CALCUTTA HIGH COURT

Bhupati Nath Smrititirtha

Vs

Ram Lal Maitra

(Lawrence H Jenkins, C.J. Stephen and Mookerjee, JJ. Coxe and Chatterjee, JJ.)

28.08.1909

JUDGMENT

Lawrence H. Jenkins, C.J.

1. The questions referred for our determination are:

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply-to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?

(ii) Whether the cases of Upendra Lal Boral v. Hem Chundra Boral (1897) I.L.R. 25 Calc. 405, Rojomoyee Dassee v. Troylukho Mohiney Basset (1901) I.L.R. 29 Calc. 200 and Nogendra-Nandini Dassi v. Benoy Krishna Deb (1902) I.L.R. 30 Calc. 521 have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

2. The disposition which has led to this reference is contained in the will of Umesh Chandra Lahiri, and is in these terms:

(Ka) All my properties shall be placed in the hands of Babu Ram Lal Maitra, son of late Ram Chandra Maitra of Haripur, and the grandsons of my father-in-law, Sriman Kali Prasanna Maitra, Sriman Chandra Maitra, Sriman Pratap Chandra Maitra, Sriman Abhay Govinda Maitra, etc., as trustees. They shall according to the provisions made in para. 4 pay to the persons mentioned in that para., their monthly allowances, as fixed by me: and shall defray the expenses for the performance of rites for the spiritual welfare of my mother, full sister and cousin (father's sister's daughter): and shall pay to my gurudev Srijukta Hari Nath Bhattacharya of village Purbasthali in the district of Burdwan Rs. 10 as barshik and to my purohit Srijukta Srish Chandra Chakrabarty of Salkeah Rs. 5 as barshik, and after defraying the expenses for the sheba and worship, during my turn of the ancestral ijmali bighraha, Iswar Gopal Dev Thakur, Saligram Narain and Iswar

Mahadev Thakur, they shall spend the surplus income which may be left in the sheba and worship of Kalee after the name of my mother, i.e., in the name of Iswar Anandamoyee Kalee. The image of the deity shall be established and consecrated at my dwelling-house or at Kashee, and in case any of the persons mentioned in para. 4 dies, then the allowance which I have fixed for him or her, during his or her lifetime, shall, after his or her death, be spent for the worship of the said Iswar Anandamoyee Kalee.

(Kha) If the said. Ram Lal Maitra or any of the grandsons of my father-in-law dies, his heirs shall be appointed in his place, in order of seniority and act according to the provisions made in para, (ka) and hold the estate as trustees. If any of those heirs be a minor, then his lawful guardian shall hold the estate during his minority, and when he will have attained his majority then the estate shall pass into his hands as a trustee.

3. The will then goes on to provide that if for any reason the image of Iswar Kalee Debee is not established and if the income of the testator's properties is not used for her sheba and worship, then the testator's gurudev and his sons, grandsons, etc, in succession should get his Rangpur properties and possess the same in absolute right from generation to generation

4. The facts as found by the referring Bench are briefly these: Umesh Chanda Lahiri died on the 28th June 1890, and in the events which have happened Hem Chandra Lahiri became and now is his heir-at-law. It was not until 1894 either in the month of October or November, that the executors for the first time established and consecrated an image of the Kalee. The image so established was in the first instance of earth, but in 1899 it was replaced by one of stone and a temple was built for its location. The worship has ever since been duly carried on as provided in the will. All we have to consider is whether the fact that the image was established and consecrated for the first time after the testator's death invalidates the provision in the will.

5. It is necessary to observe the precise character of this provision. It does not purport to be a simple gift of property to an image to be consecrated as was to some extent the basis of the appellant's argument before us; but the testator directed all his property to be placed in the hands of persons named by him and subject to certain payments these persons were directed to spend the surplus income which might be left in the sheba and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother. Now this manifestly was a disposition for religious purposes and such dispositions are favoured by Hindu law. Thus it is said by Katyayana: "If a gift be promised by a person whether in health or sickness for a religious purpose, and he dies without making it, his son should be compelled to make it: Of this there is no doubt" (see Mandlik's Hindu law, page 124). Again in the Chapter of the Mitakshara which deals with gifts it is said "whatever has been promised to any body for religious purposes should be given to him without fail": see Mitakshara, Vyavahara Adhyay, Part III, Chapter IV, Section

14 (translated by the late Girish Chandra Tarkalankar). "Property," it is said, "thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it, because Dharma is the then master or owner of such property. Let the owner himself or his representative, O Goddess appropriate to pious purposes the corpus of a property or its income according as it may have been resolved": Mahanirvana Tantra, Section 12, vv. 92-94. Other texts might be cited in support of this view, but it is unnecessary to elaborate this point.

6. And it is not in the texts alone that sanction is to be found for the view that dispositions for religious or charitable purposes are favoured: the leaning of the Courts too is in the same direction. Thus in the Mayor of Lyons v. E.I. Co. (1836) 1 Moo. I.A. 175, it was said "Their Lordships are well aware that in pursuing this course they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds in this country; but in one respect there is sufficient authority, viz., as far as regards a postponement of distributions and the not declaring the gift void on account of any present difficulty in giving it effect: the case of A.-G. v. Bishop of Chester (1785) 1 Bro. Ch. 444; 28 E.R. 1229 furnishes a direct authority for not declaring a legacy void, because it was for an object which could not at the time be accomplished and for retaining the fund in Court until it should be possible to apply it."

7. Now, had the direction in the testator's will simply been that the surplus income should be spent "in the sheba and worship of Kalee," it would, I think, clearly have been good, for the purpose would have been religious and the direction would not have been bad for uncertainty.

8. On the question of uncertainty we may look for assistance to the English decisions Ranchordas Vandravandas v. Parvati Bai (1809) I.L.R. 23 Bom. 725 L.R. 26 I.A. 71 and in England it has been held that gifts "for the worship of God" or "to be employed in the service of my Lord and Master" are good: A.G. v. Pearson (1817) 3 Mer. 353, Powerscourt v. Powerscourt (1824) 1 Mol. 616, and Be Darling [1896] 1 Ch. 50. Then does it invalidate the disposition that the discretion is for the spending of the surplus income in the sheba and worship of the Kalee "after establishing the image of the Kalee after the name of my mother?" I think not: the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected: see Mills v. Farmer (1815) 19 Ves. Jun. 482 and 486. And the decision in Ramtonoo Mullick v. Ram Gopaul Mullick (1829) 1 Knapp. 245 shows that the pious purpose does not fail merely because the testator directs as a means of carrying it into effect, that something should be done after his death: see too Mayor of Lyons v. E.I. Co. (1836) 1 Moo. I.A. 175 and Parmanandas Jivandas v. Vinayek Rao Wassudeo (1878) I.L.R. 7 Bom. 32. But then it is urged that the decision in Upendra Lal Boral v: Hem Chundra Boral (1897) I.L.R. 25 Calc. 405 is

against the validity of the disposition now under consideration. There, apparently, power was given by a testator to his wife to establish the service of an idol and by making a will in favour of it to manage the properties, construct a temple and perform the sheba.

9. In relation to those dispositions it was said, "if there was a gift to the idol it was bad because there was no idol in existence at the time of his death." In the first place, it is this decision than has principally led to the present reference, so that it cannot be regarded as in itself an authority binding on us. Next it is to be noticed that the learned Judges did not consider the aspect of the case which I have been discussing, but treated the disposition with which they were concerned, as though it were a simple gift to a non-existent idol.

10. I have shown that the disposition with which we have to deal in this case is something different from that.

11. But apart from that I think we should not regard the decision in Upendra Lal Boral's case (1897) I.L.R. 25 Calc. 405 as affording any sufficient reason for holding the direction now under consideration as invalid.

12. That decision purports to rest on the authority of Bai Motivahu v. Bai Mamubai (1897) I.L.R. 21 Bom 709 L.R. 24 I.A. 93 where their Lordships after referring to the Tagore case (3) say, "Two rules applicable to the will now under consideration are laid down in the judgment of the Committee": one is "that a person capable of taking under a will must be such a person as would take a gift inter vivos, and therefore must either in fact or in contemplation of law be in existence at the death of the testator," page 70.... And it is said (page 69): "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect from death they are generally so to be regarded as to the property which they can transfer and the person to whom it can be transferred."

13. Now, turning to the Tagore case (1872) 9 B.L.R. 377; L.R.I.A. Sup. Vol. 47, we find that the rule against a gift to a person not in existence and capable of taking from the donor at the time when the gift is to take effect, rests on the principle expressed in Dayabhaga, Chapter 1, ver. 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

14. This passage in the Dayabhaga is used to illustrate the proposition that the "right of one may consistently arise from the act of another," and it is there pointed out in proof of this that in the case of donation the donee's right to the thing arises from the act of the giver; namely, from his relinquishment in favour of the donee who is a sentient person.

15. The Privy Council evidently considered the later of these two cases was governed by the earlier, notwithstanding that to the one the Mitakshara and to the other the Dayabhaga applied,

and that in relation to the question involved in the text cited the contentions of the two schools are not in complete harmony. So it is immaterial that the referring Bench does not state which school of law applies in the circumstances of this case. It is, no doubt, true that an idol has been frequently described as a juridical person and even as owning property [Shibessouree Debia's case (1869) 13 M.I.A. 170], but it has since been explained that it is only in an ideal sense property can be said to belong to an idol: [Prasunno Kumari Debia's case (1875) 14 B.L.R. 450; L.R. 2 I.A. 145, 152 and Jagadindra Nath Roy's case (1904) I.L.R. 32 Calc. 129; L.R. 31 I.A. 209]. Whether this ideal sense means mare than that the dedication to a deity is a compendious expression of the pious purposes for which the dedication is designed, may be a question.

16. In favour of this view we have the doctrine of Medhatithi cited to us in the course of the argument that the primary meaning of property and ownership is not applicable to God, and the train of reasoning that is suggested by the teaching of the Aditya Parana that the Gods cease to reside in images which are mutilated, broken, burnt, and so forth. (Saraswati's Hindu Law of Endowment, page 129).

17. But whatever may be the true view on this obscure and complex question, this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be called a sentient person: [Ramtonoo Mullick's case (1829) 1 Knapp. 245]. It would seem that the rule propounded by Jimutavahana had regard rather to the general proposition for which he was contending, i.e., that the act of the giver is the cause of property, than to its application to particular objects of benevolence. The fiction that an idol is a person capable of holding property must be kept within its proper limits, and were we to accede to the argument that has been advanced before us, we should be allowing fiction to be built on fiction to the hindrance and not for the furtherance of justice.

18. In my opinion, therefore, the reference should be answered by saying that the principle expressed by the phrase "relinquishment in favour of the donee who is a sentient person," does not apply to the direction contained in the testator's will that the persons indicated by him shall spend the surplus income in the sheba and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother, and that if and so far as the cases cited in the reference conflict with this view they have not been correctly decided.

Stephen, J.

19. In this case I have had the advantage of reading the judgments of my colleagues before writing my own agree with their conclusions and concur in their reasons and have in fact nothing to add to what they have said. But by reason of the importance of the case I wish to explain

briefly how the matter presents itself to me, relying on my brothers Mookerjee and Chatterjee for the contents of Hindu texts, which are of prime importance in the decision of the question before us.

20. There is no doubt, in the first place, that dedication by a Hindu of property to a deity is not only lawful, but commendable in a high decree. But the question arises what is the legal effect of such a dedication. A gift consists of two parts, abandonment of rights over the subject-matter of the gift by the donor, and acceptance of those rights by the donee. In a dedication to a deity, the abandonment by the donor takes place according to the ordinary law, but there can be no acceptance by the deity. Why this should be so may be a matter that we need not enquire into; but the fact appears to me to be explained by two self-evident propositions, namely, that it is a contradiction in terms, to talk of the Creator accepting anything, in the legal sense of the word, from a creature, and that it is inconceivable that laws which were made for, if not by, men should be applicable to a deity.

21. But though a dedication to a deity does not constitute a gift, it has a legal effect. The intention of the donor is that the subject-matter of the gift shall be used for doing honour to the deity by worship and for conferring benefit on the worshippers and the ministers of the deity who conduct it. This worship is properly and, I understand, necessarily carried out by having recourse to an image or other physical object; but the image is nothing till inspired by the deity. It is the duty of the Sovereign to see that the purposes of the dedication are carried out.

22. On, and consistently with, this basis of general principles, modern law has arrived at certain conclusions. Of these the most important, for present purposes, is that an idol after it has been duly constituted is a juridical person in an ideal sense. The practical meaning of this somewhat elusive expression is that the ministers of an idol have over the property dedicated to the idol, which is the same thing as the deity

inspiring

the idol, the same rights that they would have if they were trustees for his benefit, or if he was an infant and they managers on his behalf, being at the same time liable to corresponding duties legally enforceable. This seems to me to show that such a dedication as the present is a devise for a religious purpose, such as, on the authorities referred to by my learned brothers, would be recognised as valid by English law, and not considered as bad for uncertainty.

23. The above considerations leave no room in the case of a dedication to a deity for the application of the rule as to the invalidity of gifts other than to sentient being laid down in the, Tagore case (1872) 9 B.L.R. 377, and it follows that the present case and the subsequent cases quoted in the reference before us must be held to have been wrongly decided.

Mookerjee, J.

24. The two questions of law which have been referred for decision by the Full Bench have been formulated in the order of reference in the following terms:

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to bequests to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and make such a bequest void?

(ii) Whether the cases of Upendra Lal Boral v. Hem Chundra Boral (1897) I.L.R. 25 Calc. 405, Rojomoyee Dassee v. Troylukho Mohiney Dassee (1901) I.L.R. 29 Calc. 260 and Nogendra-Nandini Dassi v. Benoy Krishna Deb (1902) I.L.R. 30 Calc. 521 have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

25. The will of the testator, upon the construction of which these questions have arisen for consideration, directed that, in the event of the failure of a son or adopted son to the testator, after provision made for certain bequests, the executors were "to spend the surplus income which may be left, in the sheba and worship of Kalee, after establishing the image of Kalee after the name of my mother, i.e., in the name of Iswar Anandamayee Kalee; the image of the deity shall be established and consecrated at my dwelling-house or at Kasee."

26. The plaintiffs commenced the present action for construction of the will and for a declaration that the trust for the establishment and consecration of the image of the Goddess Kalee and her worship was void, inasmuch as the deity had not been established in the lifetime of the testator.

27. We have been invited by the learned Counsel for the appellants to answer the questions stated in the order of reference in the affirmative. It has been argued upon the authority of the decisions of the Judicial Committee in the cases of Tagore v. Tagore (1872) 9 B.L.R. 377; L.R.I.A. Sup. Vol. 47 and Bai Motivahu v. Bai Mamubai (1897) I.L.R. 21 Bom. 709; L.R. 24 I.A. 93, that a person capable of taking under a will must be such a person as can take a gift inter vivos, and, therefore, must either in fact or in contemplation of law be in existence at the time of death of the testator. It has been assumed that this rule is applicable to a bequest to trustees for the establishment of a Hindu deity, and the inference has been drawn that the manifestation of the deity in the form of an image must be in existence at the time of the death of the testator. As reliance has been placed upon two decisions of the Judicial Committee, which, in so far as they decide any questions of law, are binding upon this Court, it is essential to examine closely the decisions themselves, and to determine whether they are really applicable to the matter' now under discussion. In this connection, it is useful to bear in mind the well known observation of Lord Halsbury in Quinn v. Leathern [1901] App. Cas. 495 and 506, that a case is only an authority for what it actually decides, and cannot be quoted for a proposition that may seem to

follow logically from it.

28. In the case of Tagore v. Tagore (1872) 9 B.L.R. 377; L.R.I.A. Sup. Vol. 47 the question which arose for consideration was as to the validity of testamentary bequests and gifts inter vivos in favour of human beings. With reference to this subject, their Lordships of the Judicial Committee observed that the legal power of transfer under the Bengal School of Hindu law applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dayabhaga, Chapter I, para. 21, by the phrase "relinquishment in favour of the donee who is a sentient person." They then went on to add that, by a rule generally adopted in jurisprudence, this class will include children in embryo, who afterwards might come into separate existence, and also by legal fiction, an adopted son, who, in contemplation of law, is begotten by the father who adopts him, or for and on behalf of whom he is adopted; apart from this exceptional case which serves to prove the rule, the law was plain that the donee must be a person in existence capable at the time when the gift takes effect. It is not necessary for my purpose to investigate the precise scope of the passage of the Dayabhaga upon which reliance has been placed in support of the proposition that a gift to be valid must be in favour of a sentient person in existence and capable of taking from the donor at the time when the gift is to take effect. I shall assume this was the view adopted by Jimutavahana. The question, however, necessarily arises whether this doctrine is applicable to the case of bequests for the establishment of images of the deity and for their worship. To secure an answer in the affirmative to this question, it is argued that, by a fiction of law, an idol is a juridical person, and in support of this view reliance is placed upon the cases of Shibessouree Debia v. Mothooranath Acharyo (1869) 13 Moo. I.A. 270 and Prosunno Kumari Debia v. Golap Chand Baboo (1875) 14 B.L.R. 450; 23 W.R. 253; L.R. 2 I.A. 145. The later decision of the Judicial Committee in the case of Jagadindra Nath Roy v. Hemanta Kumari Debi (1904) I.L.R. 32 Calc. 129 L.R. 31 I.A. 203, however, tends to indicate that this fiction must be employed cautiously and subject to many limitations. We must not, therefore, assume too readily that a Hindu deity is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities, as an ordinary sentient being, and we must closely examine the scope of the applicability of the passage in the Dayabhaga, which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being.

29. The passage in the Dayabhaga, which is supposed to go to the root of the matter, is as follows:

(Bharat Shiromani's Edition, 1863, page 25.)

30. This is translated by Colebrooke as follows: "That is actually seen in the world, since, in the

case of donation, the donee's right to the thing arises from the act of the giver, viz., from his relinquishment in favour of the donee who is a sentient person." (Chapter I, para. 21.)

31. In the very next passage Jimutavahana proceeds as follows.

32. This is translated by Colebrooke as follows: "Gift consists in the effect of raising another's property; and that effect would here depend on the donee." (Chapter I, para. 22.)

33. On the first of these passages Rambhadra comments as follows.

By this, 'gift is abandonment characterised by the result of ownership'--this definition, of gift is indicated.

34. Sreenath comments as follows:

It is said hereby that the definition of donation is abandonment characterised by the result of ownership.

35. Sreekrishna comments on the passage as follows:

As ownership does not arise from every act of abandonment like the offering of a bull, etc., he (the author) adds 'intended for some conscious being.' The intention must have for its object the ownership (of another) and this object is the object of the desire of abandonment.

36. On the second passage, Rambhadra comments as follows:

Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another as from the taking of the property of the Gods. The passage of Manu 'Those who steal the property of the Gods or the property of the Brahmans, etc.,' refers to this subject. Otherwise, as theft is already admitted as a case of sin, the prohibition of the stealing of a Brahman's property becomes superfluous. Thus, there being no other way to avoid this inconsistency, the terms 'property' and 'stealing' must be taken in a figurative or secondary sense.

37. It is clear from these passages, as well as from other passages from Sreenath, Achyutananda, and other commentators on the Dayabhaga, that they understood the rule about the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift.' It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation

to persons.

38. Again, Shoolapani in his Sraddhabibeka discusses whether a sradh can be called a gift, and in that connection observes as follows:

(Calcutta Edition, 1892, page 25.)

39. Of this passage, the following version will give a fairly accurate idea:

Sradh has not the nature of a donation, as it does not generate ownership in the manes, etc., for whom it is intended. The absence of ownership of manes, etc., is due to the absence of acceptance on their part by the words 'this is mine.' In 'donation,' having for its dative case the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being extension to it of the inseparable accompaniment of that (gift in its primary sense), viz., the offer of the sacrificial foe, etc. It has already been remarked in the Chapter on the bratis that such usage as devagram, hastigram, etc., are secondary.

40. Upon this passage Sree Krishna comments as follows:

The Gods Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the expression devagram (village of the Gods) be used? It has been remarked in the chapter on bratis that the sense here is secondary.

41. Sree, Krishna in his explanation of the term devagram, makes the following comments:

Moreover, the expression cannot be used here in its primary sense. The relation of one's ownership being excluded, the possessive case affix in devas (in the term of devagram) figuratively means abandonment for them (the Gods). Therefore, the expression is used in the sense of 'a village, which is the object of abandonment intended for the Gods.' This is the purport.

42. When we turn to the Suddhitatwa of Raghunandan, we find the subject of donation discussed. Thus in one passage he observes as follows:

(Calcutta Edition, 1891, page 308).

Thus donation is the abandonment of an object productive of the ownership of a person to whom it is given as prescribed in the shastras.

43. In another passage he says again:

Thus, though the ownership of the donor ceases to exist in consequence of abandonment on account of the non-acceptance by the person to whom it is given, it is incomplete and consequently it is not regarded as a donation in the Vedas.

44. In a third passage Raghunandan makes the following remarks:

Thus, if the particular person for whom a gift is intended does not accept it, then as the abandonment with all its conditions is not fulfilled, the ownership does not terminate. Such is the view of Ratnakar and others.

45. This indicates that in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all. This is also supported by the following observations of Sree Krishna in a passage of his commentary on the Sradhabibeka:

(Calcutta Edition, 1892, page 16.)

46. The following rendering gives a fair idea of the above passage:

Here, in the generation of ownership by the abandonment of an object, the pre-existence of acceptance by the person to whom the object is given is regarded as an auxiliary case.... Therefore, if the particular person for whom a gift is intended does not accept it afterwards, then, as donation with all its conditions is not accomplished, the ownership of the donor does not cease to exist. This is maintained by Ratnakar and others.

47. To the same effect is the following passage from the Mitakshara, in which Vijnaneswara, commenting on verse 27 of the Vyavaharadhyay of the Institutes of Yajnavalkya, observes:

(Bombay Edition, 1813 Saka, page 129.)

48. Gift consists in the relinquishment of one's own right and the creation of the right of another, and the creation of the right of another man is completed on that other's acceptance of the gift and not otherwise. Acceptance is made by three things--mental, verbal or corporeal."

49. This is also amply borne out by passages from the Bhasya of Savaraswami on the Purvamimansa. In one passage Savara defines the characteristics of a gift as follows:

(Adhyaya VI, Pada 1, Asiatic Society's Edition, Volume I, page 742.) A gift is the cessation of the ownership of one and the generation of the ownership of another,

50. Savara in another passage observes as follows:

(Adhyaya IX, Pada 1, Asiatic Society's Edition, Volume II, page 145.) Devagram (village of the Gods), Deva-kshetram (land of the Gods). These are figurative terms. What one is able to employ according to one's desire is one's property. The Gods, however, do not employ a village or land according to their use. Therefore, no (body) gives (to the Gods). Whatever is abandoned with reference to the Gods becomes a source of prosperity of the servants of the Gods.

51. Savara amplifies this view in the passage which follows and which need not be quoted at length for our present purpose, and he repeats the same opinion in Chapter 6, Section I, Volume I, page 606, when he speaks of the Gods as that is, not capable of possessing wealth, and explains the expressions dhanagram and hastigram as that is, as merely figurative terms. See also Adhyaya IX, Pada 1 (Volume II, page 141), where Savara asserts that there can be no gift to Gods, as they have not body and are incapable of enjoyment.

52. This view is supported by Medhatithi, the oldest and most authoritative of the commentators of Manu. Shastri Golap Chandra Sarkar on behalf of the respondent relied upon the following verse of Manu and the commentary of Medhatithi thereupon. (Mandalik's Edition, page 1354.)

53. That wicked man who misappropriates God-property (God's property) and Brahmana-property lives in the next world by the leavings of vultures. Manu, XI, 26.

Medhatithi's Commentary.

1. The property of persons of the three regenerate tribes that are in the habit of performing sacrifices is (to be under stood by the term) "God-property" (in this text, it is a compound word in the original, in which the word God is not inflected); and the property of a Brahman who is not in the habit of performing sacrifices is "Brahman-property."

2. Even in this manner this verse may certainly be explained. This sloka (verse) becomes (then) a laudatory one.

3. For the property of persons habitually performing sacrifices (explained by us as the import of the term "God's property") is not (the meaning) derived from the primary meaning of the words (composing the term, namely, God and property) like (the meaning of) the term stealing and the like (but a figurative meaning).

4. Hence (the term) is explained in another manner (thus)--Property that is set apart or relinquished for the purpose of performance of sacrifices and the like in honour of Gods is (to be taken as intended by the term) "God's property" by reason of the impossibility of the application to Gods of the primary meaning, namely, the relation of property and owner (a thing is property in relation to a person having proprietary rights over it, and a person is owner" in relation to a thing over which he can exercise proprietary rights).

5. For the Gods do not use the property according to pleasure, nor is their found exertion for the protection (of the property): and property is described to be of that character in popular view. Accordingly, when by referring or pointing to Gods, it is stated--This is not mine, this is God's--that is God's property--and that property is enjoined (by the Vedas) for the Fire-God and the like

in the Darsapurnamassa sacrifice and the like--(and also enjoined) by the well-known practice of the learned (not by the Vedas, for Gods worshipped) in the Durga sacrifice and the like secondary means (of attaining spiritual benefit, but not primary, inasmuch as these are not enjoined by the Vedas).

6. It cannot be argued that in popular view (property) relating to the four-armed or the like image (of Gods) is called "God's property," and it is proper to put the popular meaning on words (employed) in the Shastras.

7. It would be so if the term "God-property" acquired notoriety (in that sense), undivided (into, or without reference to, its component parts)--God and property; but by reason of the notoriety of the component parts, namely, God's property is God-property, the meaning of the whole (as consisting of the meanings of the component parts) is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning.

8. The assumption that the four-armed and the like have the status of God in the primary sense, is removed by the very use of (the term) image (in para. 6).

9. Nor can it be argued that although there is no God in the primary sense, still let such property be God's property by usage. Be it so; but there cannot be the relation and owner. The use of the term property (as God's) may be reconciled in the manner stated (above by us). This is discussed in the second.

54. The concluding reference is to the commentary of Medhatithi himself on the Second Book of the Institutes of Manu, where he observes as follows on verse 189:

55. It should be noticed that such expressions as property of the Gods, animals of the Gods, thing of the Gods, etc., mean animals, etc., supposed to be intended for the Gods. In the section on punishment, the term 'God' is desired to be used in the sense of images only; otherwise there would be an upsetting of the established order. In such texts as "anything good belonging to the Gods, Brahmans and Kings should be known, etc., i.e., a thing belonging to the Gods which is connected with an imaginary ownership of the images or likenesses imagined to be Gods. The Gods have no ownership of their own, and so the primary sense being inadmissible here, the secondary sense alone should be accepted."

56. It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the Gods. We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest times physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a

being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgacharyya, however, in his commentary on the following passages of the Nirukta, seems inclined to adopt the view that as the Gods were originally physical objects deified, they could not very well be regarded as sentient beings capable of acceptance of gifts in the strict sense of the terms.

57. The following version will give a fairly accurate idea of the passage which deals with the subject of the anthropomorphic and physical conception of the Gods:

One conception of the shapes of the Gods is that (they are) like human beings, inasmuch as the praises (of the Gods) speak of them like conscious beings. So also are their designations. They are praised with man-like limbs. As in Rigveda, 4, 7, 31, 3: 'Oh Indra; Thou art bulky in thy graceful arms.' Rigveda., 3, 2, 1, 5: 'Oh Maghaban ! As thou joinest together the two worlds (earth and heaven) large as thy fist.' (They are praised also) as possessed of things used by men. Rigveda, 2, 6, 21, 4: 'Come Indra! with a pair of horses.' Rigveda, 3, 3, 19, '6: 'In thy house is an auspicious wife [Sachi]; they are praised also with acts of human beings.' Rigveda, 8, 6, 21, 8;. 'Eat, Oh Indra and drink of (these) lying before.' Rigveda, 1, 1, 20, 9: 'Oh Indra! having ears, hearing all around, listen to our invocation quickly.' The other (conception of the shapes of the Gods) is found to be that (the Gods) are not like human beings, as the fire, the air, the sun, the earth, the moon. The hymns represent them like conscious beings, and for this reason even unconscious objects are so praised, such as dice and things like these down to plants that yield only a single harvest. Thus, they are praised as if possessed of limbs like human beings. So it is even with unconscious things. Rigveda, 8, 4, 29, 2: 'These stones used for pressing out (soma juice) with their green mouths are crying after (the Gods).' As this is a praise of the stones, so is the following a praise by connecting with things that are used by human beings. Rigveda, 8, 3, 7, 4: 'Sindhu river joined a comfortable chariot furnished with horses.' As this is a praise of the river, so is the (following) nothing but a praise of stones attributing actions like those of human beings. Rigveda, 4, 29, 2: Let the stones eat clarified butter fit for eating are the invoker of the Gods (Agni).

58. The same view is supported by Rigveda, 1, 1, 11, 1, and Atharvaveda, Book XX, Hymn 26, 4 and 5. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities there cannot be any acceptance and, therefore, necessarily, any gift. If, therefore, a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the King is the custodian of all such property. This is sufficiently indicated by the following passages: Vijnaneswar in the Mitakshara (Vyavahara Adhaya, verse 186) lays it down that one of the duties of the King is the protection of the Devagriha, and Aparaditya and Mitramisra in their

commentaries on the same subject lay down the rule in the same manner. In the Sukraneeti, Chapter IV, verse 19, stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and to the creatures of God.

59. It may further be observed that it is indisputable that the Hindu law encourages dedication of property for religious purposes. It is sufficient to refer to the following passage from Katyayana:

Which is rendered by Mandalik as follows (page 124, Edition Yajnavalkya):

If a gift be promised by a person, whether in health or in sickness and for a religious purpose, and he dies without making it, his son should be compelled to make it. Of this there is no doubt.

60. There can be no question as to the genuineness of the passage, because it is quoted with approval in the Mitakshara, Viramitrodoya, Vyavaharamadhaba, Vyvaharamayukha, Kamalakar's Vivadatandab, Raghunandan's Suddhitattwa, Vivadaratnakar, and in Jagannath's Vivadabhangarnaba translated by Colebrooke. The spirit, if not the letter, of this text is entirely inconsistent with the position that a direction given by a Hindu that an image of a deity should be established, and that his property should be applied for the maintenance of the worship, is inoperative, because the image was not established by himself. Jagannath in Book II, Chapter IV, Section I, verse 3, touches upon this matter, and points out that the text of Narada relating to the recovery of objects of gifts not duly given (Asiatic Society's Edition 137) has no application to religious gifts. The conclusion, therefore, is irresistible that the doctrine laid down by the Judicial Committee in the cases of Tagore v. Tagore (1872) 9 B.I.R. 377; 18 W.R. 359; L.R.I.A. Sup. Vol. 47. and Bai Motivahu v. Bai Mamubai (1897) I.L.R. 21 Bom. 709; L, R, 24 I.A. 93, as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof.

61. It has been argued before us that even if it be assumed that the rule about acceptance applies in the case of the deity as in the case of sentient beings, the validity of the testamentary disposition may be upheld, inasmuch as the deity is always existent, and it is immaterial whether the image is established or not. The argument in substance is that, to take a concrete example, whether a particular image of Kalee is established or not, the Goddess Kalee is ever existent, and a gift for the purpose of her worship is valid, although at the time of the death of the testator there is no image in existence. In support of this view reliance has been placed upon the following

passage quoted by Raghunandan:

It is for the benefit of the worshippers or devotees that there is manifestation in male and female forms of the supreme being, which is bodiless, which has no attribute, which consists of pure spirit, and which is without a second being.

62. Various passages of the same import are to be found in other authorities, for instance, Haratatwadidheeti and Mahanirvantantra (4, 16), the latter of which quotes a passage from Mundamalatantra and gives other texts of similar import from Kularnabtantra and Agastya Sanhita. From this point of view also, the position of the appellant may be undoubtedly supported; but it is not necessary to base my opinion upon this ground, for it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.

63. Let us now consider the decided cases from the point of view of the principles already explained. The cases of Upendra Lal Boral v. Hem Chundra Boral (1897) I.L.R. 25 Calc. 405, Rojomoyee Dassee v. Troylukho Mohiney Dassee (1901) I.L.R. 29 Calc. 260 and Nogendra-Nandini Dassi v. Benoy Krishna Deb (1902) I.L.R. 30 Calc. 521 proceeded on the assumption that the rule in the case of Tagore v. Tagore (1872) 9 B.L.R. 377 L.R.I.A. Sup. Vol. 47 and Bai Motivahu v. Bai Mamubai (1897) I.L.R. 21 Bam. 790 L.R. 24 I.A. 93 is applicable to cases of dedication of property for the establishment of images of deities and for their worship. The case of Promotha Nath Roy v. Nagendrabala Chaudhrani (1908) 12 C.W.N. 808 rests on the same assumption. The case of Dourga Proshad Dass v. Sheu Proshad Pandah (1880) 7 C.L.R. 278 does not directly touch the point, though it appears to have been held that an idol cannot be said to have juridical existence, unless it has been consecrated by proper ceremonies and so has become spiritualised. Nor does the earlier case of Sibchunder Mullick v. Treepoorah Soondry Dossee (1842) Fulton 98 really affect the question now under consideration. The Court proceeded on the ground that it would not require trustees to carry out trusts for religious purposes under the will of a Hindu, unless those purposes were defined. On the other hand the cases of Ramtonoo Mullick v. Ramgopaul Mullick (1829) 1 Knapp. 215, Gokool Nath Guha v. Issur Lochun Roy (1886) I.L.R. 14 Calc. 222, Prafulla Chunder Mullick v. Jogendra Nath Sreemany (1905) 9 C.W.N. 528, Ashutosh Dutt v. Doorga Churn Chatterjee (1879) I.L.R. 5 Calc. 438; L.R. 6 I.A. 182, Hemangini Dasi v. Nobin Chand Ghose (1882) I.L.R. 8 Calc. 788, Parbati Bibee v. Ram Barun Upadhya (1904) I.L.R. 31 Calc. 895, Jairam Narronji v. Kuverbai (1885) I.L.R. 9 Bom. 491, Manohar v. Keshavram (1878) I.L.R. 12 Bom. 267n, Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen (1897) I.L.R. 25 Calc. 112 are all based on the contrary assumption that a trust for a religious purpose is not invalid, because the image to be established is not in existence at the time of the death of the testator, and I may add that this latter view undoubtedly represents what

was regarded as the law from the time of the decision of the Judicial Committee in 1829 down to 1897. These decisions appear to me to be consistent with the true rule of Hindu law as deducible from the authorities I have already examined, It is, however, I think, possible to show that the view indicated above not only represents the true rule of Hindu law, but is consistent with the rules of English law in similar matters.

64. Under the English law it is well-settled that a gift for the advancement of religion in general terms, as for instance, a gift to be employed "in the service of My Lord and Master" or "for the worship of God" are valid. In support of this proposition, reference may be made to the decisions in In re Darling [1896] 1 Ch. 50 and Attorney General v. Pearson (1817) 3 Mer. 353 and 409; 17 R.R. 100. In the former of these cases, reference is made to the decision of Lord Manners in Powerscourt v. Powerscourt (1824) 1 Molloy 616, the decision in which was followed in Felan v. Russell (1842) 4 Ir. Eq. Rep. 701. In the second case, Lord Eldon observed that if lands or money were given in such a way as would be legal, notwithstanding the statutes concerning disposition of charitable uses, for the purposes of building a churph or a house or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, the Court of Chancery would execute such a trust by making a provision for maintaining and propagating the established religion of the country. This is in agreement with the view previously indicated by the Lord Chanceller in Mills v. Farmer (1815) 19 Ves. 482; 1 Mer. 55, namely, that it is quite impossible to maintain the proposition that a gift to charity is to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. The case before us, in which no question of indefiniteness can possibly arise, consequently occupies a much stronger position.

65. It is further clear that, under the English law, a valid gift may be made to a charity not in esse at the time, but to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, for the benefit of any private corporation or person, or perpetuity in a prior taker. One of the most recent decisions on the subject is that of Wallis v. Solicitor-General for New Zealand [1903] App. Cas. 173 which was heard on appeal by the Judicial Committee from New Zealand. In that case, certain Maori chiefs had in 1848 given 500 acres of land to the Bishop of New Zealand for a college to be erected thereon for the general purpose of promoting religion. Up to 1898, no college had been erected, and it was found that the land had in course of time become an unsuitable site, while the accumulation of its rent had amounted to a considerable sum ft was ruled that there was an express gift of laud and money for charitable purposes, and that such a gift was not invalidated by the fact that the particular application directed could not immediately take effect or would not of necessity take effect within any defined limit of time and might never take effect at all. It was further held that the doctrine of cy-pres was applicable. Lord Macnaghten in his judgment relied in support of this

proposition upon the decision of Lord Selborne in Chamberlayne v. Brockett (1872) L.R. 8 Ch. App. 206. This, however, is only one of many instances in which the English Courts have affirmed this doctrine, and the cases where charitable gifts to non-existent corporations or societies have been sustained are really numerous. The leading case on the subject is that of the Downing College reported under the name of Attorney General v. Downing (1766) 2 Amb. 550, 571; Wilm. 1; Dick 414. and under the name of Attorney General v. Bowyer (1798) 3 Ves. Jun. 714; (1800) 5 Vos. Jun. 300; (1803) 3 Ves. 256. Other cases in which the same rule has been affirmed are those of Attorney General v. Bishop of Chester (1785) 1 Bro. C.R. 444, Loscombe v. Wintringham (1850) 13 Beav. 87; 51 E.R. 34 Attorney General v. Craven (1856) 21 Beav. 392; 52 E.R. 910, Martin v. Maugham (1844) 14 Sim. 230; 60 E.R. 346 Henshaw v. Atkinson (1818) 3 Madd. 306 In re Clergy Society (1856) 2 Kay & J. 615; 69 E.R. 928, In re Maguire (1870) L.R. 9 Eq. 632 and Sinnett v. Herbert (1872) L.R. 7 Ch. App. 232. The Supreme Court of the United States has on several occasions affirmed the same doctrine after an elaborate review of the English decisions on the subject. Inglis v. Sailors Snug Harbour (1830) 3 Peters 99 and 114, Trustees v. Stale (1852) 14 Howard 274, Ould x. Washington Hospital (1877) 95 U.S. 313, Russell v. Allen (1882) 107 U.S. 168 and Jones v. Habersham (1882) 107 U.S. 191. In the third and fourth of these cases, many of the decisions in England to which we have referred are minutely examined, and the rule is laid down that a gift for charitable uses is valid, even though it is in favour of a non-existent corporation or society. I refer to these English and American decisions not as authorities in any way binding upon this Court, but solely to illustrate the position that the conclusion at which we arrive upon a strict interpretation of the texts of Hindu law, is consonant with the principles which have been adopted independently in other systems of jurisprudence. We cannot overlook the fact that as pointed out in the case of Trikamdas Damodhar v. Haridas Morarji (1907) I.L.R. 31 Bom. 583, their Lordships of the Judicial Committee, when called upon to decide an analogous question in Ranchordas Vandravandas v. Parvatibai (1899) I L.R. 23 Bom. 725 L.R. 26 1. A. 71, placed considerable reliance upon the decisions of the English Courts in similar matters, although in that particular instance there is room for doubt whether the actual decision was, in view of the texts to which attention was invited by Sir Subrahmanya Ayyar in Parthasarathy Pillai v. Thiruvengada Pillai (1907) I.L.R. 30. Mad. 340 quite in harmony with the true doctrine of Hindu jurisprudence.

66. To sum up:

(i) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator, is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is

inconsistent with the first principles of Hindu jurisprudence.

(ii) The Hindu law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed extra-commercium and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments: Manohar Ganesh Tambekar v. Lakhmiram Govindram (1887) I.L.R. 12 Bom. 247 affirmed, on appeal, by the Judicial Committee in Chotalal Lakhmiram v. Manohar Ganesh Tambekar (1899) I.L.R. 24 Bom. 50 L.R. 26 I.A. 199. It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

67. On these grounds, I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.

Coxe J.

68. I agree with the learned Chief Justice.

Chatterjee J.

69. The testator Umesh Chandra Lahiri died on the 28th June 1890 after having made a will on the 26th of June 1890. Amongst other matters the will provided,--"All my properties shall be placed in the hands of" Babus so and so "as trustees." They were to give certain annuities, to defray the expenses of certain named relatives, to pay Rs. 10 per annum to his guru Hari Nath Bhattacharya and Rs. 5 to his purohit Sreesh Chandra Chakrabarti, to defray the cost of the worship of the family Thakurs. It also directed that "they shall spend the surplus income which may be left, in the sheba and worship of Kalee, after establishing the image of the Kalee after the name of my mother, i.e., in the name of Iswar Anandamoyee Kalee." "I further provide that if for any reason, the image of Iswar Kalee Debee is not established and if the income of my properties is not used for her sheba and worship, then my gurudeb and his sons, grandsons, etc., in succession, shall get my Rangpur properties and possess the same in absolute right from generation to generation with right to sell, etc."

70. In accordance with the above direction, the executors established and consecrated, in the month of October or November 1894, an image of the Goddess made of earth, and later on, in the year 1894, replaced the same by one made of stone, and had a temple built for its location. They thus carried out the direction in the will, and the worship has ever since been carried on. On the 4th July 1904, the plaintiffs, who are the sons of the guru of the testator, brought the present suit for the construction of the will, for a declaration that the trust for the establishment and consecration of the image of Goddess Kalee and her worship was void, for possession of the

Rangpur properties and for an account and mesne profits. The Court of first instance held that the bequest in favour of the Goddess Kalee was valid, and dismissed the suit. On appeal by the plaintiffs the Division Bench, disagreeing with the case of Upendra Lal Boral v. Hem Chundra Boral (1) and some later cases which followed the same, referred the following questions for the decision of the Full Bench:

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?

(ii) Whether the cases of Upendra Lal Boral v. Hem Chundra Boral (1897) I.L.R. 25 Calc. 405 Rojomoyee Dassee v. Troylukho Mohiney Dassee (1901) I.L.R. 29 Calc. 260 and Nogendra-Nandini Dassi v. Benoy Krishna Deb (1902) I.L.R. 30 Calc. 521 have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

71. The cases mentioned in the order of reference are all, more or less, based on the decision of the Privy Council in the great Tagore case (1872) 9 B.L.R. 377; 18 W.R. 353; L.R.I.A. Sup. Vol. 47. The said case was in respect of a gift to a human being and was based on a passage in the Dayabhaga, Chapter I, para. 21, which is to the following effect:

The right of one may consistently arise from the act of another: for an express passage of law is authority for it; and that is actually seen in the world, since, in the case of donation, the donee's right to the thing arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient person. Colebrooke's translation.

72. The next paras. 22 and 23 go on to say that the title of the donee accrues before the acceptance and para. 24 says that the acceptance makes the title which has already accrued capable of full enjoyment, thus differing from the Mitakshara which holds that title does not accrue before acceptance. The author is here incidentally dealing with the meaning of the word gift and does not make any further reference to the subject. Of the commentators on the Dayabhaga, Sreenath says "the word 'sentient' is spoken of, of some particular sentient being and the definition of gift is not wide enough to include jaga (or gift in favour of a deity) or the worship of a cow, etc. (to which things are given)." Achyutananda says simple or relinquishment would be wide enough to include the dedication of the sacred bull, etc., and therefore the word 'sentient' is used." Sreekrishna Tarkalankar also says as in the dedication of the sacred bull no title to the same accrues to any one, the word tyaga, or relinquishment is spoken of in reference to a sentient being."

73. All these commentators, therefore, understand the definition as limited to secular gifts as contradistinguished from gifts of the nature of jaga, which is a technical word meaning Sradhabibeka, Chandi Charan's Ed. p. 18, "or relinquishment of property intended for a deity or other religious dedications, such as that of the sacred bull at a sradh." The subject of dana or gift, however, is dealt with in some detail by Narada in the chapter on the subtraction of gifts, and in making a subdivision he says: "In civil affairs the law of gift is fourfold--(i) what may be given, (ii) what may not be given, (iii) what is given or a valid gift, (iv) what is not given or invalid gifts. Colebrooke's Dig., Vol. I, page 401. In commenting on the above, Jagannath Tarkapanchanan says:" the rule to be established that gifts made by a man afflicted with disease and the like are void, regards civil gifts not donations for a religious purpose. This title of law does not extend to a gift made for a religious purpose: the donation is valid if it be made by the owner of the thing." Jagannath then quotes the text of (Katyayana):

What a man has promised in health or in sickness for a religious purpose must be given; and if he die without giving it, his son shall doubtless be compelled to deliver it.

74. The same text is quoted with approval by the Vivada Ratnakar: see page 136, Bibliothica Indica Series, where the author, in commenting upon another text of Katyayana as to invalid gifts, says i.e., "gift by a person affected with disease (being invalid) must apply to gifts other than those made for a religious purpose." Raghunandan in his Bangabasi Edition, p, 498 (Shudditatwa) quotes the same text of Katyayana and says i.e., "in the same way the inclusion of a gift by a dying person among invalid gifts has reference to gifts made for other than religious purposes." See also Vyavastha Darpan, 3rd Edition--Vyavastha 713, page 623 (Part I), and the authorities quoted.

75. It appears that the word or gift, when spoken of in respect of the deity, is used in a i.e., secondary or figurative sense. The Sradhabibeka of Shoolapani says i.e., Sradhabibeka, Chandi Charan's Ed. p. 22 "the use of the word or gift in respect of a gift to the Sun and other Gods is secondary or figurative and intended to signify, by analogy, the giving of the fee in either case." Sreekrishna Tarkalankar, the great commentator of the Dayabhaga, in his commentary on the above passage, says i.e.. "here also the use of the word in its primary sense is impossible, as there is no sense of one's own ownership" (like that of the donee in a secular gift).

76. Medhatithi, the great commentator of Manu, in commenting upon the word devaswam (god-property) in Manu, Chapter XI, Section 26, says i.e., "Property that is relinquished in favour of Gods for sacrifices in their honour is called god-property, by reason of the impossibility of the application to Gods of the (ordinary) relation of owner and thing owned. For the Gods do not us(c) the property according to their pleasure, nor do we see them exerting for the protection of the same."

77. Again "It cannot be argued that in popular view (property relating to the four-armed or the like image of God) is called 'god-property,' and it is proper to put the popular meaning on words occurring in the shastras. It would be so if the term 'god-property' acquired notoriety (in that sense) as a single undivided word; but by reason of the notorious meaning of the component parts of the word, namely, God and property, the meaning of the whole, that is, God's property is god-property, is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning. The assumption that the four-armed and the like have the status of God in the primary sense is removed by the very use of the term image. Nor can it be argued that although there is no God in the primary sense in such cases, still let such property be god-property by usage. Be it so, but there cannot be the relation of owner and thing owned. The use of the term property (as God's) may be reconciled in the manner stated. This is discussed in the second Chapter of the Mimansa of Jaimini." Kullooka Bhatta, in his commentary on the same words, says: i.e., "the property dedicated for the images and other deities is called devaswam." It would appear sufficiently clear from the authorities that the definition of gift referred to by the Dayabhaga, Chapter I, Section 21, is in respect of a secular gift and not a gift for religious purpose. This disposes of the applicability of the Tagore case (1872) 9 B.L.R. 377; 18 W.R. 359; L.R.I.A. Sup. Vol. 47 and also the case of Bai Molivahu v. Bai Mamubai (1897) I.L.R. 21 Bom. 709; L.R. 24 I.A. 93, which latter case may be further distinguished as being governed by the Mitakshara law.

78. Even if we were to apply the definition, as given in the above text of the Dayabhaga, to such a gift, it would seem absurd to say that a deity is not a sentient being. If the deity exists and it manifests itself in the image upon the invocation of the worshipper with certain mantras, it cannot be said to be an insentient being. If it answers to the i.e., "come here", "stay here" of the votary, it cannot be said to be insentient. The text

79. "For the use or benefit of the votary Brahman or God, although only existing in spirit and without a second, having no attribute and no body, assumes forms." Shastri's Hindu Law, 3rd Ed., page 420, shows the Hindu idea of the forms attributed to God for the convenience of worship. A particular image may be insentient until consecrated, but the deity is not if the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality, but the same deity and properties previously vested in the lost or mutilated Thakur become vested in the substituted Thakur. A Hindu does not worship the "idol" or the material body made of clay or gold or other substance, as a mere glance at the mantras and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the mantras peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity. According to either view, it is the

relinquishment of property, in the name of the deity, for securing its gratification, that completes the gift, and such relinquishments are valid according to Hindu law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attribute of the God-head, that is worshipped in a particular form, but it cannot be said with any approach to truth that the great Rishis and their commentators who declared the Hindu law had such a gross idea of the divinity they worshipped. In this view of the case also, the text of the Dayabhaga relied on in the Tagore case (1) cannot invalidate the gift in favour of a deity whoso image is consecrated after the death of the donor.

80. Then again, their Lordships of the Judicial Committee, in the Tagore case (1872) 9 B.L.R. 377; 18 W.R. 309; L.R.I.A. Sup. Vol. 47 say that the object of the donation must be in existence, at least in contemplation of law, and as an instance, the case of an adopted son is mentioned, as, by a fiction of law, he is supposed to have been conceived during the lifetime of the adoptive father. It is contended that Anandamoyee Kalee was not in existence during the lifetime of the testator, although the Goddess Kalee was, is and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name: Ram, 'Syam' or 'Gopal. It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted, because a son of that particular name could not be supposed to have been conceived by relation back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity, as the reasons hereinbefore enumerated will show, but if it were necessary, there would be no difficulty to the Hindu lawyer to call it in aid in favour of the gift.

81. I have stated above that in the case of a gift to a God, the relation of an owner to the thing owned in its primary sense is considered to be wanting. Who then is the owner of the property? In a secondary sense, ho doubt, the deity is the owner, but the shastras lay down i.e., "Gifts are to be given to the deity and the fee for the acceptance of the gift also is to be given to the deity, but all these are to be (ultimately) given to a Brahman, otherwise the gift would be useless."

82. Matsya Sooktam quoted by Raghunandan in his Shuddhitatwa Suddhitatwa, Bang. Ed. p. 557.

83. Every gift, therefore, in favour of a deity is a gift for the ultimate benefit of a Brahman or Brahmans, and may, therefore, be looked upon as a charitable gift. It was held by Sir Raymond West in the case of Monohar Ganesh Tambekar v. Lakhmiram Govindram (1887) I.L.R. 12 Bom. 247 and 263 that a trust for a Hindu God and temple was one created for public charitable purposes. The God and temple, in that case, was a public one and the trust was therefore, considered to be a public one. There is no reason why the gift in this case, which is expressly vested in trustees for the purpose of building a private temple and setting up a private diety,

should not be considered a private charitable trust--'charitable' I say because the ultimate benefit must come to the pujaris and shebaits. "It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in nature of things be entrusted to some person as shebait or manager: "Prosunno Kumari Debia v. Golap Chand Baboo (1875) 14 B.L.R. 450; 23 W.R. 253; L.R. 2 I.A. 145 and 152. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol: Jagadindra Nath Roy v. Hemanta Kumari Debi (1904) I.L.R. 32 Calc. 129; L.R. 31 I.A. 203. Again, bequests for the performance of the periodical poojas of Durga, Kalee, etc., or for the celebration of the periodical festivals, called Dolejatra, Rashjatra, etc., have been from very old times given effect to by our Courts. Instances will be found in the following cases:

84. Ramtonoo Mullick v. Ramgopaul Mullick (1829) 1 Knapp. 45, Ashutosh Dutt v. Doorga Churn Chatterjee (1879) I.L.R. 5 Calc. 438; L.R. 6 I.A. 182 Hemangini Dasi v. Nobin Chand Ghose (1882) I.L.R. 8 Calc. 788, Gokool Nath Guha v. Issur Lochun Roy (1880) I.L.R. 14 Calc. 222 Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen (1897) I.L.R. 25 Calc. 112, Bisseswar Prasanna Sen v. Bhagabati Prasanna Sen (1906) 3 C.L.J. 606, Prafulla Chunder Mullick v. Jogendra Nath Sreemany (1905) 9 C. W N. 528 Jairam Narronji v. Kuverbai (1885) I.L.R. 9 Bom. 491 and Manohar Ganesh Tambekar v. Lakhmiram Govindram (1887) I.L.R. 12 Bom. 247.

85. If a gift in favour of a deity, whose image has to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

86. In the present case again, the testator does not expressly make a gift to Kalee or Anandamoyee Kalee. He only vests his properties in certain trustees who are to employ the surplus income of his properties in a certain way, by spending the same in the establishment, sheba and pooja of the Goddess Kalee under the name and style of Iswar Anandamoyee Kalee. I do not see how the rules of gift to a deity, even if they were not as 1 have stated above, can invalidate the bequest in this case. For the reasons stated above, I would answer both the questions referred in the negative.

87. Per Curiam. The order of the Court accordingly is that the case be returned to the Division Bench to decide the matter in accordance with the opinion we have expressed.