Commissioner of Income-Tax, West Bengal III

Vs

Sri Jagannath Jew (though Shebaits)

Civil Appeals Nos. 1682-1683 of 1971

(H.R. Khanna, V.R. Krishna Iyer JJ)

17.12.1976

JUDGMENT

KRISHNA IYER J. -

The fiscal - not the philosophical - implications of Jesus' pragmatic injunction "Render to Ceasar the things that are Ceasar's and to God the things that are God's" - fall for jural exploration in these appeals, by special leave, the appellant being the Union of India represented by the Commissioner of Income-tax, West Bengal, and the respondent, Sree Jagannathji, and the subject-matter the taxability of the deity, Jagannathji, by the State under the Indian Income-tax Act, 1922, beyond the admitted point. To appreciate the exigibility issue, we have to flash back to 19th Century Bengal and the then prevailing societal ethos of affluent Hindu piety, and we find ourselves in the spiritual-legal company of Raja Rajendra Mullick, at once holy and wealthy, who, in advancing years, executed a comprehensive will to promote his cherished godly wishes and to provide for his secularly dear cause and near relatives. The construction of this testamentary complex of dispositions and the location of its destination are the principal exercises in these appeals.

Raja Rajendra Mullick Bahadur of Calcutta executed his last will and testament on February 21, 1887. While the author of the will was a Bengali Brahmin(?) of the last century, the draftsman of the document was John Hart, an English solicitor. While the author's wishes are usually transmitted into the deed by the draftsman, the diction and accent are flavored by the draftsman's ink. So it happens that this will represents pious Bengali wishes and dispositions - but draped in an English solicitor's legalese. The court's function in such an ambiguous situation is to steer clear of the confusion imparted by the diction and to reach the real intendment (of the testator). Such an essay in ascertaining the true intent of Raja Rajendra Mullick is fraught with difficulties and our guideline has to be to pick it up from the conspectus of clauses - rather than from particular expressions or isolated features. Only the totality tells the story of the author's mind as he unburdened himself of his properties for causes and purposes dear to his heart. The court's discerning loyalty is not to the formalistic language used in drawing up the deed but to the intentions which the disponer desired should take effect in the manner he designed. This back-drop of observations made, we proceed to a board delineation of the actual provisions.

The munificent testator had enormous estates, lavish charity, piety aplenty and a large family. So he trifurcated his assets as it were, provided for religious objects, eleemosynary purposes and members of his family. The last was distinctly and separately dealt with and we are not concerned with the bequests so made. But the first two were more or less lugged together and ample properties earmarked therefor. How did he engineer into legal effect these twin purposes ? Did he create an absolute debutter of these properties, totally dedicating them to the deity whose devotees he and his

father were, coupled with several directions, addressed to the shebaits, for application of the income for performance of stated pujas, execution of public charitable projects and payment of remuneration for sheba plus liberal grants and facilities to the sons an widows of sons who were objects of his bounty ? Or did he really create a trust in the sense of the English law vesting the whole estate in trustees saddled with obligations to expend the income for enumerated items, godly and philanthropic, creating but a partial debutter ? This is the key question calling for adjudication but an alternative but interlaced issue also arises. Assuming that a total debutter had been created, did the will contain directions of expenditure which siphoned off the income, as it accrued, for specified objects and entitles in such manner that by such overriding diversion at the source, such income did not get into the hands of Lord Jagannath qua His income but reached Him merely as collector of those receipts to be disbursed for meeting those paramount claims and charged for those destined uses ? Or could it be true meaning of the clauses that the whole income was to be derived by the deity but later to be applied by the human agencies representing Him for fulfilling objects, secular and sacred ?

A skeletal picture of the complex of provisions of the will has to be projected now for a better understanding of the pros and cons of the controversy. The will opens with the words : 'I hereby dedicate and make debutter my Thakoorbaree' and mentions a mansion which is to be the abode of his God. Income-tax hereby give, dedicate and make debutter all the jewels... heretofore used, for the worship of the Thakoors...'is another recital whereby valuables are dedicated. These are for direct use and both the Lord's mansion an the Lord's adornments yield great spiritual bliss but no secular income. Prima facie, the language is unmistakable and a full dedication and, argues Shri Sharma for the revenue, the creation of absolute debutter is an unchallengeable inference. Equally indisputable is the character of the last set of bequests to his sons (save one who has been disinherited) and widows of deceased sons and these are admittedly out of the area of dispute before us. But in between lies the estate (including securities) which yields high income and is disposes of in terms which lend themselves to contrary constructions, marginal obscurity and conceptual mix-up of ideas borrowed from English and Hindu law. 'I do hereby give, dedicate and make debutter in the name and for the worship of my Thakoor Sree Sree Jagannath Jee the following properties' - so run the words which are followed by a list of properties and a string of directions addressed to 'shebaits and trustees' of 'shebaits or trustees' or these who indifferently and indiscriminately mentioned singly. He even directed a board of trustees to be constituted in the event of male heirs failing, to take over shebaitship and execution of the trusts - and here and there referred to trusts under the deed. Nor were all the incomes to be devoted to pooja. His cultivated and compassionate mined had many kindly concern and finer pursuits.

The enlightened donor appears to have had an aristocratic and aesthetic flair for promoting the joy of life and a philanthropic passion to share it, even posthumously, with the public at large. His charitable disposition seems to have overpowered his love of castemen and his kindness for living creatures claimed a share of his generosity. These noble an multiple instincts persuaded him to make an art collection which could be reckoned as among the best an individual could be proud of anywhere in the world and these paintings and sculptures, he directed, shall be kept open for public delight, free of charge. He maintained a glorious garden which he wished should be kept in fine trim and be hospitable for any member of the public who liked to relax in beautiful surrounds. His compassionate soul had, in lofty sentiment of fellow-felling, collected birds and non-carnivorous animals. But, after him, the aviary and menagerie were to be taken care of and lovers of birds and animals were, according to his testamentary direction, permitted to seek retreat and pleasure among these natural environs. Of course, he rewarded his sons and widows sumptuously, the layout on the rituals of worship consuming but a portion of the total income.

At this stage, the litigative journey may be sketched to indicate how the dispute originated, developed and gained access to this court. The story of this tax entanglement began nearly two decades ago with the Income-tax Officer issuing notices and the assessee-deity responding with "nil" returns under section 22(2) of the Indian Income-tax Act, 1922, for the assessment years 1856-57 and 1957-58. A portion, however, was by legitimate concession of the income-tax department, carved out of the total income as non-taxable. According to the High Court - See [1971] 81 ITR 353, 357 (Cal) : "When the proceedings for the assessment year 1955-56 were pending before the Income-tax Officer, the assessee had filed an application under article 226 of the Constitution of India and had obtained an interim stay against the said proceedings. It appears that on the October 9, 1961, in terms of the settlement arrived at between the income-tax department and the assessee the interim stay of proceedings was vacated. It was recorded in that said order that part of the income of the assessee which would be proved before the income-tax authorities to have been applied in connection with, (a) feeding of the poor, (b) subscription to other charities enduring for the benefit of the public would be exempted under section 4(3)(i) of the Indian Income-tax Act, 1922."

We regard this stand of the revenue as correct in the light of the provisions of section 4(3)(i) and hold, in limine, that whatever the outcome of the contest, the amounts spent on poor feeding and other public charitable purposes are outside the reach of the tax net and are totally exempt. We may, in fairness, state here that counsel for the revenue, Shri Sharma, rightly agreed that the correct legal position, on a sound understanding of section 4(3)(i) of the Act, was that these charitable expenditures were totally deductible from the computation for fixing the tax.

Let us continue the later developments. For assessment for the year 1956-57, the Income-tax Officer was of the opinion, on the construction of the said will, that besides directions for spending amounts on charitable objects, the will had also provided for payment of certain fixed allowances to the acting shebaits as well as the widows of the deceased shebaits, maintenance of horse-drawn carriages and motor cars for the use of the shebaits, medical aids to the shebaits, and the members of their families, expenses on account of sraddha ceremony of the ancestors of the shebaits and other private charities. On behalf of the assessee it was claimed before the Income- tax Officer that the remuneration of the trustees and the allowances to the widows of the deceased trustees as provided in the will created a charge on the income of the trust estate and should, therefore, be treated as diversion of the income of the trust before it accrued in the hands of the trustees. The Income-tax Officer rejected that contention. He held that reading the will as a whole it was clear that the remuneration to the shebaits and the allowances to the widows were merely applications of the trust income and as such not deductible. According to the Income-tax Officer, under the will, the shebaits and trustees were to collect the income of the whole debutter property in the first instances and after paying the Government revenues and taxes and rates and other outgoings, perform the puja and the other ceremonies for the worship of the family deity and, therefore, spend amounts on charitable and public purposes and, lastly, to pay the remuneration, allowances and private donations. The Income-tax Officer, therefore, determined the income of the trust estate under section 9 and 12 of the Indian Income-tax Act, 1922, and computed income from property at Rs. 1,94,377 and income from other sources at Rs. 97,248 making a total of Rs. 2,91,625. From the above he deducted the amounts spent on charitable objects such as feeding of the poor, maintenance of art gallery and menagerie for birds and non-carnivorous animals. A sum of Rs. 1,32,023 was subjected to tax for the assesment year 1956-57. The Income-tax Officer followed the same principal for the assessment year 1957-58 and determined the assessable income at Rs. 1,06,067.

The assessee preferred appeals before the Appellate Assistant Commissioner, who passed a consolidated order on November 25, 1963, dismissing the assessee's appeals on all the grounds.

On appeal to the Tribunal, a full legal debate followed and, while the revenue won substantially, some items more were held exempt on the holding that the direction contained in the will for the expenditure on the performance of Sraddha and other ceremonies for the spiritual benefit of the testator and his ancestors must also be held to be obligations created by the testator which the trustees or the shebaits were obliged to discharge before applying the income for the benefit of the deity. Both parties moved the Tribunal for referring certain questions of law under section 66(1) and the sequel was a reference of two questions at the instance of each. The four questions may be set out as the staring point of the discussio :

> "(1) Whether, on a proper construction of the will of the late Raja Rajendra Mullick dated February 21, 1887, the Tribunal was right in rejecting the assessee's claim that the only incomes which could be subjected to Income-tax in the hands of the deity, Sri Sri Jagannath Jew, are the beneficial interests of the said deity under the terms of the will as represented by the expenses incurred by the shebaits for the daily seva puja of the deity and the performance of the various religious ceremonies connected with the said deity as mentioned in the will ?
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> (2) If the answer to the above question be in the positive, whether on the facts and in the circumstances of the case and on a proper interpretation of the terms of the will of the late Raja Rajendra Mullick Bahadur, the Tribunal was right in holding that the expenses incurred for payment of remuneration to the shebaits, and the monthly allowances paid to the widows of the deceased shebaits, as also the expenditure incurred for maintaining horses, carriages or motor cars for the use of shebaits concerned and the annual value of such part of the debutter property as is being used by the shebaits and their families for the purpose of their residence, all in terms of the aforesaid will, could be included in the total income of the assessee in this case ?" (Questions referred by assessee).
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> "(3) Whether, on the facts and in the circumstances of the case and on a proper construction of the will of Raja Rajendra Mullick executed on the February 21, 1887, the Tribunal was right in holding that the surplus of the income of the estate after defraying the expenses mentioned in the said will was held in trust for charitable purposes and the thus exempt from taxation under section 4(3)(i) of the Indian Income-tax Act, 1922 ?
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> (4) Whether, on the facts and in the circumstances of the case and on a proper construction of the aforesaid will, the Tribunal was right in holding that the amounts spent for performing sraddha and other ceremonies for the spiritual benefit of the testator as well as subscriptions and donations to charitable societies and for charitable purposes were diverted by an overriding title and was accordingly to the excluded from the total income of the Deity ?" (Question referred by the Commissioner of Income-tax)

The High Court, on a meticulous consideration of the entire will, decided against the revenue on the spinal issue and took the view that - See [1971] 81 ITR 353, 373, 374 (Cal :

> "Reading the will as a whole we are of the opinion that the entire beneficial interest in the properties did not vest in the assessee- deity. The assessee deity was not the owner of the properties. Therefore, the only income which could be subjected to

> income-tax in the hands of the assessee would the beneficial interest of the said deity under the will, which would be expenses incurred for the seva puja of the deity and for the various religious ceremonies connected with the said deity and the value of the residence of the deity in the temple."

The back of the State's contention was thus broken but, even though vanquished, by special leave it sought to agitate in appeal the case that the testator had created an absolute debutter of the whole estate, and not a trust with estate vested in the trustees, that the directions given to the "shebaits and trustees" were mere mandates for application of the income in the hands of the deity and not overriding diversion at the source and so all the receipts, save what had been excluded by the officer, were exigible to tax.

Although it may not be strictly pertinent as a circumstances to spell out the intention of the testator, it may be of value as background material to have a sample break-up of the figures of expenditure laid out in fact in one of the assessment years. We give the actuals for 1956-57 :

#Rs.(1) Expenses incurred for the poojas specifiedunder the will 4,637(2) The money laid out on feeding the poor 78,295(3) The cost of maintaining the art gallery 36,963(4) Upkeep of the aviary and menagerie 13,263(5) Cost of keeping the garden trim 2,979(6) Other miscellaneous charges 4,014(7) Expenses laid out on the shebaits andtrustees, their residence and maintenanceof the horse-drawn carriages, etc., 66,254##

It is fair to comment that, even making allowance for annual variations, price fluctuations and change in circumstances, the pujas consume but a small fraction, the public charitable purposes bulk prominently in the budgeted expenditure and that the sums spent on the "shebaits and trustees" are liberal enough to exceed prudent reward for services. To set the record straight, it must be stated that a preponderant part of the income was spent on general public charitable causes like poor feeding, art gallery, aviary, menagerie and keeping a garden. Together with the cost of the rituals the budget was dominantly religio-charitable. These facts have no bearing on the construction of the will but invests the perspective with a touch of realism.

We may now tackle the crucial problem in the case, the de-coding of the will to discover the repository of the gift. Did the testator create an absolute or partial debutter ? Or was there no dedication to the idol but a vesting of the legal estate in the trustees (in the sense of the English law) with fiduciary obligations to expend for specific purposes, Shree Jagannathjee ranking as one amoung the recipients of his benefactions ? The use of words like "trusts", "shebaits and trustees", has lent muscle to this logomachic exercise but we have to push aside the English hand to reach at the Indian heart.

The principles governing the situation are those which rulings of courts, imbibing the Indian ethos, appreciating the Hindu sacred sentiment and applying the law of religious and charitable trusts gathered from ancient texts, have crystallised into an informal code. The passage of decades after the enactment of the Constitution has not succeeded in persuading Parliament into legislative action for making a secular code except to some limited extent governing the subject of Indian charitable trusts. And this unnoticed parliamentary procrastination has compelled the courts to dive into hoary books and vintage case-law to ascertain the current law. We will, therefore, navigate, with this ancient mariner's compass, although we have the advantage of an authoritative work in B. K. Mukherjea, on Hindu Law Religious and charitable Trusts, relied on by counsel on both sides.

Two paramount background consideration of assistance to decipher the intention of the testator, which have appealed to us, may be mentioned first. We are construing the will of a pious Hindu aristocrat whose faith in ritual performances was more than matched by his ecumenical perspective, whose anxiety for spiritual merit for himself and his manes was balanced by a universal love and compassion. Secondly, the sacred sentiment writ large in the will is his total devotion and surrender to the family deity, Sree Jagannathjee.

It is easy to see that, in formal terms, the author makes a dedication to Sree Jagannathjee and calls the properties debutter. But, Shri

trust and counters it by reliance on expressions like "shebaits and trustees" and "trusts" and urges that there are no clear words of vesting so far as the second category of properties is concerned. It is trite but true that while the label "debutter" may not clinch the legal character, there is much in a name, fragrant with profound sentiment and expressive of inner dedication. It looks like doing violence to the heart of the will if we side-step Sree Jagannathjee as the divine dedicate, downgrade him to the status of but one of the beneficiaries and, by judicial construction, transmit the sanctified estate into human hands as the legal owners to distribute the income, one of the several objects being doing pujas prescribed.

The will, right in the forefront, declare : "I hereby dedicate and make debutter", "I do hereby dedicate and make debutter in the name and for the worship my Thakoor Sree Sree Jagannathjee the following properties.....". "I hereby give, dedicate and make debutter all the jewels to the Thakoor Sree Sree Jagannathjee". These solemn and emphatic dedicative expressions cannot be wasted words used by an English Solicitor but implementatory of the intention of the donor whose inmost spiritual commitment, gathered from the many clauses, appears to be towards his family Thakoor. Of course, if there are the clearest clauses striking a contrary note and creating but a particle debutter, this deductive diction must bow down. The law is set down thus by B. K. Mukherjea :

> "The fact that property is ordinarily described as debutter is certainly a piece of evidence in favour of dedication, but not conclusive. In Binod Behari v. Manmatha [1915] 21 CLJ 42 (Cal), Cox J. observed as follow :
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> "The fact that the property is called debutter is a doubtless evidence in the plaintiff's favour but it does not relieve than of the whole burden of proving that the land was dedicated and is inalienable."

Though inconclusive, it carries weight in the light of what we may call the mission of the disposition which is inspired by devotion to "my Thakoor" and animated by a general religious fulfillment. It must be remembered that the donor was not tied down by bigotry to performance of pujas, important though they were. A more cosmic and liberal view of Hinduism informed his soul and also in his declaration of dedication to Sree Jagannathjee he addressed to the managers many directions of a broadly religious and charitable character. His injunction to fell the poor was Narayana seva, for worship of God through service of man in a and where the divinity in daridra Narayana is conceptually common place and, while it is overtly secular, its motive springs from spiritual sources. It is religion to love the poor. Likewise, his insistence on the aviary and the menagerie and throw open both to the people to see and delight is not a mundane mania but has deeper religious roots. Hinduism worships all creatio :

> (Peace be unto all bipeds and even so to all quadrupeds). Indeed, the love of sub-

human brethren is high religion.

For

#"He prayeth best, who loveth bestAll things both great and smallFor the dear God who loveth us.He made and loveth all."(Coleridge, in Ancient Mariner)##

Form the Buddha and Mahavira to St. Francis of Assissi and Gandhiji, compassion for living creatures is a profound religious motivation. The sublime mind of Mullick was obviously in religious sympathy with fellowbeings of the lower order when he showed this tenderness to birds and beasts and started it with the public. The art gallery too had link with religion in its wider connotation although it is plainer to regard it is a gesture of aesthetics and charitable disposition. The art gallery too had link with religion in its wider connotation although it is plainer to regard it as a gesture of aesthetics and charitable disposition. God is Truth. Truth is beauty, beauty Truth. A thing of beauty is a joy for ever. In fact, for a highly elevated Indian mind, this conceptual nexus in not far-fetched. The garden and the love of flowers strike a psychic chord at once beautiful and religiously mystical, as any reader of Wordsworth or other great poet in English of Sanskrit will agree. The point is that the multiform dispositions had been united by a spiritual thirst and, if read in their integrality, could be designated religious-cum-charitable. In sum, the primary intendment was to dedicate as debutter and to direct fulfillment of uplifting religious and para-religious purposes, the focus being on worship of Sree Jagannathjee and the fall-out some subsidiary, yet significant, charitable items. The finer note struck by the felt necessities of his soul was divinised an humanised, the central object being Sree Jagannathjee, the Lord of the Universe.

Of course Sri Sen submits that verbalism cannot take us far and the description of debutter cannot be decisive because the magnitude of the expenses on the various items, apart from other telling clauses which we will presently advert to, was indicative not of a dedication to the idol but of a general charitable bunch of dispositions to be carried out through the agency of trusteeship in the sense of the English law. For instance, he argues that feeding the poor, maintenance of the art gallery, menagerie, aviary and gardens and fulfillment of the other charities have little to do with the idol qua idol. Moreover, making a substantial margin for the remuneration of the shebaiti, there is some clear excess in favour of donor's family members in the amounts to be paid or spent on behalf of the shebaits- cum-trustees. These are strongly suggestive of a non-debutter character, especially because the cost of the pujas makes but a small bite on the total income. He reinforces the submission by many other points which may be mentioned at this stage. He states that the donor, if he meant a straight-forward case of debutter, would have confined himself to the expression "shebaits" but there was a sedulous combination of "shebaits" and/or "trustees" and there was also reference to trusts in some places. Provision for the heirs, for the residence of the shebaitee's families, the horse carriages and the like also do not smack of debutter. A specification of the minimum age of 18 of become shebaits and trustees also savours of trusteeship rather than shebaitship. Appointment of a board of trustees on shebaits failing in succession throws clear light on the creation of trust in the English sense rather than a debutter in the Hindu sense. Again, shebaitship is property and if what is created is only shebaitship, not trusteeship, how can the testator exclude females, insist on 18 years of age and prescribe a course of succession not quite consistent with Hindu law ? Does this not also point towards trusteeship and whey from debutter ? In any case, a fair conclusion, according to Sri Sen, would be to regard the appointees as shebaits for purposes of puja and management of the shrine and as trustees for the other substantial purposes, which means that there is a partial debutter and the vesting of the estate in the trustees.

There is other evidence to be gleaned from the tenor of the will to which or attention has been drawn by Sri Sen with a view to emphasize that publics charities of a secular character, construction of buildings for residence, for feeling the poor, repairs and maintenance of a miscellaneous sort plus detailed directions towards all shebaits and trustees are telling against absolute debutter. Since the expenses for the pujas cover only a small part of the total income, a correct reading of the will may be to hold that the corpus vests in the trustees, subject to an interest being created in the deity to the extent of the share of the income reasonably necessary for the puja and residence of the Lord. We see the force in these submissions and shall deal with them presently. Before that we may state the correct legal approach as set out by Mukherjea in his Tagore Law Lecture :

> "Even when a deed of dedication is not fictitious or benami the provisions of the deed might show that the benefit intended for the deity was very small or of a nominal character. If the gift to the deity is wholly illusory there is no debutter in the eye of law, but there are cases where a question arises on the construction of the document itself, whether the endowment created was only a partial one meaning thereby that the dedicated property did not actually vest in the idol, but the latter enjoyed a charge upon the secular property of the founder, given to his heir or other relations, for the expenses of its worship. I will discuss this matter separately under the second head. I may only state here that where there is an out and out dedication to and idol, the reservation of a moderate portion of the income of the endowed estate for the remuneration of the shebait would not invalidate the endowment either as a whole or to the extent of the income so served. In Jadu Nath Singh v. Thakur Sita Ramji [1917] LR 44 IA 187; 42 IC 225, 227 (PC) there was a dedication of the entire property of the founder to the idol, and the direction given was that half of the income was to be applied for the worship of the idol and repairs of the temple, and the other half was to go for the upkeep of the managers. Their Lordships of the Judicial Committee in holding the gift as a valid debutter observed as follow :
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> 'The deed ought to be read just as it appears, and there is no reason, why it should not be so construed as meaning simply what the language says, a gift for the maintenance of the idol and the temple, under which the idol is to take the property, and, for the rest, the family are to be the administrators and managers, and to be remunerated with half the income of the property. If the income of the property had been large, a question might have been raised, in the circumstances, as throwing some doubt upon the integrity of the settler's intention, but, as the entire income is only 800 rupees a year, it is obvious that the payment to these ladies is of the most trifling kind and certainly not an amount which one would expect in a case of this kind.'

Following this decision it was held by the Calcutta High Court in Chandi Charan Das v. Dulal Paik [1926] 30 CWN 930; AIR 1926 CAL 1083 that a provision for remuneration of the Shebaits with half of the income of the debutter property (which proved to be a small sum) as well as for their residence in the thakurbari were quite compatible with an absolute endowment. You should bear in mind in this cnnection, that when a property is absolutely dedicated to a deity, it is not necessary that every farthing of the income should be spent for the worship of the poor. Sadavart or entertainment of pilgrims an guests is often found to be an adjunct of a public debutter. In the case of Monohar Mukherjee v. Bhupendra Nath Mukerjee [1933] 37 CWN 29; AIR 1932 Cal 791 [FB] there was a provision in the deed of dedication that the surplus income of the endowment should be spent upon maintenance of childless widow of the family and construction of roads and excavation of the tanks for public use, and these directions, it was held, did not make the dedication incomplete

(pages 129-130)."

The demarcating line between absolute and partial debutter is drawn by the author thu :

> "Where the dedication made by a settler in favour of an idol covers the entire beneficial which he had in the property, the debutter is an absolute or complete debutter. Where, however, some proprietary or pecuniary right or interest in the property is either undisposed or is reserved for the settlor's family or relations, a case of partial dedication arises. In a partial dedication the deity does not become the owner of the dedicated property but is in the position of a charge holder in respect of the same. A charge is created on the property and there is an obligation on the holder to apply a portion of the income for the religious purposes indicated by the settlor. The property does not become extra-commercium like debutter property, strictly speaking so called, but is alienable subject to the charge and descends according to the ordinary rules of inheritance. It can be attached and sold in execution of a decree against the holder. Whoever gets the property, however, takes it burdened with the charge or religious trusts. In Dasaratharami Reddi v. Subba Rao [1957] SCR 1122 (SC) it was observed by the Supreme Court that the question whether a dedication was complete or partial must depend on whether the settlor intended that his title should be completely extinguished and transferred to the trust, that in ascertaining that intention regard must be had to the terms of the document as a whole and that the use of the word 'trust', though of some help in determining such intention, was not decisive of the matter.
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> It sometimes happens that the settlor merely provides for the performance of certain religious services or charities from out of the income of properties specified, and the question arises whether in such cases the specified properties themselves form the subject-matter of dedication. Where the entire income from the properties or a substantial portion thereof is directed to be applied, or is required for such purposes, then the property itself must be held to have been absolutely dedicated for those purposes. Where, however, after applying the income for the purposes specified, there still remains a substantial portion thereof undisposed of, then the dedication must be held to be partial and the properties will continue to be held in private ownership, subject to a charge in favour of the charities mentioned. "(pages 134-135)."

Mr. Sen cited several decisions which are more appropriate to a contest between shebaits and heirs and do not directly bear on rival considerations decisive of the absolute or partial nature of a debutter and so we do not burden this judgment with those many citations but may refer to a few.

In Har Narayan v. Surja Kunwari [1921] LR 48 IA 143; AIR 1921 PC 20, the Judicial Committee was dealing with the case where a dispute was between the heirs and the shebaits and it is held tha :

> "..... although a will provides that the property of the testator 'shall be considered to be the property of' a certain idol, the further provisions such as that the residue after defraying the expenses of the temples 'shall be used by our legal heirs to meet their own expenses', and the circumstances, such as that in the ceremonies to be performed were fixed by the will and would absorb only a small proportion of the total income, may indicate that the intention was that the heirs should take the property subject to a

> charge for the performance of the religious purposes named."

Granting the creation of a debutter, the telling tests to decide as between an absolute and partial debutter cannot necessarily be gathered from this ruling. On the other hand, this very ruling emphasized that a substantial part of the income was to go to the legal heirs to meet their own expenses and that circumstances deflected the decision. Moreover, Lord Shaw of Dunfermline there observed([1921] LR 48 IA 143, 149; AIR 1921 PC 20, 22 :

> "The case (Jadu Nath Singh [1917] LR 44 IA 187) merely illustrates the inexpediency of laying down a fixed and general rule applicable to the construction of settlements varying in terms and applying to estates varying in situation."

The observation of this court in State of Bihar v. Charusila Dasi [1959] Supp. 2 SCR 601 (SC) - a case dealing with the question of legislative competency on the constitutionality of the Bihar Hindu Religious Trusts Act - seems to suggest that the establishment of a hospital for Hindu females and a charitable dispensary for patients of any religion or creed were consistent with the creation of a religious and charitable trust.

The crux of the matter, agitated before us, is the determination of the true intention of the testator and this has to be gathered from the name used, the recitals made and the surrounding circumstances. From a bestowal of reflection on the subject and appraisal in the light of the then conditions, sentiments and motivations of the author, we are inclined to the view that Raja Mullick, the maker of the will, dedicated as debutter to his Maker and Thakoor the entire estate, saddling the human agents or shebaits with duty to apply the income for godly and near-godly uses and for reward of the shebaits and for their happy living. Of course, he had horses and carriages and other items to make life enjoyable. Naturally, his behest covered the obligation to keep these costly things in good condition and regular use. The impact on the mind, if one reads the provisions reclining in a chair the lapsing into the mood of the maker of the will, is that he gave all he had to his Thakoor, as he unmincingly said, and thus dedicated to create an absolute debutter. The various directions are mostly either religious or philanthropic but not so remote as to be incongruous with dedication to an idol or creation of a debutter. The quantum of expenditure on the various items is not so decisive of the character of the debutter as absolute or partial as the accent on and subjective importance of the purposes, in the setting of the totality of commands and cherishments. His soulful wished were for the religious and charitable objects and the other directions were secondary in his estimate. Not counting numbers nor computing expenses, marginally relevant though they are, but feeling the pulse of his passion to do godly good and promote public delight, that belights the spirit of his testament. Essentially, Raja Rajendra Mullick gave away his estate to his Thakoor and created an absolute debutter. He obligated the managers of the debutter with responsibility to discharge certain secular but secondary behests including benefit to family members, their residence and transportation.

How then do we reconcile such a conclusion with the many points forcefully urged Sri. B. Sen and adverted to earlier ? We think that the expressions "shebaits and trustees", "shebaits or trustees", "shebaits" "trustees" and "trusts" were indiscriminately used, indifferent to sharp legal semantics and uncertain of the precise import of these English legal terms in the Indian context. More, an English solicitor's familiar legal diction superimposed on an unfamiliar Indian debutter, rather than an exercise in ambiguity or deliberate dubiety, explains the odd expressions in the will. The author merely intended to dedicate to Sree Jagannathji and manage through shebaits. Of course, the reference to the board of trustees, the majority vote the like, strike discordant note but the

preponderant intent is what we have held it is.

The magnitude of the expenditure on the items, secular and sacred, may vaguely affect the conclusion but cannot conclusively decide the issue. The religious uses related to Sree Jagannathji, the Lord of the Universe, cannot be narrowly restricted to rituals but must be spread out to embrace universal good, especially when we read the mind of a Hindu highly evolved and committed to a religion whose sweep is vasudhaiva kutumbakam (All creation is His family). The blurred lines between the spiritual and the secular, in the context of this case, do not militate against our construction.

We are not unmindful of the stress Shri B. Sen placed on the passage in B. K. Mukherjea which we may extrac :

> "But it happens in some cases that the property dedicated is very large, and the religious ceremonies which are expressly prescribed by the founder cannot and do not exhaust the entire income. In such cases some portion of the beneficial interest may be construed as indisposed of and cannot but vest as secular property in the heirs of the founder. There are cases against where although the document purposes, on the fact of it, to be an out and out dedication of the entire property to the deity, yet a scrutiny of the actual provisions reveals the fact that the donor did not intend to give the entire interest to the deity, but reserved some portion of the property or its profits for the benefit of his family relations. In all such cases the debutter is partial and incomplete and the dedicated property does not vest in the deity as a juridical person. It remains with the grantees or secular heirs of the founder subject to a trust of charge for the religious uses. The earliest pronouncement of the law on the subject is to be found in the decision of the Judicial Committee in Sonatun Bysack v. Smt. Juggutsoondree Dossee [1859] 8 MIA 66 (PC), which was followed and applied in the subsequent case of Ashutosh Dutt v. Doorga Churn Chatterjee [1879] LR 6 IA 182; ILR 5 Cal 438 (PC)."

Sonatun Bysack [1859] 8 MIA 66, 85 (PC), referred to by the learned author, dealt with a case where a Hindu, by his will, gave his whole estate to the family deity he directed that the properties should never be divided but that the sons and grandsons is succession would enjoy "the surplus proceeds only". There were other kindred directions. The Judicial Committee held that the bequest to the idol was not an absolute gif :

> "'A reference to the second, third and fifth clauses of the will' (so runs the Judgment) 'leads us to the conclusion that although the will purports to begin with an absolute gift in favour of the idol, it is plain that the testator contemplated that there was to be some distribution of the property according as events might turn out; and that he did not intend to give this property absolutely to the idol seems to their Lordships to be clear from the directions which are contained in the third clause, that after the expenses of the idol are paid, the surplus shall be accumulated; and still more so from the fifth clause, by which the testator a provided or whatever surplus should remain out of the interest of the property, the expenses of the idol being first deducted. It is plain, that the testator, looking at the expenses of the idol, was not contemplating ask absolute and entire gift in favour of the idol'. On a construction of the entire will it was held that there was as gift to the favour sons of the testator and their off-spring in the make line as a point family, and the four sons were entitled to the surplus of the

> property after providing for the performance in the will for maintenance." (pages 136-137, Mukherjea).
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> The cardinal point to notice is what Har Narayan [1921] LR 48 IA 143; AIR 1921 PC 20 emphasize :
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> "The question whether the idol itself shall be considered beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will." (page 137, Mukherjea).

If, on a consideration of the totality of terms, on sifting the more essential from the less essential purposes, on sounding the depth of the donor's wished to find whether this family or his deity were the primary beneficiaries and no taking note of the language used, if the vesting is in the idol an absolute debutter can be spelt out. So considered, if the grant is to the heirs with a charge on the income of the performance of pujas, the opposite inference is inevitable. Before us, their is no dispute between the heirs and the idol. The point mooted is about the creation of an English trust, an unconventional legal step where the dedication is to a deity. On a full study of the will as a whole, we think that this benignant Bengalee's testament, draped though in Victorian verbal haberdashery, had, no legal auscultation, the Indian heartbeats of Hindu religious culture, and so scanned, his will intended vesting the properties in absolute debutter. The idol was, therefore, the legal owner of the whole and liable to be assessed as such.

The respondent, however, has a second string to his bow. Assuming and absolute debutter, there is still many a slip between the lip and the cup, between the income and exigibility to tax. For, while, odinarily, income accuses in the hands of the owner of property and is taxable as such, it is quite on the cards that in view of the special provisions in the deed of grant certain portions of the income may be tied up for other purposes or persons and may not reach the grantee as his income. By an overridden charge, sums of money may be devoured at the very source to other destinations and only the balance of income may legally be received by the done as his income. The argument of the respondent is that even if the estate vested in the deity, an assessable entire in our secular system as held in Jogendra Nath Naskar v. Commissioner of Income-tax [1969] 74 ITR 33 (SC) still all the amounts meant meant to be spent on the shebaits and the members of the family, on the upkeep of horses and carriages and repair of buildings, etc., were charged on the income and by paramount provisions, directed to these uses. These sums did not and could not come into the hands of he deity as its income and could not be taxed as such. If the "shebaits and trustees" collected the income by was of rents and interest, to the extent of these other disbursements they received the amount merely as collectors of rent, etc., not as receivers of income. Such amounts were free from income-tax in the hands of the idol.

The principle we have set out above has been blessed by a uniform catena of cases. The leading ruling on the subject is by the Judicial Committee in Raja Bejoy Singh Dudhuria v. Commissioner of Income-tax [1933] 1 ITR 135, 138, 139 (PC). Lord Macmillan there observed as follow :

> "When the Act by section 3 subjects to charge 'all' income of an individual it is what reaches the individual as income which it is intended to charge. In the present case the decree of the court by charging the appellant's whole resources with a specific

> payment to his step-mother has to that extent diverted his income from his and has directed it to his step-mother; to that what he receives for her is not his income. It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands."

A case in contract is P C Mullick v. Commissioner of Income-tax [1938] 6 ITR 206, 207, 210 (PC). Ther :

> "The testator died in October, 1931. By this will he appointed the appellants (and another) his executors. He directed them to pay his debts out of the income of his property, and to pay Rs. 10,000 out of the income of his property on the occasion of his "Addya Shradh" for expenses in connection therewith to the person entitled to perform the Shradh. He also directed his executors to pay out of the income of his property the costs of taking out probate of his will. After confront out of income benefits on the second wife and his daughter and (out of the estate) benefits on the sons, if any, of his daughter, and after providing of the payment out of income 'gradually' of diverse sums to some persons, and certain annuities to others, he bequeathed all his remaining property (in the events which happened) to a son taken in adoption after his death by his wife, viz., one Ajit Kumar Ghosh, who is still a minor.....
>
> The payment of the Shradh expenses and the costs of probate were payments made out of the income of the estate coming to the hands of the appellants as executors, and in pursuance of an obligation imposed by their testator. It is not a case like the case of Raja Bejoy Singh Dudhuria v. Commissioner of Income-tax [1933] 1 ITR 135 (PC) in which a portion of income was by an overdoing title diverted from the person who would otherwise have received it. It is simply a case in which the executors having received the whole income of the estate apply a portion in a particular way pursuant to the directions of their testator, in whose shoes they stand."

In Commissioner of Income-tax v. Sitaldas Tirathdas [1961] 41 ITR 367, 374, 375 (SC), this court referred to many reported decisions some of which we have just mentioned. Mr. Justice Hidayatullah, speaking for the court, summed up the rule thu :

> "In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his some. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence in law decided ones not follow. It is the first kind of payment which can truly be excused an not the second. The second payments is merely an obligation to pay another a portion of one's income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who, even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and

> children of the assessee who continued to be members of the family received a protean of the income of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case on which by and overriding charge the assessee became only a collector of another's income."

The High Court, in a laconic paragraph, dismissed this contention but Shri Sen submitted that there was merit in it and had to be accepted. We agree with the High Court because the terms in which the directions a couched to not divert the income at the source but merely command the shebaits to apply the income received from the debutter properties for specified purposes. We may quote to illustrat :

> "I direct that the shebaits and trustees shall out of the debutter funds maintain and keep of sufficient number of carriages and horses for their use and comfort and that of their families and after providing for the purposes aforesaid out of the debutter income I direct the shebaits and trustees to pay to each of he shebaits for the time being who shall actually take part in the performance of the duties of the shebaits and the execution of the trusts of this fund as and by way of remuneration for their services the sum of rupees five hundred a month....."
>
> "I direct that the widows of may three deceased sons, Greendro, Soorendro and Jogendra, who assist in the work of preparing articles of offerings to the Thakoors and for the fain and distribution to the poor and all the widows of shebaits hereby appointed and future shebaits who shall in like manner assist in the said work shall be fed and clothed and maintained and shall receive a remuneration of the sum of rupees fifty each a month from the income of the debutter fund....."

So the shebaits first get the income and then apply it in conformity with the directives given in the will. The rulings relied on by both sides do not shake the position we have taken and may not merit discussion.

These conclusions we have drawn mean that the appeals have to be allowed and the reference answered in favour of the revenue and against the assessee. Accordingly, we answer questions referred at the request of the revenue, affirmatively. While answering the above question we may state that all income earmarked for religious and charitable purposes conforming to section 4(3) (i) read with the Explanation to section 4(3) of the 1922 Act shall not be included in the total income. It is also made clear that who fever income was agreed to the excluded in terms of the concession made by the revenue in the High Court shall remain excluded.

The fluctuating fortunes of this litigations have been occasioned by the discordant notes struck by the different clause of will and the inevitable element of confusion injected by the religious, charitable and secular wished of the Hindu testator being translated into formal, legal terms by an English solicitor in the latter half of the last century. We, therefore, direct that the parties do dear their own costs throughout.

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