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.

(40) 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 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 practise religion guaranteed by Art. 25(1) has been violated does not appear to be well-founded.

(41) 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.

(42) 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.

(43) 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.

(44) 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.

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

(46) 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.

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

(48) 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.

GE/D. Appeal allowed.

AIR 1961 Supreme Court 1419 (V 48 C 265)

(From Calcutta)*

21st February, 1961

J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Haridas Mondal, Appellant v. Anath Nath Mittra, Respondent.

Civil Appeal No. 508 of 1957.

Debt Laws — Bengal Money-lenders Act (10 of 1940), S. 36 — Suit on mortgage — Final decree for sale — Debt not satisfied by execution sale — Personal decree obtained for balance — Execution — Suit under S. 36 to re-open personal decree — Amount reduced and instalments allowed —

*(See A. F. A. D. No. 1090 of 1949, D/- 3-6-1955—Cal.)

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.

(35) 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.

(36) 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.

(37) However, we have allowed Mr. Pathak to argue this part of the respondents' case on the broad and general ground that the Chishtia Soofies constitute either a denomination or a section of a denomination and as such they are entitled to administer and manage all the properties of the Durgah including the offerings to which specific reference has been made in the petition by the respondents. The challenge thus presented to the vires of S. 5 and other subsidiary sections dealing with the powers of the Committee cannot succeed for the simple and obvious reason that the denomination never had the right to administer the said property in question. We have already seen how the history of the administration of the Durgah Endowment from the time the first endowment was made down to the date of the Act clearly shows that the endowments have always been made on such terms as did not confer on the denomination the right to manage the properties endowed. The management of the properties endowed was always in the hands of officers appointed by the State who were answerable to the State and who were removable by the State at the State's pleasure. We have already seen that until Akbar made his endowment in favour of the Durgah the position of the Durgah and its properties was very modest and there was hardly any property to manage or administer. Ever since the first endowment was made and subsequent additions by similar endowments followed the administration and management of the property has been consistent with the same pattern and the said pattern excludes any claim that the administration of the property in question was ever in the hands of the said denomination. It is obvious that Art. 26(c) and (d) do not create rights in any denomination or its section which it never had; they merely safeguard and guarantee the continuance of rights which such denomination or its section had. In other words, if the denomination never had the right to manage the properties endowed in favour of a denominational institution as for instance by reason of the terms on which the endowment was created it cannot be heard to say that it has acquired the said rights as a result of Art. 26(c) and (d), and that the practice and custom prevailing in that behalf which obviously is consistent with the terms of the endowment should be ignored or treated as invalid and the administration and management should now be given to the denomination. Such a claim is plainly inconsistent with the provisions of Art. 26. If the right to administer the properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it Art. 26 cannot be successfully invoked. The history of the administration of the property endowed to the tomb in the present case which is spread over nearly

four Centuries is sufficient to raise a legitimate inference about the origin of the terms on which the endowments were founded, an origin which is inconsistent with any rights subsisting in the denominations to administer the properties belonging to the institution. It was because the respondents were fully conscious of this difficulty that they did not adopt this broad basis of challenge in their writ petition. 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.

(38) 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 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 Section 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.

(39) 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 Nazars 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