appertaining to the *Khankah* in question, devolved to his care, and previous to that time he had no concern whatever with that matter. In such a case, agreeably to the intentions of section xiv. of Regulation III of 1793, the claim of the Appellant in every way appears worthy of being entertained by the Court.

Thirdly, They say, "Although according to usage in cases of *Bye-bil-wuffa* (conditional sale) it behoves that the purchase-money of *Bye-bil-wuffa* should be caused to be paid by the Plaintiff to the Defendant, after the

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

latter shall have accounted for the *Wasilaut* (mesne profits) of the villages in dispute, yet as the estate in question was *la-khiraj* or rent free, and a profitable one, and has moreover been in the possession of the Respondent ever since the year 1806-7 up to the present time, a period of sixteen years, it is presumable that in such a length of time the purchase-money (principal and interest) must have been realized by the Defendant from the *Mahal* (district) in question. For this reason, and also in consideration of the seizin of the Defendant in the property in question being illegal, and the payment not lying in the Plaintiff, who is the *Mutwaly* (procurator) and superintendent, an ascertainment of the *Wasilaut* (mesne profits) is deemed unnecessary; but rather with a view of putting an end to the dispute, and the suffering of the parties, it is deemed proper that neither the purchase-money be caused to be paid by the Plaintiff to the Defendant, nor the [418] *Wasilaut* money be demanded of the Defendant by the Plaintiff."

The Court therefore decreed in favour of the Plaintiff's claim, reversing the decision of the *Patna* Court, and directed the costs of the parties in both Courts to be defrayed respectively by each.

Such being the determination of the Court of Appeal, their Lordships are to consider whether that Court has determined rightly. First, that villages contained in the royal grants were to be considered as *Wukf*, and therefore inalienable in any manner whatsoever. Secondly, that notwithstanding the lapse of time, the Plaintiff, in the character of *Mutwaly*, to which he had been appointed by Government in 1819, was entitled to recover those villages. Thirdly, that as the possession of them by the Defendant was illegal, and as the Plaintiff was not the debtor of the Defendant, he was not bound to repay the money advanced. With respect to the determination that the Plaintiff ought not to have any account of the mesne profits, as the Plaintiff himself has made no complaint, it is unnecessary to consider it.

The question whether the property mentioned in the two royal grants was to be considered as *Wukf* or as a proprietary right was much discussed in the above-mentioned case of *Kubeer-ood-deen* (the present Plaintiff) against *Mussummaut Qadira*; and the opinions of the native law-officers taken in that cause being found to be contradictory, it became necessary to consult the *Futwas* of lawyers in cases formerly decided by the Court respecting *Wukf* endowments, and the decision of the Sudder Dewanny Adawlut of the 1st of *March* 1814, in the case of *Kulb Ali Hoossein* v. *Syf Ali*, together with a *Futwa* of a former *Kazi-ool-Rouzet* of the [419] Sudder Dewanny Adawlut and of the *Moofti* of that Court, were referred to.

The terms of the *Firmans* of *Aulun Gheer* in that cause ran thus: "As it has come to the knowledge of His Majesty, that agreeably to a

2 M.I A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

Sunud, furnished by the *Hakims*, certain *Mouzas* situate, &c., have been appropriated for the purpose of meeting the charges of *Fakeers* and students of the *Madrissa*, and the *Khankah* and *Musjid* of *Moolla Dervish Hoossein*, son of *Moolla Gholam Ali*, and the aforesaid individual is hopeful for the royal munificence and favour, his Majesty's royal commands are, that in the event of the aforesaid *Mouzas* being in the occupation and enjoyment of that individual, the whole of their *Mouzas* shall continue as they formerly were at *Jumma* of 15,000 *dams* from (such a date), in the character of a *Maddad Mash* (aid for subsistence), according to the tenor of the grant; and in order that he may apply the produce of these lands to meet the charges of the students of his *Madrissa* and *Musjid*, and the present and future *Hakims*, the *Amils*, &c., are enjoined to relinquish the *Mouza* in question to that person's occupation, to deem them *Maaf*, (exempt from tax,) and blotted with the pen in every respect, and not to require of him a fresh *Sunud* annually. Should that individual occupy anything in any other way, they are not to countenance him." Upon reading the *Firman*, the *Kazi-ool-Rouzat* and the *Moofti* gave their *Futwa* as follows: "As in the *Firman* it is written that the produce of the lands specified therein is to be applied to meet the charges of students of *Madrissa* and *Musjid* of *Moolla Dervish Hoossein*, and as it is not written that the said *Moolla* shall appropriate the produce to meet the charges of his family and children, or that he shall enjoy the [420] same with his family and children, it therefore appears to us that the lands in question have been paid as *Wukf* in the character of *Maddad Mash*, and are not liable to sale or gift."

Agreeably to the above *Futwa*, the Judges of the Sudder Dewanny Adawlut decreed that the litigated lands contained in the *Firman* in question were a *Wukf* endowment, and were not disposable by sale or gift; the grounds of which Judgment (it is said) are fully stated in the Decree of that Court, under date *March* 1st, 1824.

It is to be observed, that the word *Wukf* was not mentioned in the *Firman*, and that the individual on whose application the grant was made, *Moolla Hoossein*, was expressly named. In the report of this case, (2 *Macnaghten*, 110,) it is said that the terms of the *Firman* declared that the general superintendence of the resources should be confided to *Dervish Hoossein*, and should remain vested in him, his heirs, and successors; or other property to pious and charitable purposes is sufficient to constitute *Wukf*, without the express use of that term in the grant, and that the alienation of such property, from the purposes intended, is illegal.

After referring to this case, and the opinions of the law-officers, the Sudder Dewanny Adawlut, in the case of *Mussummaut Qadira* v. *Shah Kubeer-ood-deen* (3 Mac., Sud. Dew. R., 407,) appear to have determined, that notwithstanding the use of the words "*Inam*" and "*Altamgha*," in the

2 M.I.A. 390=6 W.R. 3 (P.C.)=1 Suth. P.C.J. 100=1 Sar. P.C.J. 206—(*Contd.*).

royal grants and the mention therein of the persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made as expressed in the petitions) for the purpose of maintaining [421] a charitable institution, the persons named were not to be considered proprietors; that the establishment (the *Khankah*) was the real donee, and the persons named were only *Mutwalies* of the *Khankah*; that a *Mutwaly* has no right to alienate, and consequently that the transfer by gift or otherwise by *Shah Shumsood-deen* was illegal.

This decision is in accordance with the doctrine laid down in the *Hidaya*, book xv., of *Wukf* or appropriation, *Hamilton's* translation, vol. ii., page 334, where it is said, "*Wukf*" in its primitive sense means "detention." In the language of the law, (according to *Haneefa*,) it signifies the appropriation of any particular thing, in such a way that the appropriator's right in it shall continue, and that the advantage of it go to some charitable purpose, in the manner of a loan. According to the two disciples, "*Wukf*" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that *Aboo Yoosaf* holds the appropriation to be absolute from the moment of its execution, whereas *Mahomed* holds it to be absolute only on the delivery of it to a *Mutwaly*, (or procurator,) and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus the term *Wukf*, in its literal sense, comprehends all that is mentioned, both by *Haneefa*, and by the two disciples.

Again (page 344) it is said, "Upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers: the transfer is unlawful, because of [422] a saying of the Prophet, 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable,'"

If the decision in the case of *Kubeer-ood-deen* v. *Mussumat Kadira* was correct, it follows that the transfer in this case, whether conditional or absolute, by the same person (*Shumsh-ood-deen*) to the Defendant, was illegal: also, secondly, with respect to the lapse of time, the Plaintiff, not being the proprietor, had no right to sue for the recovery of the villages as his own; accordingly, he preferred his suit as *Sijjada-nashin*, having been appointed *Mutwaly* in 1819. Had he succeeded as heir of his father to a proprietary right in the villages, he might have been barred by the lapse of twelve years, according to section xiv. of Regulation III of 1793; but having no right except as *Mutwaly*, he stood in a

very different situation. The superintendence of the *Wukf* villages devolved to his care from the date of his appointment only. The *Mutwaly* is the procurator of the donor, which, in this case, was the sovereign; and it appears, by Regulation XIX. of 1810, that it is the duty of every Government to provide, that the endowments for pious and beneficial purposes be applied according to their real intention: the local agents are appointed to ascertain and report the names of trustees, managers and superintendents, whether under the designation of *Mutwaly* or any other, and all vacancies, and to recommend fit persons where the nomination devolves on the Government. That the Board of Commissioners may appoint such persons or make such other provision for the superintendence, management or trust as may be thought fit. The Plaintiff, therefore, upon his appointment as *Mutwaly*, became the authorized agent of the Government for the performance of the acknowledged [423] duty of the Government to protect the endowment from misapplication; for, as it is said in the opinion of the Mahomedan lawyers, "The endower and the *Mutwaly* are one and the same." The endowment in this case was a perpetual endowment, and the duty of the Government to preserve its application to the right use was a public and perpetual duty. By Regulation II. of 1805, section ii., it is provided, that the limitation of twelve years for the commencement of civil suits shall not be considered applicable to the commencement of any suits for the recovery of the public revenue, or for any public rights or claims whatever which may be instituted by or on behalf of the Government, with the sanction of the Governor-General in Council, or by direction of any public officer or officers who may be duly authorised to prosecute the same on the part of Government. The Plaintiff, who was neither heir nor personal representative of his father, in respect of *Wukf* property, had no right of action against the Defendant till his appointment in 1819, and the Defendant could acquire no right against the Government, whose procurator the Plaintiff was, at least until twelve years had elapsed from his appointment.

The endowment being a perpetual *Wukf*, and the alienation consequently illegal, and it not having been shown that the purchase-money was applied to the use of the *Khankah*, the Plaintiff cannot be required to account for it, even supposing the Defendant not to have been fully repaid by his long possession of the property.

Their Lordships are therefore of opinion, that the Judgment of the Sudder Dewanny Adawlut ought to be affirmed.

TAB-19

existed in the other parts of Rajasthan. This difference between the two parts did not justify that such progressive and ameliorative measures for the welfare of the people existing in a particular area should be done away with and the State be brought down to the level of the unprogressive States. The judgment shows that the Bench far from going back on its previous view adhered to it and expressly distinguished the case under appeal before us on its special facts.

1954

The State of Rajasthan v. Rao Manohar Singhji.

Ghulam Hasan J.

As a result of the foregoing discussion we hold that the view taken by the High Court is correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Agent for the appellant: *R. H. Dhebar.*

THE COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS

v.

SRI LAKSHMINDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT.

1954

March 16.

[MEHR CHAND MAHAJAN C. J., MUKHERJEA, S. R. DAS, VIVIAN BOSE, GHULAM HASAN, BHAGWATI and VENKATARAMA AYYAR JJ.]

Constitution of India, arts. 19(1)(f), 25, 26, 27—Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951), ss. 21, 30(2), 31, 55, 56 and 63 to 69, 76—Whether ultra vires the Constitution—Word "property" in art. 19(1)(f) meaning of—Tax and fee, meaning of—Distinction between.

Held, that ss. 21, 30(2), 31, 55, 56 and 63 to 69 of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) are *ultra vires* arts. 19(1)(f), 25 and 26 of the Constitution of India.

Section 76(1) of the Act is void as the provision relating to the payment of annual contribution contained in it is a tax and not a fee and so it was beyond the legislative competence of the Madras State Legislature to enact such a provision.

That on the facts of the present case the imposition under s. 76(1) of the Act, although it is a tax, does not come within the latter part of art. 27 because the object of the contribution under the section is not the fostering or preservation of the Hindu religion or any denomination under it but the proper administration of religious trusts and institutions wherever they exist.

130

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

The word "property" as used in art. 19(1)(f) of the Constitution should be given a liberal and wide connotation and should be extended to all well-recognized types of interest which have the insignia or characteristics of proprietary right.

The ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. Therefore he is entitled to claim the protection of art. 19(1)(f).

A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.

It is not possible to formulate a definition of fee that can apply to all cases as there are various kinds of fees. But a fee may generally be defined as a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases such expenses are arbitrarily assessed.

"The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for a special benefit or privilege."

Scope of arts. 25 and 26 discussed.

Meaning of the term "Mathadhipati" and "religion" explained.

Vidya Varuthi v. *Balusami* (48 I.A. 302), *Monahar* v. *Bhupendra* (60 Cal. 452), *Ganesh* v. *Lal Behary* (63 I.A. 448), *Bhabatarini* v. *Ashalata* (70 I.A. 57), *Angurbala* v. *Debabrata* ([1951] S.C.R. 1125), *Davis* v. *Benson* (133 U.S. 333), *The State of West Bengal* v. *Subodh Gopal Bose* (*Civil Appeal No. 107 of 1952 decided by the Supreme Court on the 17th December, 1953*), *Adelaide Company* v. *The Commonwealth* (67 C.L.R. 116, 127), *Minersville School District, Board of Education etc.* v. *Gobitis* (310 U.S. 586), *West Virginia State Board of Education* v. *Barnette* (319 U.S. 624), *Murdock* v. *Pennsylvania* (319 U.S. 105), *Jones* v. *Opelika* (316 U.S. 584), *Matthews* v. *Chicory Marketing Board* (60 C.L.R. 263, 276), *Lower Mainland Dairy* v. *Crystal Dairy Ltd.* ([1933] A.C. 168) referred to.

(Findlay Shirras on Science of Public Finance, Vol. I. p. 203).

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 38 of 1953.

Appeal under article 132(1) of the Constitution of India from the Judgment and Order dated the 13th December, 1951, of the High Court of Judicature, Madras, in Civil Miscellaneous Petition No. 2591 of 1951.

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

V.K.T. Chari, Advocate-General of Madras (*R. Ganapathy Iyer*, with him) for the appellant.

B. Somayya and *C.R. Pattabhi Raman* (*T. Krishna Rao* and *M.S.K. Sastri*, with them) for the respondent.

T. N. Subramania Iyer, Advocate-General of Travancore-Cochin (*T. R. Balakrishna Iyer* and *Sardar Bahadur*, with him) for the Intervener (State of Travancore-Cochin).

1954. March 16. The Judgment of the Court was delivered by

MUKHERJEA J.—This appeal is directed against a judgment of a Division Bench of the Madras High Court, dated the 13th of December, 1951, by which the learned Judges allowed a petition, presented by the respondent under article 226 of the Constitution, and directed a writ of prohibition to issue in his favour prohibiting the appellant from proceeding with the settlement of a scheme in connection with a Math, known as the Shirur Math, of which the petitioner happens to be the head or superior. It may be stated at the outset that the petition was filed at a time when the Madras Hindu Religious Endowments Act (Act II of 1927), was in force and the writ was prayed for against the Hindu Religious Endowments Board constituted under that Act, which was the predecessor in authority of the present appellant and had initiated proceedings for settlement of a scheme against the petitioner under section 61 of the said Act.

The petition was directed to be heard along with two other petitions of a similar nature relating to the temple at Chidambaram in the district of South Arcot and questions were raised in all of them regarding the validity of Madras Act II of 1927, hereinafter referred to as the Earlier Act. While the petitions were still pending, the Madras Hindu Religious and Charitable Endowments Act, 1951 (hereinafter called the New Act), was passed by the Madras Legislature and came into force on the 27th of August, 1951. In view of the Earlier Act being replaced by the new one, leave was given to all the petitioners to amend their petitions and challenge the validity of the New Act as well.

1954

Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Tirtha Swamiar of Sri Shirur Mutt.

Bhagwati J.

Under section 103 of the New Act, notifications, orders and acts under the Earlier Act are to be treated as notifications, orders and acts issued, made or done by the appropriate authority under the corresponding provisions of the New Act, and in accordance with this provision, the Commissioner, Hindu Religious Endowments, Madras, who takes the place of the President, Hindu Religious Endowments Board under the Earlier Act, was added as a party to the proceedings.

So far as the present appeal is concerned, the material facts may be shortly narrated as follows: The Math, known as Shirur Math, of which the petitioner is the superior or Mathadhipati, is one of the eight Maths situated at Udipi in the district of South Kanara and they are reputed to have been founded by Shri Madhwacharya, the well-known exponent of dualistic theism in the Hindu Religion. Besides these eight Maths, each one of which is presided over by a Sanyasi or Swami, there exists another ancient religious institution at Udipi, known as Shri Krishna Devara Math, also established by Madhwacharya which is supposed to contain an image of God Krishna originally made by Arjun and miraculously obtained from a vessel wrecked at the coast of Tulava. There is no Mathadhipati in the Shri Krishna Math and its affairs are managed by the superiors of the other eight Maths by turns and the custom is that the Swami of each of these eight Maths presides over the Shri Krishna Math in turn for a period of two years in every sixteen years. The appointed time of change in the headship of the Shri Krishna Math is the occasion of a great festival, known as *Pariyayam*, when a vast concourse of devotees gather at Udipi from all parts of Southern India, and an ancient usage imposes a duty upon the Mathadhipati to feed every Brahmin that comes to the place at that time.

The petitioner was installed as Mathadhipati in the year 1919, when he was still a minor, and he assumed management after coming of age some time in 1926. At that time the Math was heavily in debt. Between 1926 and 1930 the Swami succeeded in clearing off a large portion of the debt. In 1931, however, came the

turn of his taking over management of the Shri Krishna Math and he had had to incur debts to meet the heavy expenditure attendant on the *Pariyayam* ceremonies. The financial position improved to some extent during the years that followed, but troubles again arose in 1946, which was the year of the second *Pariyayam* of the Swami. Owing to scarcity and the high prices of commodities at that time, the Swami had to borrow money to meet the expenditure and the debts mounted up to nearly a lakh of rupees. The Hindu Religious Endowments Board, functioning under the Earlier Act of 1927, intervened at this stage and in exercise of its powers under section 61-A of the Act called upon the Swami to appoint a competent manager to manage the affairs of the institution. The petitioner's case is that the action of the Board was instigated by one Lakshminarayana Rao, a lawyer of Udipi, who wanted to have control over the affairs of the Math. It appears that in pursuance of the direction of the Board, one Sripath Achar was appointed an agent and a Power of Attorney was executed in his favour on the 24th of December, 1948. The agent, it is alleged by the petitioner, wanted to have his own way in all the affairs of the Math and paid no regard whatsoever to the wishes of the Mahant. He did not even submit accounts to the Mahant and deliberately flouted his authority. In this state of affairs the Swami, on the 26th of September, 1950, served a notice upon the agent terminating his agency and calling upon him to hand over to the Mathadhipati all account papers and vouchers relating to the institution together with the cash in hand. Far from complying with this demand, the agent, who was supported by the aforesaid Lakshminarayana Rao, questioned the authority of the Swami to cancel his agency and threatened that he would refer the matter for action to the Board. On the 4th of October, 1950, the petitioner filed a suit against the agent in the Sub-Court of South Kanara for recovery of the account books and other articles belonging to the Math, for rendering an account of the management and also for an injunction restraining the said agent from interfering with the affairs of the Math under colour of the

1954

Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Tirtha Swamiar of Sri Shirur Mutt.

Chatterjea J.

authority conferred by the Power of Attorney which the plaintiff had cancelled. The said Sripath Achar anticipating this suit filed an application to the Board on the 3rd of October, 1950, complaining against the cancellation of the Power of Attorney and his management of the Math. The Board on the 4th October, 1950, issued a notice to the Swami proposing to inquire into the matter on the 24th of October following at 2 p.m. at Madras and requesting the Swami either to appear in person or by a pleader. To this the Swami sent a reply on 21st October, 1950, stating that the subject-matter of the very enquiry was before the court in the original suit filed by him and as the matter was *sub judice*, the enquiry should be put off. A copy of the plaint filed in that suit was also sent along with the reply. The Board, it appears, dropped that enquiry, but without waiting for the result of the suit, initiated proceedings *suo moto* under section 62 of the Earlier Act and issued a notice upon the Swami on the 6th of November, 1950, stating that it had reason to believe that the endowments of the said Math were being mismanaged and that a scheme should be framed for the administration of its affairs. The notice was served by affixture on the Swami and the 8th of December, 1950, was fixed as the date of enquiry. On that date at the request of the counsel for the Swami, it was adjourned to the 21st of December, following. On the 8th of December, 1950, an application was filed on behalf fo the Swami praying to the Board to issue a direction to the agent to hand over the account papers and otherdocuments, without which it was not possible for him to file his objections. As the lawyer appearing for the Swami was unwell, the matter was again adjourned till the 10th of January, 1951. The Swami was not ready with his objections even on that date as his lawyer had not recovered from his illness and a telegram was sent to the Board on the previous day requesting the latter to grant a further adjournment. The Board did not accede to this request and as no explanation was filed by the Swami, the enquiry was closed and orders reserved upon it. On the 13th of January, 1951, the Swami, it appears, sent a written

explanation to the Board, which the latter admittedly received on the 15th. On the 24th of January, 1951, the Swami received a notice from the Board stating *inter alia* that the Board was satisfied that in the interests of proper administration of the Math and its endowments, the settlement of a scheme was necessary. A draft scheme was sent along with the notice and if the petitioner had any objections to the same, he was required to send in his objections on or before the 11th of February, 1951, as the final order regarding the scheme would be made on the 15th of February, 1951. On the 12th of February, 1951, the petitioner filed the petition, out of which this appeal arises, in the High Court of Madras, praying for a writ of prohibition to prohibit the Board from taking further steps in the matter of settling a scheme for the administration of the Math. It was alleged *inter alia* that the Board was actuated by bias against the petitioner and the action taken by it with regard to the settling of a scheme was not a *bona fide* act at all. The main contention, however, was that having regard to the fundamental rights guaranteed under the Constitution in matters of religion and religious institutions belonging to particular religious denominations, the law regulating the framing of a scheme interfering with the management of the Math and its affairs by the Mathadhipati conflicted with the provisions of articles 19(1) (f) and 26 of the Constitution and was hence void under article 13. It was alleged further that the provisions of the Act were discriminatory in their character and offended against article 15 of the Constitution. As has been stated already, after the New Act came into force, the petitioner was allowed to amend his petition and the attack was now directed against the constitutional validity of the New Act which replaced the earlier legislation.

The learned Judges, who heard the petition, went into the matter with elaborate fullness, both on the constitutional questions involved in it as well as on its merits. On the merits, it was held that in the circumstances of the case the action of the Board was a perverse exercise of its jurisdiction and that it should

not be allowed to proceed in regard to the settlement of the scheme. On the constitutional issues raised in the case, the learned Judges pronounced quite a number of sections of the New Act to be *ultra vires* the Constitution by reason of their being in conflict with the fundamental rights of the petitioner guaranteed under articles 19(1) (f), 25, 26 and 27 of the Constitution. In the result, the rule *nisi* issued on the petition was made absolute and the Commissioner, Hindu Religious Endowments, Madras, was prohibited from proceeding further with the framing of a scheme in regard to the petitioner's Math. The Commissioner has now come up on appeal before us on the strength of a certificate granted by the High Court under article 132(1) of the Constitution.

The learned Advocate-General for Madras, who appeared in support of the appeal, confined his arguments exclusively to the constitutional points involved in this case. Although he had put in an application to urge grounds other than the constitutional grounds, that application was not pressed and he did not challenge the findings of fact upon which the High Court based its decision on the merits of the petition. The position, therefore, is that the order of the High Court issuing the writ of prohibition against the appellant must stand irrespective of the decision which we might arrive at on the constitutional points raised before us.

It is not disputed that a State Legislature is competent to enact laws on the subject of religious and charitable endowments, which is covered by entry 28 of List III in Schedule VII of the Constitution. No question of legislative incompetency on the part of the Madras Legislature to enact the legislation in question has been raised before us with the exception of the provision relating to payment of annual contribution contained in section 76 of the impugned Act. The argument that has been advanced is, that the contribution is in reality a tax and not a fee and consequently the State Legislature had no authority to enact a provision of this character. We will deal with this point separately later on. All the other points canvassed

before us relate to the constitutional validity or otherwise of the several provisions of the Act which have been held to be invalid by the High Court of Madras on grounds of their being in conflict with the fundamental rights guaranteed under articles 19(1) (f), 25, 26 and 27 of the Constitution. In order to appreciate the contentions that have been advanced on these heads by the learned counsel on both sides, it may be convenient to refer briefly to the scheme and the salient provisions of the Act.

The object of the legislation, as indicated in the preamble, is to amend and consolidate the law relating to the administration and governance of Hindu religious and charitable institutions and endowments in the State of Madras. As compared with the Earlier Act, its scope is wider and it can be made applicable to purely charitable endowments by proper notification under section 3 of the Act. The Earlier Act provided for supervision of Hindu religious endowments through a statutory body known as the Madras Hindu Religious Endowments Board. The New Act has abolished this Board and the administration of religious and charitable institutions has been vested practically in a department of the Government, at the head of which is the Commissioner. The powers of the Commissioner and of the other authorities under him have been enumerated in Chapter II of the Act. Under the Commissioner are the Deputy Commissioners, Assistant Commissioners and Area Committees. The Commissioner, with the approval of the Government, has to divide the State into certain areas and each area is placed in charge of a Deputy Commissioner, to whom the powers of the Commissioner can be delegated. The State has also to be divided into a number of divisions and an Assistant Commissioner is to be placed in charge of each division. Below the Assistant Commissioner, there will be an Area Committee in charge of all the temples situated within a division or part of a division. Under section 18, the Commissioner is empowered to examine the records of any Deputy Commissioner, Assistant Commissioner, or Area Committee, or of any trustee not being the trustee

1954

Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

of a Math, in respect of any proceeding under the Act, to satisfy himself as to the regularity, correctness, or propriety of any decision or order. Chapter III contains the general provisions relating to all religious institutions. Under section 20, the administration of religious endowments is placed under the general superintendence and control of the Commissioner and he is empowered to pass any orders which may be deemed necessary to ensure that such endowments are properly administered and their income is duly appropriated for the purposes for which they were founded or exist. Section 21 gives the Commissioner, the Deputy and Assistant Commissioners and such other officers as may be authorised in this behalf, the power to enter the premises of any religious institution or any place of worship for the purpose of exercising any power conferred, or discharging any duty imposed, by or under the Act. The only restriction is that the officer exercising the power must be a Hindu. Section 23 makes it obligatory on the trustee of a religious institution to obey all lawful orders issued under the provisions of this Act by the Government, the Commissioner, the Deputy Commissioner, the Area Committee or the Assistant Commissioner. Section 24 lays down that in the administration of the affairs of the institution, a trustee should use as much care as a man of ordinary prudence would use in the management of his own affairs. Section 25 deals with the preparation of registers of all religious institutions and section 26 provides for the annual verification of such registers. Section 27 imposes a duty on the trustee to furnish to the Commissioner such accounts, returns, reports and other information as the Commissioner may require. Under section 28, power is given to the Commissioner or any other officer authorised by him to inspect all movable and immovable properties appertaining to a religious institution. Section 29 forbids alienation of all immovable properties belonging to the trust, except leases for a term not exceeding five years, without the sanction of the Commissioner. Section 30 lays down that although a trustee may incur expenditure for making arrangements for securing the health and

comfort of pilgrims, worshippers and other people, when there is a surplus left after making adequate provision for purposes specified in section 79(2), he shall be guided in such matters by all general or special instructions which he may receive from the Commissioner or the Area Committee. Section 31 deals with surplus funds which the trustee may apply wholly or in part with the permission, in writing, of the Deputy Commissioner for any of the purposes specified in section 59(1). Chapter IV deals specifically with Maths. Section 52 enumerates the grounds on which a suit would lie to remove a trustee. Section 54 relates to what is called "dittam" or scale of expenditure. The trustee has got to submit to the Commissioner proposals for fixing the "dittam" and the amounts to be allotted to the various objects connected with the institution. The proposals are to be published and after receiving suggestions, if any, from persons interested in the institution, they would be scrutinised by the Commissioner. If the Commissioner thinks that a modification is necessary, he shall submit the case to the Government and the orders of the Government would be final. Section 55 empowers the trustee to spend at his discretion and for purposes connected with the Math the "Pathakanikas" or gifts made to him personally, but he is required to keep regular accounts of the receipts and expenditure of such personal gifts. Under section 56, the Commissioner is empowered to call upon the trustee to appoint a manager for the administration of the secular affairs of the institution and in default of such appointment, the Commissioner may make the appointment himself. Under section 58, a Deputy Commissioner is competent to frame a scheme for any religious institutions if he has reason to believe that in the interests of the proper administration of the trust any such scheme is necessary. Sub-section (3) of this section provides that a scheme settled for a Math may contain *inter alia* a provision for appointment of a paid executive officer professing the Hindu religion, whose salary shall be paid out of the funds of the institution. Section 59 makes provision for application of the "*cy pres*" doctrine when the specific

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Lakshmindra Tirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

objects of the trust fail. Chapter VI of the Act, which comprises sections 63 to 69, deals with the notification of religious institutions. A religious institution may be notified in accordance with the provisions laid down in this chapter. Such notification remains in force for five years and the effect of it is to take over the administration and vest it in an executive officer appointed by the Commissioner. Chapter VII deals with budgets, accounts and audit and Chapter VIII relates to finance. Section 76 of Chapter VIII makes it compulsory for all religious institutions to pay annually to the Government a contribution not exceeding 5 per cent. of their income on account of the services rendered to them by the Government and their officers functioning under this Act. Chapter IX is not material for our purpose, and Chapter X deals with provisions of a miscellaneous nature. Section 89 in Chapter X prescribes the penalty for refusal by a trustee to comply with the provisions of the Act. Section 92 lays down that nothing contained in the Act shall be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination under clauses (a), (b) and (c) of article 26 of the Constitution. Section 99 vests a revisional jurisdiction in the Government to call for and examine the records of the Commissioner and other subordinate authorities to satisfy themselves as to the regularity and propriety of any proceeding taken or any order or decision made by them. These, in brief, are the provisions of the Act material for our present purpose.

The learned Judges of the High Court have taken the view that the respondent as Mathadhipati has certain well defined rights in the institution and its endowments which could be regarded as rights to property within the meaning of article 19(1)(f) of the Constitution. The provisions of the Act to the extent that they take away or unduly restrict the power to exercise these rights are not reasonable restrictions within the meaning of article 19(5) and must consequently be held invalid. The High Court has held in the second place that the respondent, as the head and

representative of a religious institution, has a right guaranteed to him under article 25 of the Constitution to practise and propagate freely the religion of which he and his followers profess to be adherents. This right, in the opinion of the High Court, has been affected by some of the provisions of the Act. The High Court has held further that the Math in question is really an institution belonging to Sivalli Brahmins, who are a section of the followers of Madhwacharya and hence constitutes a religious denomination within the meaning of article 26 of the Constitution. This religious denomination has a fundamental right under article 26 to manage its own affairs in matters of religion through the Mathadhipati who is their spiritual head and superior, and those provisions of the Act, which substantially take away the rights of the Mathadhipati in this respect, amount to violation of the fundamental right guaranteed under article 26. Lastly, the High Court has held that the provision for compulsory contribution made in section 76 of the Act comes within the mischief of article 27 of the Constitution. This last point raises a wide issue and we propose to discuss it separately later on. So far as the other three points are concerned, we will have to examine first of all the general contentions that have been raised by the learned Attorney-General, who appeared for the Union of India as an intervener in this and other connected cases, and the questions raised are, whether these articles of the Constitution are at all available to the respondent in the present case and whether they give him any protection regarding the rights and privileges, of the infraction of which he complains.

As regards article 19(1)(f) of the Constitution, the question that requires consideration is, whether the respondent as Mathadhipati has a right to property in the legal sense, in the religious institution and its endowments which would enable him to claim the protection of this article? A question is also formulated as to whether this article deals with concrete rights of property at all? So far as article 25 of the Constitution is concerned, the point raised is, whether this

article which, it is said, is intended to protect religious freedom only so far as individuals are concerned, can be invoked in favour of an institution or organisation? With regard to article 26, the contention is that a Math does not come within the description of a religious denomination as provided for in the article and even if it does, what cannot be interfered with is its right to manage its own affairs in matters of religion only and nothing else. It is said, that the word "religion", as used in this article, should be taken in its strict etymological sense as distinguished from any kind of secular activity which may be connected in some way with religion but does not form an essential part of it. Reference is made in this connection to clause (2)(a) of article 25 and clause (d) of article 26. We will take up these points for consideration one after another.

As regards the property rights of a Mathadhipati, it may not be possible to say in view of the pronouncements of the Judicial Committee, which have been accepted as good law in this country ever since 1921, that a Mathadhipati holds the Math property as a life-tenant or that his position is similar to that of a Hindu widow in respect to her husband's estate or of an English Bishop holding a benefice. He is certainly not a trustee in the strict sense. He may be, as the Privy Council(1), says, a manager or custodian of the institution who has to discharge the duties of a trustee and is answerable as such; but he is not a mere manager and it would not be right to describe Mahantship as a mere office. A superior of a Math has not only duties to discharge in connection with the endowment but he has a personal interest of a beneficial character which is sanctioned by custom and is much larger than that of a Shebait in the debutter property. It was held by a Full Bench of the Calcutta High Court(2), that Shebaitship itself is property, and this decision was approved of by the Judicial Committee in *Ganesh* v. *Lal Behary*(3), and again in *Bhabatarini* v. *Ashalata*(4).

(1) Vide *Vidya Varuthi* v. *Balusami*, 48 I.A. 302.
(2) Vide *Monahai* v. *Bhupendra*, 60 Cal. 452.
(3) 63 I.A. 448.
(4) 70 I.A. 57.

The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasise the proprietary element in the Shebaiti right and to show that though in some respects an anomaly, it was an anomaly to be accepted as having been admitted into Hindu law from an early date. This view was adopted in its entirety by this court in *Angurbala* v. *Debabrata* (1), and what was said in that case in respect to Shebaiti right could, with equal propriety, be applied to the office of a Mahant. Thus in the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right. It is true that the Mahantship is not heritable like ordinary property, but that is because of its peculiar nature and the fact that the office is generally held by an ascetic, whose connection with his natural family being completely cut off, the ordinary rules of succession do not apply.

There is no reason why the word "property", as used in article 19(1) (f) of the Constitution, should not be given a liberal and wide connotation and should not be extended to those well recognised types of interest which have the insignia or characteristics of proprietary right. As said above, the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy his character as a Mahant altogether. It is true that the beneficial interest which he enjoys is appurtenant to his duties

(1) [1951] S.C.R. 1125.

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

and as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interest of the public. But the restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and superior of spiritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to the disciples and followers of the Math and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the Mathadhipati down to the level of a servant under a State department. It is from this standpoint that the reasonableness of the restrictions should be judged.

A point was suggested by the learned Attorney-General that as article 19(1)(f) deals only with the natural rights inherent in a citizen to acquire, hold and dispose of property in the abstract without reference to rights to any particular property, it can be of no real assistance to the respondent in the present case and article 31 of the Constitution, which deals with deprivation of property, has no application here. In the case of *The State of West Bengal* v. *Subodh Gopal Bose*(1) (Civil Appeal No. 107 of 1952, decided by this court on the 17th December, 1953), an opinion was expressed by Patanjali Sastri C. J. that article 19(1)(f) of the Constitution is concerned only with the abstract right and capacity to acquire, hold and dispose of property and that it has no relation to concrete property rights. This, it may be noted, was an expression of opinion by the learned Chief Justice alone and it was not the decision of the court; for out of the other four learned Judges who together with the Chief Justice constituted the Bench, two did not definitely agree with this view, while the remaining two did not express any opinion one way or the other. This point was not raised before us by the Advocate-General for Madras, who appeared in support of the appeal, nor by any of the other

(1) [1954] S.C.R. 587.

counsel appearing in this case. The learned Attorney-General himself stated candidly that he was not prepared to support the view taken by the late Chief Justice as mentioned above and he only raised the point to get an authoritative pronouncement upon it by the court. In our opinion, it would not be proper to express any final opinion upon the point in the present case when we had not the advantage of any arguments addressed to us upon it. We would prefer to proceed, as this court has proceeded all along, in dealing with similar cases in the past, on the footing that article 19(1) (f) applies equally to concrete as well as abstract rights of property.

We now come to article 25 which, as its language indicates, secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. A question is raised as to whether the word "persons" here means individuals only or includes corporate bodies as well. The question, in our opinion, is not at all relevant for our present purpose. A Mathadhipati is certainly not a corporate body; he is the head of a spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. It is his duty to practise and propagate the religious tenets, of which he is an adherent and if any provision of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guaranteed to every person under article 25. Institutions as such cannot practise or propagate religion, it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of article 25. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlour meeting.

As regards article 26, the first question is, what is the precise meaning or connotation of the expression

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

"religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name." It is well known that the practice of setting up Maths as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name,—in many cases it is the name of the founder, and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As article 26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article.

The other thing that remains to be considered in regard to article 26 is, what is the scope of clause (b) of the article which speaks of management "of its own affairs in matters of religion?" The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply. The question is, where is the line to be drawn between what are matters of religion and what are not?

It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the article applies. What then are matters of religion? The word "religion" has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case(1), it has been said "that the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with *cultus* of form or worship of a particular sect, but is distinguishable from the latter." We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon article 44(2) of the Constitution of Eire and we have great doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a

(1) Vide *Davis* v. *Benson*, 133 U.S. 333 at 342.

1954

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in article 25. Latham C. J. of the High Court of Australia while dealing with the provision of section 116 of the Australian Constitution which *inter alia* forbids the Commonwealth to prohibit the "free exercise of any religion" made the following weighty observations(1):

"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious *opinions*, it nevertheless may deal as it pleases with any *acts* which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under articles 25 and 26 on grounds of public order, morality and health. Clause (2)(a) of article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can

(1) Vide *Adelaide Company* v. *The Commonwealth* 67 C.L.R. 116, 127.

legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon clause (2)(a) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b). What article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as "Jehova's Witnesses." This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted

human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of "Jehova's Witnesses" incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them under the National Security Regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations(1). These were undoubtedly political activities though arising out of religious belief entertained by a particular community. In such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery.

The courts of America were at one time greatly agitated over the question of legality of a State regulation which required the pupils in public schools on pain of compulsion to participate in a daily ceremony of saluting the national flag, while reciting in unison, a pledge of allegiance to it in a certain set formula. The question arose in *Minersville School District, Board of Education, etc.* v. *Gobitis*(2). In that case two small children, Lillian and William Gobitis, were expelled from the public school of Minersville, Pennsylvania, for refusing to salute the national flag as part of the daily exercise. The Gobitis family were affiliated with "Jehova's Witnesses" and had been

(1) Vide *Adelaide Company* v. *The Commonwealth*, 67 C.L.R. 116, 127.

(2) 310 U.S. 586.

brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by the scripture. The point for decision by the Supreme Court was whether the requirement of participation in such a ceremony exacted from a child, who refused upon sincere religious ground, infringed the liberty of religion guaranteed by the First and the Fourteenth Amendments? The court held by a majority that it did not and that it was within the province of the legislature and the school authorities to adopt appropriate means to evoke and foster a sentiment of national unity amongst the children in public shools. The Supreme Court, however, changed their views on this identical point in the later case of *West Virginia State Board of Education* v. *Barnette*(1). There it was held overruling the earlier decision referred to above that the action of a State in making it compulsory for children in public schools to salute the flag and pledge allegiance constituted a violation of the First and the Fourteenth Amendments. This difference in judicial opinion brings out forcibly the difficult task which a court has to perform in cases of this type where the freedom or religious convictions genuinely entertained by men come into conflict with the proper political attitude which is expected from citizens in matters of unity and solidarity of the State organization.

As regards commercial activities, which are prompted by religious beliefs, we can cite the case of *Murdock* v. *Pennsylvania*(2). Here also the petitioners were "Jehova's Witnesses" and they went about from door to door in the city of Jeannette distributing literature and soliciting people to purchase certain religious books and pamphlets, all published by the Watch Tower Bible and Tract Society. A municipal ordinance required religious colporteurs to pay a licence tax as a condition to the pursuit of their activities. The petitioners were convicted and fined for violation of the ordinance. It was held that the ordinance in question was invalid under the Federal Constitution as constituting a denial of freedom of speech, press and religion;

(1) 319 U.S. 624.
(2) 319 U.S. 105.

1954

e Commis-mer, Hindu gious Endow-nts, Madras v. *Lakshmindra irtha Swamiar Sri Shirur Mutt.*

ukherjea J.

and it was held further that upon the facts of the case it could not be said that "Jehova's Witnesses" were engaged in a commercial rather than in a religious venture. Here again, it may be pointed out that a contrary view was taken only a few years before in the case of *Jones* v. *Opelika*(1), and it was held that a city ordinance, which required that licence be procured and taxes paid for the business of selling books and pamphlets on the streets from house to house, was applicable to a member of a religious organisation who was engaged in selling the printed propaganda pamphlets without having complied with the provisions of the ordinance.

It is to be noted that both in the American as well as in the Australian Constitutions the right to freedom of religion has been declared in unrestricted terms without any limitation whatsoever. Limitations, therefore, have been introduced by courts of law in these countries on grounds of morality, order and social protection. An adjustment of the competing demands of the interests of Government and constitutional liberties is always a delicate and a difficult task and that is why we find difference of judicial opinion to such an extent in cases decided by the American courts where questions of religious freedom were involved. Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to

(1) 316 U.S. 584.

interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under article 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of article 26.

Having thus disposed of the general contentions that were raised in this appeal, we will proceed now to examine the specific grounds that have been urged by the parties before us in regard to the decision of the High Court so far as it declared several sections of the new Act to be *ultra vires* the Constitution by reason of their conflicting with the fundamental rights of the respondent. The concluding portion of the judgment of the High Court where the learned Judges summed up their decision on this point stands as follows:

"To sum up, we hold that the following sections are *ultra vires* the State Legislature in so far as they relate to this Math: and what we say will also equally apply to other Maths of a similar nature. The sections of the new Act are: sections 18, 20, 21, 25(4), section 26 (to the extent section 25(4) is made applicable), section 28 (though it sounds innocuous, it is liable to abuse as we have already pointed out earlier in the judgment), section 29, clause (2) of section 30, section 31, section 39(2), section 42, section 53 (because courts have ample powers to meet these contingencies), section 54, clause (2) of section 55, section 56, clause (3)

133

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

of section 58, sections 63 to 69 in Chapter VI, clauses (2), (3) and (4) of section 70, section 76, section 89 and section 99 (to the extent it gives the Government virtually complete control over the Matadhipati and Maths)."

It may be pointed out at the outset that the learned Judges were not right in including sections 18, 39(2) and 42 in this list, as these sections are not applicable to Maths under the Act itself. This position has not been disputed by Mr. Somayya, who appears for the respondent.

Section 20 of the Act describes the powers of the Commissioner in respect to religious endowments and they include power to pass any orders that may be deemed necessary to ensure that such endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded. Having regard to the fact that the Mathadhipati occupies the position of a trustee with regard to the Math, which is a public institution, some amount of control or supervision over the due administration of the endowments and due appropriation of their funds is certainly necessary in the interest of the public and we do not think that the provision of this section by itself offends any fundamental right of the Mahant. We do not agree with the High Court that the result of this provision would be to reduce the Mahant to the position of a servant. No doubt the Commissioner is invested with powers to pass orders, but orders can be passed only for the purposes specified in the section and not for interference with the rights of the Mahant as are sanctioned by usage or for lowering his position as the spiritual head of the institution. The saving provision contained in section 91 of the Act makes the position quite clear. An apprehension that the powers conferred by this section may be abused in individual cases does not make the provision itself bad or invalid in law.

We agree, however, with the High Court in the view taken by it about section 21. This section empowers the Commissioner and his subordinate officers and also persons authorised by them to enter the premises of

any religious institution or place of worship for the purpose of exercising any power conferred or any duty imposed by or under the Act. It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed. Section 21, it is to be noted, does not confine the right of entry to the outer portion of the premises; it does not even exclude the inner sanctuary "the Holy of Holies" as it is said, the sanctity of which is zealously preserved. It does not say that the entry may be made after due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution. We think that as the section stands, it interferes with the fundamental rights of the Mathadhipati and the denomination of which he is head guaranteed under articles 25 and 26 of the Constitution. Our attention has been drawn in this connection to section 91 of the Act which, it is said, provides a sufficient safeguard against any abuse of power under section 21. We cannot agree with this contention. Clause (a) of section 91 excepts from the saving clause all express provisions of the Act within which the provision of section 21 would have to be included. Clause (b) again does not say anything about custom or usage obtaining in an institution and it does not indicate by whom and in what manner the question of interference with the religious and spiritual functions of the Math would be decided in case of any dispute arising regarding it. In our opinion, section 21 has been rightly held to be invalid.

Section 23 imposes a duty upon the trustees to obey all lawful orders issued by the Commissioner or any subordinate authority under the provisions of the Act. No exception can be taken to the section if those

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

provisions of the Act, which offend against the fundamental rights of the respondent, are left out of account as being invalid. No body can make a grievance if he is directed to obey orders issued in pursuance of valid legal authority. The same reason would, in our opinion, apply to section 24. It may be mentioned here that sections 23 and 24 have not been specifically mentioned in the concluding portion of the judgment of the High Court set out above, though they have been attacked by the learned Judges in course of their discussion.

As regards section 25, the High Court has taken exception only to clause (4) of the section. If the preparation of registers for religious institutions is not wrong and does not affect the fundamental rights of the Mahant, one fails to see how the direction for addition to or alteration of entries in such registers, which clause (4) contemplates and which will be necessary as a result of enquiries made under clause (3), can, in any sense, be held to be invalid as infringing the fundamental rights of the Mahant. The enquiry that is contemplated by clauses (3) and (4) is an enquiry into the actual state of affairs, and the whole object of the section is to keep an accurate record of the particulars specified in it. We are unable, therefore, to agree with the view expressed by the learned Judges. For the same reasons, section 26, which provides for annual verification of the registers, cannot be held to be bad.

According to the High Court section 28 is itself innocuous. The mere possibility of its being abused is no ground for holding it to be invalid. As all endowed properties are ordinarily inalienable, we fail to see why the restrictions placed by section 29 upon alienation of endowed properties should be considered bad. In our opinion, the provision of clause (2) of section 29, which enables the Commissioner to impose conditions when he grants sanction to alienation of endowed property, is perfectly reasonable and to that no exception can be taken.

The provision of section 30(2) appears to us to be somewhat obscure. Clause (1) of the section enables

a trustee to incur expenditure out of the funds in his charge after making adequate provision for the purposes referred to in section 70(2), for making arrangements for the health, safety and convenience of disciples, pilgrims, etc. Clause (2), however, says that in incurring expenditure under clause (1), the trustee shall be guided by such general or special instruction as the Commissioner or the Area Committee might give in that connection. If the trustee is to be guided but not fettered by such directions, possibly no objection can be taken to this clause; but if he is bound to carry out such instructions, we do think that it constitutes an encroachment on his right. Under the law, as it stands, the Mahant has large powers of disposal over the surplus income and the only restriction is that he cannot spend anything out of it for his personal use unconnected with the dignity of his office. But as the purposes specified in sub-clauses (a) and (b) of section 30(1) are beneficial to the institution there seems to be no reason why the authority vested in the Mahant to spend the surplus income for such purposes should be taken away from him and he should be compelled to act in such matters under the instructions of the Government officers. We think that this is an unreasonable restriction on the Mahant's right of property which is blended with his office.

The same reason applies in our opinion to section 31 of the Act, the meaning of which also is far from clear. If after making adequate provision for the purposes referred to in section 70(2) and for the arrangements mentioned in section 30(2) there is still a surplus left with the trustee, section 31 enables him to spend it for the purposes specified in section 59(1) with the previous sanction of the Deputy Commissioner. One of the purposes mentioned in section 59(1) is the propagation of the religious tenents of the institution, and it is not understood why sanction of the Deputy Commissioner should be necessary for spending the surplus income for the propagation of the religious tenets of the order which is one of the primary duties of a Mahant to discharge. The next thing that strikes one is, whether sanction is necessary if the trustee

1954

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

wants to spend the money for purposes other than those specified in section 59(1)? If the answer is in the negative, the whole object of the section becomes meaningless. If, on the other hand, the implication of the section is that the surplus can be spent only for the purposes specified in section 59(1) and that too with the permission of the Deputy Commissioner, it undoubtedly places a burdensome restriction upon the property rights of the Mahant which are sanctioned by usage and which would have the effect of impairing his dignity and efficiency as the head of the institution. We think that sections 30(2) and 31 have been rightly held to be invalid by the High Court.

Sections 39 and 42, as said already, are not applicable to Maths and hence can be left out of consideration. Section 53 has been condemned by the High Court merely on the ground that the court has ample jurisdiction to provide for the contingencies that this section is intended to meet. But that surely cannot prevent a competent legislature from legislating on the topic, provided it can do so without violating any of the fundamental rights guaranteed by the Constitution. We are unable to agree with the High Court on this point. There seems to be nothing wrong or unreasonable in section 54 of the Act which provides for fixing the standard scale of expenditure. The proposals for this purpose would have to be submitted by the trustee; they are then to be published and suggestions invited from persons having interest in the amendment. The Commissioner is to scrutinise the original proposals and the suggestions received and if in his opinion a modification of the scale is necessary, he has to submit a report to the Government, whose decision will be final. This we consider to be quite a reasonable and salutary provision.

Section 55 deals with a Mahant's power over *Pathakanikas* or personal gifts. Ordinarily a Mahant has absolute power of disposal over such gifts, though if he dies without making any disposition, it is reckoned as the property of the Math and goes to the succeeding Mahant. The first clause of section 55 lays down that such *Pathakanikas* shall be spent only for the

purposes of the Math. This is an unwarranted restriction on the property right of the Mahant. It may be that according to customs prevailing in a particular institution, such personal gifts are regarded as gifts to the institution itself and the Mahant receives them only as the representative of the institution; but the general rule is otherwise. As section 55(1) does not say that this rule will apply only when there is a custom of that nature in a particular institution, we must say that the provision in this unrestricted form is an unreasonable encroachment upon the fundamental right of the Mahant. The same objection can be raised against clause (2) of the section; for if the *Pathakanikas* constitute the property of a Mahant, there is no justification for compelling him to keep accounts of the receipts and expenditure of such personal gifts. As said already, if the Mahant dies without disposing of these personal gifts, they may form part of the assets of the Math, but that is no reason for restricting the powers of the Mahant over these gifts so long as he is alive.

Section 56 has been rightly invalidated by the High Court. It makes provision of an extremely drastic character. Power has been given to the Commissioner to require the trustee to appoint a manager for administration of the secular affairs of the institution and in case of default, the Commissioner can make the appointment himself. The manager thus appointed though nominally a servant of the trustee, has practically to do everything according to the directions of the Commissioner and his subordinates. It is to be noted that this power can be exercised at the mere option of the Commissioner without any justifying necessity whatsoever and no pre-requisites like mismanagement of property or maladministration of trust funds are necessary to enable the trustee to exercise such drastic power. It is true that the section contemplates the appointment of a manager for administration of the secular affairs of this institution. But no rigid demarcation could be made as we have already said between the spiritual duties of the Mahant

1954

Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Tha Swamia Sri Shirur Mutt.

Mukherjea J.

and his personal interest in the trust property. The effect of the section really is that the Commissioner is at liberty at any moment he chooses to deprive the Mahant of his right to administer the trust property even if there is no negligence or maladministration on his part. Such restriction would be opposed to the provision of article 26(d) of the Constitution. It would cripple his authority as Mahant altogether and reduce his position to that of an ordinary priest or paid servant.

We find nothing wrong in section 58 of the Act which relates to the framing of the scheme by the Deputy Commissioner. It is true that it is a Government officer and not the court who is given the power to settle the scheme, but we think that ample safeguards have been provided in the Act to rectify any error or unjust decision made by the Deputy Commissioner. Section 61 provides for an appeal to the Commissioner against the order of the Deputy Commissioner and there is a right of suit given to a party who is aggrieved by the order of the Commissioner with a further right of appeal to the High Court.

The objection urged against the provision of clause (3)(b) of section 58 does not appear to us to be of much substance. The executive officer mentioned in that clause could be nothing else but a manager of the properties of the Math, and he cannot possibly be empowered to exercise the functions of the Mathadhipati himself. In any event, the trustee would have his remedy against such order of the Deputy Commissioner by way of appeal to the Commissioner and also by way of suit as laid down in sections 61 and 62. Section 59 simply provides a scheme for the application of the *cy pres* doctrine in case the object of the trust fails either from the inception or by reason of subsequent events. Here again the only complaint that is raised is, that such order could be made by the Deputy Commissioner. We think that this objection has not much substance. In the first place, the various objects on which the trust funds could be spent are laid down in the section itself and the jurisdiction of the Deputy Commissioner is only to make a choice out of the several heads

Further an appeal has been provided from an order of the Deputy Commissioner under this section to the Commissioner. We, therefore, cannot agree with the High Court that sections 58 and 59 of the Act are invalid.

Chapter VI of the Act, which contains sections 63 to 69, relates to notification of religious institutions. The provisions are extremely drastic in their character and the worst feature of it is that no access is allowed to the court to set aside an order of notification. The Advocate-General for Madras frankly stated that he could not support the legality of these provisions. We hold, therefore, in agreement with High Court that these sections should be held to be void.

Section 70 relates to the budget of religious institutions. Objection has been taken only to clause (3) which empowers the Commissioner and the Area Committee to make any additions to or alterations in the budget as they deem fit. A budget is indispensable in all public institutions and we do not think that it is *per se* unreasonable to provide for the budget of a religious institution being prepared under the supervision of the Commissioner or the Area Committee. It is to be noted that if the order is made by an Area Committee under clause (3), clause (4) provides an appeal against it to the Deputy Commissioner.

Section 89 provides for penalties for refusal by the trustee to comply with the provisions of the Act. If the objectionable portions of the Act are eliminated, the portion that remains will be perfectly valid and for violation of these valid provisions, penalties can legitimately be provided. Section 99 vests an overall revisional power in the Government. This, in our opinion, is beneficial to the trustee, for he will have an opportunity to approach the Government in case of any irregularity, error or omission made by the Commissioner or any other subordinate officer.

The only other point that requires consideration is the constitutional validity of section 76 of the Act which runs as follows:

"76. (1) In respect of the services rendered by the Government and their officers, every religious institution shall, from the income derived by it, pay to the

14
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v.
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erjea J.

Government annually such contribution not exceeding five per centum of its income as may be prescribed.

(2) Every religious institution, the annual income of which for the fasli year immediately preceding as calculated for the purposes of the levy of contribution under sub-section (1), is not less than one thousand rupees, shall pay to the Government annually, for meeting the cost of auditing its accounts, such further sum not exceeding one and a half per centum of its income as the Commissioner may determine.

(3) The annual payments referred to in sub-sections (1) and (2) shall be made, notwithstanding anything to the contrary contained in any scheme settled or deemed to be settled under this Act for the religious institution concerned.

(4) The Government shall pay the salaries, allowances, pensions and other beneficial remuneration of the Commissioner, Deputy Commissioners, Assistant Commissioners and other officers and servants (other than executive officers of religious institutions) employed for the purposes of this Act and the other expenses incurred for such purposes, including the expenses of Area Committees and the cost of auditing the accounts of religious institutions."

Thus the section authorises the levy of an annual contribution on all religious institutions, the maximum of which is fixed at 5 per cent. of the income derived by them. The Government is to frame rules for the purposes of fixing rates within the permissible maximums and the section expressly states that the levy is in respect of the services rendered by the Government and its officers. The validity of the provision has been attacked on a two-fold ground: the first is, that the contribution is really a tax and as such it was beyond the legislative competence of the State Legislature to enact such provision. The other is, that the contribution being a tax or imposition, the proceeds of which are specifically appropriated for the maintenance of a particular religion or religious denomination, it comes within the mischief of article 27 of the Constitution and is hence void.

1954

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

So far as the first ground is concerned, it is not disputed that the legislation in the present case is covered by entries 10 and 28 of List III in Schedule VII of the Constitution. If the contribution payable under section 76 of the Act is a "fee", it may come under entry 47 of the Concurrent List which deals with "fees" in respect of any of the matters included in that list. On the other hand, if it is a tax, as this particular tax has not been provided for in any specific entry in any of the three lists, it could come only under entry 97 of List I or article 248(1) of the Constitution and in either view the Union Legislature alone would be competent to legislate upon it. On behalf of the appellant, the contention raised is that the contribution levied is a fee and not a tax and the learned Attorney-General, who appeared for the Union of India as intervener in this as well as in the other connected appeals, made a strenuous attempt to support this position. The point is certainly not free from doubt and requires careful consideration.

The learned Attorney-General has argued in the first place that our Constitution makes a clear distinction between taxes and fees. It is true, as he has pointed out, that there are a number of entries in List I of the Seventh Schedule which relate to taxes and duties of various sorts; whereas the last entry, namely entry 96, speaks of "fees" in respect of any of the matters dealt with in the list. Exactly the same is with regard to entries 46 to 62 in List II all of which relate to taxes and here again the last entry deals only with "fees" leviable in respect of the different matters specified in the list. It appears that articles 110 and 119 of the Constitution which deal with "Money Bills" lay down expressly that a bill will not be deemed to be a "Money Bill" by reason only that it provides for the imposition of fines.....or for the demand or payment of fees for licences or fees for services rendered, whereas a bill dealing with imposition or regulation of a tax will always be a Money Bill. Article 277 also mentions taxes, cesses and fees separately. It is not clear, however, whether the word "tax" as used in article 265 has not been used in the wider sense as including all other

1954

: Commis-
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v.
Lakshmindra
tha Swamiar
Sri Shirur
Mutt.

khergea J.

impositions like cesses and fees; and that at least seems to be the implication of clause (28) of article 366 which defines taxation as including the imposition of any tax or impost, whether general, local or special. It seems to us that though levying of fees is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists, it has given a power to the particular legislature to legislate on the imposition of fees in respect to every one of the items dealt with in the list itself. Some idea as to what fees are may be gathered from clause (2) of articles 110 and 119 referred to above which speak of fees for licences and for services rendered. The question for our consideration really is, what are the indicia or special characteristics that distinguish a fee from a tax proper? On this point we have been referred to several authorities by the learned counsel appearing for the different parties including opinions expressed by writers of recognised treatises on public finance.

A neat definition of what "tax" means has been given by Latham C. J. of the High Court of Australia in *Matthews* v. *Chicory Marketing Board*(1). "A tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment *for services rendered*". This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law(2). The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the

(1) 60 C.L.R. 263, 276.
(2) Vide *Lower Mainland Dairy* v. *Crystal Dairy Ltd.*; [1933] A.C. 168.

object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of *quid pro quo* between the taxpayer and the public authority(1). Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

Coming now to fees, a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay(2). These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

As regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person has got to pay if he wants certain services from the Government; but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If a man wants a licence that is entirely his own choice and then only he has to pay the fees, but not otherwise. We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees. It is difficult, we think, to conceive of a tax except, it be something like a poll tax, the incidence of which falls on all persons within a State. The house tax has to be paid only by those who own houses, the land tax by those who possess lands, municipal taxes or rates will fall on those who have properties within a

(1) See Findlay Shirras on "Science of Public Finance", Vol. I, p. 203.
(2) Vide Lutz on "Public Finance" p. 215.

1954

The Commissioner, Hindu Religious Endowments, Madras
v.
Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

municipality. Persons, who do not have houses, lands or properties within municipalities, would not have to pay these taxes, but nevertheless these impositions come within the category of taxes and nobody can say that it is a choice of these people to own lands or houses or specified kinds of properties, so that there is no compulsion on them to pay taxes at all. Compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent; and this element is present in taxes as well as in fees. Of course, in some cases whether a man would come within the category of a service receiver may be a matter of his choice, but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest(1). Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action(2).

If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services. As indicated in article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either

(1) Vide Findlay Shirras on "Science of Public Finance" Vol. I, p. 202
(2) Vide Seligman's Essays on Taxation, p. 408.

heavy or moderate from that person in return for the privilege that is conferred. A most common illustration of this type of cases is furnished by the licence fees for motor vehicles. Here the costs incurred by the Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant(1), and if the money paid by licence holders goes for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regarded as a tax.

In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes(2).

Our Constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists with regard to various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included in it. The implication seems to be that fees have special reference to governmental action undertaken in respect to any of these matters.

Section 76 of the Madras Act speaks definitely of the contribution being levied in respect to the services rendered by the Government; so far it has the appearance of fees. It is true that religious institutions do not want these services to be rendered to them and it

(1) Vide Seligman's Essays on Taxation, p. 409.
(2) Ibid, p. 406.

1954

— r Commissioner, Hindu ious Endowments, Madras v. Lakshmindratha Swamiar Sri Shirur Mutt.

— ukherjea J.

may be that they do not consider the State interference to be a benefit at all. We agree, however, with the learned Attorney-General that in the present day concept of a State, it cannot be said that services could be rendered by the State only at the request of those who require these services. If in the larger interest of the public, a State considers it desirable that some special service should be done for certain people, the people must accept these services, whether willing or not(1). It may be noticed, however, that the contribution that has been levied under section 76 of the Act has been made to depend upon the capacity of the payer and not upon the quantum of benefit that is supposed to be conferred on any particular religious institution. Further the institutions, which come under the lower income group and have income less than Rs. 1,000 annually, are excluded from the liability to pay the additional charges under clause (2) of the section. These are undoubtedly some of the characteristics of a 'tax' and the imposition bears a close analogy to income-tax. But the material fact which negatives the theory of fees in the present case is that the money raised by levy of the contribution is not ear-marked or specified for defraying the expenses that the Government has to incur in performing the services. All the collections go to the consolidated fund of the State and all the expenses have to be met not out of these collections but out of the general revenues by a proper method of appropriation as is done in case of other Government expenses. That in itself might not be conclusive, but in this case there is total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution under the provision of section 76 and in these circumstances the theory of a return or counter-payment or *quid pro quo* cannot have any possible application to this case. In our opinion, therefore, the High Court was right in holding that the contribution levied under section 76 is a tax and not a fee and consequently it was beyond the power of the State Legislature to enact this provision.

(1) Vide Findlay Shirras on "Science of Public Finance" Vol. I, p. 202.

1954

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.

Mukherjea J.

In view of our decision on this point, the other ground hardly requires consideration. We will indicate, however, very briefly our opinion on the second point raised. The first contention, which has been raised by Mr. Nambiar in reference to article 27 of the Constitution is that the word "taxes", as used therein, is not confined to taxes proper but is inclusive of all other impositions like cesses, fees, etc. We do not think it necessary to decide this point in the present case, for in our opinion on the facts of the present case, the imposition, although it is a tax, does not come within the purview of the latter part of the article at all. What is forbidden by the article is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason underlying this provision is obvious. Ours being a secular State and there being freedom of religion guaranteed by the Constitution, both to individuals and to groups, it is against the policy of the Constitution to pay out of public funds any money for the promotion or maintenance of any particular religion or religious denomination. But the object of the contribution under section 76 of the Madras Act is not the fostering or preservation of the Hindu religion or any denomination within it. The purpose is to see that religious trusts and institutions, wherever they exist, are properly administered. It is a secular administration of the religious institutions that the legislature seeks to control and the object, as enunciated in the Act, is to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for the purposes for which they were founded or exist. There is no question of favouring any particular religion or religious denomination in such cases. In our opinion, article 27 of the Constitution is not attracted to the facts of the present case. The result, therefore, is that in our opinion sections 21, 30(2), 31, 55, 56 and 63 to 69 are the only sections which should be declared invalid as conflicting with the fundamental rights of the respondent as Mathadhipati of the Math in question and

135

1954

he Commis-oner, Hindu gious Endow-nts, Madras v. Lakshmindra irtha Swamiar f Sri Shirur Mutt.

section 76(1) is void as beyond the legislative competence of the Madras State Legislature. The rest of the Act is to be regarded as valid. The decision of the High Court will be modified to this extent, but as the judgment of the High Court is affirmed on its merits, the appeal will stand dismissed with costs to the respondent.

Appeal dismissed.

1954

March 16.

MAHANT SRI JAGANNATH RAMANUJ DAS AND ANOTHER

v.

THE STATE OF ORISSA AND ANOTHER.

[MEHR CHAND MAHAJAN C.J., MUKHERJEA, S. R. DAS, VIVIAN BOSE, and GHULAM HASAN JJ.]

Constitution of India, arts. 19(1) (f), 25, 26, 27—Orissa Hindu Religious Endowments Act, 1939, as amended by Amending Act II of 1952, ss. 38 and 39 and proviso to s. 46—Whether ultra vires *the Constitution—Section 49 of the Act—Whether* ultra vires *art. 27.*

Held, that ss. 38 and 39 and the proviso to s. 46 of the Orissa Hindu Religious Endowments Act, 1939 as amended by the Amending Act II of 1952 are *ultra vires* arts. 19(1) (f), 25 and 26 of the Constitution.

The annual contribution provided in s. 49 of the Act is in the nature of a fee and not a tax and therefore it was within the competence of the Provincial Legislature to enact such a provision. Further an imposition like this is not hit by art. 27 of the Constitution because the object of the contribution under s. 49 is not the fostering or preservation of the Hindu religion or of any denomination within it but the proper administration of religious trusts and institutions wherever they exist.

Civil Appeal No. 38 of 1953 referred to.

ORIGINAL JURISDICTION : Petition No. 405 of 1953.

Under article 32 of the Constitution of India for the enforcement of Fundamental Rights

and

APPELLATE JURISDICTION: Case No. 1 of 1950.