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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.

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.*

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THE COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS

v.

SRI LAKSHMINDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT.

[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—Work "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.

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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.

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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.

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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

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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 petitioners' 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

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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 of the Swami praying to the Board to issue a direction to the agent to hand over the account papers and other documents, 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

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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 Constitution Points raised before us.

It is not disputed that a State Legislature is competent to enact laws on the subject of religious and charitable endowment, 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

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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 institution 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

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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 right 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 right 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

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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.

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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 anomaly to be accepted 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.

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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. Institution as such cannot practise or propogate 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

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"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 organisation. 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. at 342.

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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 an economic, financial, political and other secular activities which may be associated with religions 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

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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, Lilian 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 schools. 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*( ). 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.

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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.

interefere 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 innacuous, 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)

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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

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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

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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 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 equiry 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 tenants 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

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wants to spend the money for purposes other than those specified in section 59(I)? 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

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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 here 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 to 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

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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.

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 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

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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 taxed 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 the 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.

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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.

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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.

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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 ceses, 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

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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.

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March 16.

[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.