THE DURGAH COMMITTEE, AJMER AND ANOTHER

v.

SYED HUSSAIN ALI AND OTHERS

1961

March 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Ibid, p. 56.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal allowed.