
(1960) 09 BOM CK 0028
In the Bombay High Court
Case No : First Appeal No. 147 of 1956

Martand Pandharinath Harkare	Vs	APPELLANT
Charity Commissioner		RESPONDENT

Date of Decision : 28-09-1960

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 72

Citation : (1961) 63 BOMLR 274

Hon'ble Judges : Shah, J

Bench : Single Bench

Judgement

Shah, J.—This is an appeal by the original applicant who had filed an application claiming that the property referred to in the application was his private property and was not governed by the provisions of the Bombay Public Trusts Act, against the order passed by the learned District Judge, Poona, by which his application u/s 72 of that Act against the order of the Charity Commissioner was dismissed with costs.

2. It appears that one Yashodabai and her sister Haribai had inherited certain Immovable properties from their maternal grand father Keshav Mahadeo Deshpande. including a house. In a portion of this house they constructed a small temple in about 1915 and installed an idol of Shri Datta. In order that some arrangement may be made for the purpose of the worship of the deity these two sisters executed a Danpatra on February 22, 1918, in favour of one Pandurang Balwant Kulkarni. This Danpatra does not seem to have been produced in the present case and, therefore, it is difficult to say as to whether the two sisters had made a gift of their properties to Pandurang Balwant Kulkarni in consideration of his performing the worship of the deity. Pandurang Kulkarni, however, did not accept the gift and the gift deed (Danpatra) passed in his favour was treated as cancelled. The properties thereafter continued to be in the possession of the two sisters till 1931. They looked after the properties as also the worship of the deity they had installed in their house. On August 29, 1931, it

appears, the two sisters once again executed another Danpatra in favour of "Datta Mandir Sansthan represented by its permanent Vahiwatdar Krishnanath Gujabuva". This Danpatra is produced in this case and is exh. 17. The recitals in this Danpatra show that whatever right, title and interest Krishnanath Gujabuva acquired under the Danpatra were acquired by him on behalf of Datta Mandir Sansthan in his capacity of a permanent Vahiwatdar. After reciting that a prior Danpatra had been executed in 1913, which was later cancelled because the donee under that deed declined to accept the gift the two sisters stated in that Danpatra that they were confident that Krishnanath Gujabuva would perform the worship of the deity regularly and in the best manner and that on that account they were making a gift of the properties to the temple. In the latter part of this Danpatra, however, certain recitals appear to have been made which show that the original intention of the two sisters that the properties should be delivered in the possession of Krishnanath Gujabuva as a permanent Vahiwatdar after making a gift of them to Datta Mandir Sansthan. was considerably modified and it was stated that Krishnanath Gujabuva should enjoy the properties from generation to generation. The Danpatra further recites that the properties were of the ownership of the deity and of Krishnanath Gujabuva and finally the document recites that the two sisters had thereafter no interest whatever in the properties.

3. It appears that after the Danpatra exh. 17 was executed by the two sisters Krishnanath Gujabuva looked after the properties for some time, but eventually be also left the management of the properties and also the worship of the deity. The two sisters accordingly, particularly in view of their advancing age, were again compelled to execute another Danpatra on August 1, 1936, in favour of the appellant Martand Pandhiranath Harkare. The title of this Danpatra is entirely different from the title which appeared on the earlier Danpatra exh. 17. This Danpatra is executed in favour not of "Datta Mandir Sansthan represented by its permanent Vahiwatdar.," as was the case in the earlier Danpatra exh. 17, but in favour of Martand Pandharinath Harkare in his own individual capacity. In this Danpatra the two sisters expressed an intention to make a permanent arrangement in respect of the worship of the deity in their house and the properties which they had set apart for the purpose of meeting the expenses of the deity. They stated that they were executing a gift deed of the properties in favour of Martand Pandharinath Harkare and appointing the latter as a permanent Vahiwatdar. They also stated

in order to ensure your material well being we have today gifted the aforesaid properties which had been in our exclusive possession from the first and the same have been delivered into your possession. Hence you should enjoy according to your pleasure all the aforesaid properties from generation to generation and should serve the God.

4. Some time after the execution of this Danpatra, which is exh. 16 in the case, one of the sisters Haribai died. It appears that the other sister Yeshodabai executed one more document described as "Vahiwat Hakkache Patra" in favour of

one Vishnu Shridhar Bhalerao. In this document it was stated that Krishnanath Gujabuva in whose favour Danpatra exh. 17 was executed did not look after the property and relinquished its management and that since then Yeshodabai and her sister Haribai (during her life time) were looking after the property. By this document Yeshodabai appointed Vishnu Shridhar Bhalerao as a Vahiwatdar with power to nominate his successor in the event of his death. This document, however, is not entitled as "Danpatra" like the other two earlier documents and purports only to be a document transferring the right to manage the property. This document is exh. 18 in the case. Martand, the appellant, it seems, obtained besides the Danpatra exh. 16 another Danpatra from Krishna-nath Gujabuva on December 2, 1938, presumably with a view to perfect his title to the properties. According to this document, whatever right Krishna-nath Gujabuva had acquired under the Danpatra exh. 17 was transferred to Martand Pandharinath Harkare. This document, it may be noted, was executed by Datta Mandir represented by Krishnanath Gujabuva who styled himself as the permanent Vahiwatdar.

5. Some time after these different documents were executed in favour of Martand the appellant and in favour of Bhalerao it appears that a dispute between Martand and Bhalerao with regard to the management of the properties arose. Martand thereupon filed a suit being civil suit No. 411, of 1940 against Bhalerao and others for possession of the properties which he claimed under the Danpatra exh. 16, on the ground that he was wrongfully dispossessed by Bhalerao. The trial Court decided the suit in favour of the plaintiff Martand, but the appellate Court, however, in appeal reversed the decree of the trial Court and the plaintiff's suit was dismissed. Martand then filed a second appeal in the High Court. Mr. Justice Bavdekar, who heard this appeal, allowed it, reversed the decree passed by the District Court in appeal and restored the decree that was passed by the trial Court. In course of the judgment in that appeal Mr. Justice Bavdekar observed:-

So far as the temple is concerned no income was to be derived from the temple premises which was the property of the deity only and the plaintiff has no ownership in respect of the temple. He is entitled only to be its Vahiwatdar. So far as the two lands are concerned, the plaintiff had proved his title.

6. On the conclusion of this litigation Martand recovered the possession of the properties and started looking after the temple as well as the properties. Soon thereafter the Bombay Public Trusts Act, 1950, came into force and a question arose as to whether the trust in respect of the temple was liable to be registered under that Act, Martand, the appellant, made an application to the Charity Commissioner stating therein that the property was his private property and was not governed by the provisions of the Bombay Public Trusts Act. A notice was issued to the public of the village in which the temple and the properties were situated inviting objections, if any, to the application that was made by Martand, It appears that none of the village people came forward to raise any objection to the claim made by Martand in his application to the Charity Commissioner. The

Charity Commissioner, however, called upon three of the village people, one of them being a police patil, to make their statement before him as regards the nature of the temple as also the properties. The statements were recorded and the Assistant Charity Commissioner who conducted the enquiry held that the house No. 133 in which the temple of Datta was located belonged exclusively to the deity and the four Immovable properties as described in the Danpatra exh. 16 were of the joint ownership of the deity and of Martand with a charge on the properties of Rs. 25 to be paid by Martand Harkare for expenses of the temple. It may be noted that the latter part of his finding was based not upon exh. 16 which was the Danpatra in favour of Martand, but on the basis of exh. 17 which was passed in favour of Krishnanath Gujabuva. Being dissatisfied with this order of the Assistant Charity Commissioner, Martand filed an appeal to the Charity Commissioner. This appeal was disposed of by the Deputy Charity Commissioner upholding the order of the Assistant Charity Commissioner and dismissing the appeal. Martand thereafter made an application to the District Court against the order passed by the Deputy Charity Commissioner u/s 72 of the Bombay Public Trusts Act. In this application the learned District Judge raised two issues for his decision, (1) whether there was a public trust? and. (2) what was the property of the public trust ? After hearing the arguments advanced by both the parties to the application and considering the authorities that were cited at the Bar the learned District Judge agreed with the view taken by the Assistant Charity Commissioner as also the Deputy Charity Commissioner in appeal and dismissed the application with costs. It is against this order of the learned District Judge that Martand has filed the present appeal to this Court.

7. In support of this appeal it was contended by Mr. Joshi, the learned advocate for the appellant, that applying the tests which have been time and again laid down not only by our own Court, but also by the Privy Council and the Supreme Court the temple in the present case could never be said to be a public religious trust. He argued that on a true construction of the Danpatra exh. 16 which was passed by the two sisters in favour of the appellant, it would appear that the two sisters had as a matter of fact made a gift of the four Immovable properties which they had inherited from their maternal grand father in favour of the appellant, and that in so far as the deity was concerned, by the same deed the appellant was appointed as the Vahiwardar for the purpose of performing the Pooja of the deity. He further urged that in the second appeal which was decided by Mr. Justice Bavdekar the learned Judge had. held that so far as the four Immovable properties were concerned, the appellant was the absolute owner of those properties, but that in so far as the temple was concerned, he was held entitled only to be a Vahiwardar in respect thereof. Mr. Joshi also urged that in view of the fact that his client the appellant had been paying assessment in respect of the house in which the deity was installed to the Gram Panchayat the temple could not be said to be a public religious institution at all, because in that event the Gram Panchayat would not be entitled to charge any assessment in respect of that house. On the other hand, it was contended by Mr. Gambhirwala,

the learned Assistant Government Pleader, that on a proper consideration of the circumstances of the case including the gift deed exh. 16 the decision of the learned District Judge could not be said to be erroneous. According to him, oral evidence was not the only material on which a conclusion could be arrived at in the present case as to whether or not the temple in question was a public religious institution. He contended that there were several other factors which were taken into account by the learned District Judge and which should really be taken into account by this Court as well before coming to any conclusion as regards the nature of the endowment in question.

8. Now, examining the respective contentions of the learned advocates, there is no doubt that in order to decide a question as to whether a particular endowment or institution is public or private it is necessary not only to rely upon the oral evidence, if any, but also upon all the circumstances of the case. The Courts have undoubtedly laid down several principles for the purpose of deciding such a question. But after all, every case has got to be decided upon its own facts. The learned District Judge while coming to the conclusion that the temple in question was a public religious endowment took into account circumstances, such as putting up of a sign-board outside the temple, some time after the Harijan Temple Entry Act was passed with a view to prevent Harijans from entering the temple and the existence of a Sabha Mandan inside the house which would accommodate about 100 to 150 persons at a time. With regard to the entries in the Record of Rights the learned District Judge in para. 13 of his judgment in one place stated that even if the agricultural lands were shown in the Record of Rights as the personal property of the applicant, that would not necessarily justify an inference that the temple also was the applicant's personal property and at another place he stated that the Record of Rights entries in respect of survey Nos. 670 and 121 showed that those lands stood in the name of Shri Datta Dev or Datta Sansthan of which the applicant was described as the Vahiwardar. As a matter of fact, it is clear from the Record of Rights in respect of these lands, that the lands are shown as standing in the name of the applicant as Kabjedar. They are not shown in the name of Shri Datta Dev or Datta Sansthan at all. The learned District Judge also stated that the receipts of the village Panchayat in respect of the taxes levied on the Datta Mandir showed that in the Village Panchayat records the property stood in the name of the Datta Mandir of which the applicant was the Vahiwardar. According to the learned District Judge, if the Datta Mandir was the private property of the applicant as contended by him, it would have stood in the name of the applicant only. The learned District Judge also considered some authorities on which reliance was placed by the advocate for the applicant before him. Eventually, he came to the conclusion that the decision arrived at by the Assistant Charity Commissioner as well as the Deputy Charity Commissioner was not at all erroneous and that the application filed by the applicant should be dismissed.

9. Now, before going to the authorities which were cited before me at the Bar I would like to examine the recitals in the Danpatra exh. 16 itself for the purpose

of finding as to whether there was any dedication of the temple or the properties to the public. To start with, the two sisters recite that the several properties described in the Danpatra were inherited by them as heirs from their mother's father Shri Keshav Mahadeo Deshpande. Then they recite that the properties they had so inherited were kept separate by them for the purpose of meeting the expenses of Shri Datta Mandir Samsthan at village Behle and "which till today has been in our possession". From this recital it is clear that at the date of this Danpatra there existed in their house a Datta Mandir and that the two sisters had set apart the properties which they had inherited from their maternal grand father for the express purpose of meeting the expenses of the Mandir. There is no indication, however, in this part of the Danpatra as to whether they themselves utilised any part of the income of those properties for their own maintenance. One thing, however, is very clear that the Datta Mandir to which a reference has been made was not dedicated to the public and also that the properties which they had set apart for the purpose of meeting the expenses of the Mandir were not actually dedicated to the Mandir itself. All that these, recitals show is that the two sisters continued to be the owners of the properties and they were maintaining the Datta Mandir in their own house out of the income of those properties. Then, while describing the house as one of the Immovable properties which they had inherited from their maternal grand father the two sisters state as follows:-

One house in the village Belhe which is situate near the school and which faces the north and the length of which from South to North is 50 cubits and the breadth of which from East to West is 10 cubits and in this in a portion thereof there is a Datta Mandir, the length of which is 25 cubits and the breadth of which is 15 cubits and in which length and breadth there is a temple with an upper floor thereon and which is covered with tiles.

Now, it may be noted that this house is described as one of the properties which they had inherited from their maternal grand father and it was in this house that there existed a Datta Mandir at the date of the Danpatra exh. 16 which was executed on August 1, 1936. There is no recital in this Danpatra to show as to when this Datta Mandir came into existence. A reference to exh. 17, which is the Danpatra executed by the two sisters in 1931, however, shows that the two sisters had constructed the temple within the house about 15 to 17 years ago i.e. some where about 1914-1915. It may be remembered that the first time the two sisters executed a Danpatra was in 1918 for the purpose of management of the temple. Accordingly, it is clear that at least for the first two or three years after the construction of the temple the two sisters managed the temple themselves and the Pooja of the deity was performed either by themselves or through some priest. The document of 1918, as already observed, has not been produced in this case, nor is there any other document to show as to whether following upon the construction of the temple inside the house by the two sisters there was any dedication of the temple to the public or any religious ceremonies such as Prathishta were performed. It appears that the two sisters being Brahmins

themselves and having no other relations in their family thought of installing a deity in their own house and thereby took to a religious way of life. The installation of a deity in such circumstances can only be said to be for the benefit of the two sisters themselves and it was they who really wanted to earn for themselves spiritual benefit from the worship of the deity in their own house. There is no evidence at all to suggest that anybody else out of the members of the public in the village was interested in the worship of the deity or whether the two sisters had thrown open the temple to the members of the public for worship or Darshan. In the absence of any such evidence, it is clear that the temple was a private property of the two sisters themselves and there was no dedication of the temple to any section of the public of the village.

10. The Danpatra exh. 16 thereafter describes the other properties which the two sisters had inherited from their maternal grand father and also recites the circumstances under which the earlier Danpatra were executed and cancelled. In the concluding portion of this Danpatra the two sisters have stated as follows:-

We having both grown very much old at present and it became apparent that we must in view of our old age make satisfactory arrangement in respect of the deity and hence we asked of you and you agreed and hence we are executing in your favour this deed of gift in respect of the aforesaid properties and we are delivering into your possession the Immovable properties of the Sansthan together with the deities therein and have appointed yourself as a permanent Vahiwardar thereof and in order to ensure your material well being we have today gifted the aforesaid properties which had been in our exclusive possession from the first and the same have been delivered into your possession. Hence you should enjoy according to your pleasure all the aforesaid properties from generation to generation and should serve the God.

This portion of the Danpatra expresses the necessity on the part of the two sisters of executing the Danpatra in favour of the appellant. It appears that at the date of this Danpatra one of the two sisters was aged 70 years and the other was aged about 65 years. It was, therefore, imperative from their point of view that some arrangement should be made for the purpose of continuing the worship of the deity that they had installed in their own house. Having failed in their attempt to make such an arrangement in the past inspite of their having executed as many as two gift deeds in favour of two different persons, they seem to have thought that unless and until the Immovable properties which they had inherited from their maternal grand father were not actually given to some person by way of gift in consideration of such person carrying on the worship of the deity they would never be able to make a satisfactory arrangement in that behalf. Accordingly, it seems, that by the Danpatra exh. 16 they made a gift of the Immovable properties in their possession and appointed the appellant as the Vahiwardar in respect of the temple with an obligation to continue the worship of the deity from generation to generation. The true construction of this recital in the Danpatra, in my opinion, is that far from dedicating either the temple or any

of the properties to the use of the public the two sisters made a specific gift of the Immovable properties in favour of the appellant with an obligation that he should continue the worship of the deity. The Danpatra also provided that the gift of the properties was not to be limited only to the life of the appellant nor was the worship of the deity. The appellant, according to this recital, is to enjoy the properties according to his pleasure from generation to generation to which the only condition being that he and his heirs should serve the God that is to say should continue the worship of the deity in their house. The effect of this Danpatra read as a whole, in my opinion, is that the temple inside the house was only a private property of the two sisters and that for the purpose of maintaining the worship of the deity they themselves had installed in the house in a specially constructed temple they had offered by way of gift their own Immovable properties to the appellant as an inducement to accept the obligation of worshipping the deity and continuing the worship from generation to generation. It may be that in making such a provision the two sisters were looking forward to their own spiritual benefit through the continuance of the worship of the deity installed in their own house even after their death. It may also be that it was intended for the religious and spiritual benefit of the appellant as also his heirs. In any event, from the recitals in this Danpatra it does not appear that any beneficiaries of the endowment, if there were any at all, other than the two sisters themselves and the appellant and his heirs, were intended to take benefit by the worship of the deity. In that view of the matter, in my opinion, the temple in question in no event can be said to be a public religious endowment. The utmost that can be said in regard to this temple is that if not of the private ownership of the two sisters it is a private religious endowment.

11. It is true that the appellant had put up a sign-board some time after the Harijan Temple Entry Bill was passed into an Act by the Bombay Legislature prohibiting the Harijans from entering the temple. No inference from this fact alone, however, can necessarily be drawn that such a sign-board had been put up because it was a temple dedicated to the Hindu public of the village which would not countenance the entry of Harijans into their temple. Mr. Joshi, the learned advocate for the appellant, urged that it was thought necessary by the appellant to put up such a sign-board because it was apprehended that Harijans might seek an entry into the temple thinking that it was a public temple. It must be noted that the village in which this temple is situated is a very small one and almost everybody in the village would know as to whether any householder maintains a deity in his own house or not. The villagers might, not have a clear idea in their mind as to whether a deity installed in a particular house or a temple was accessible to the members of the public or not. In view of these circumstances, Mr. Joshi contended that there was nothing wrong on the part of the appellant in putting up a sign-board prohibiting Harijans from entering this temple. Whatever it may be, in my opinion, it is impossible to draw an irresistible inference from this circumstance alone that the temple was open to the public.

12. It is also true that in the temple there is a Sabha Mandap which might accommodate about 100 to 150 persons at a time. The learned District Judge placed reliance upon this circumstance for the purpose of an inference that the temple was open to the public. Now, it is not uncommon among the Hindus to provide a certain portion of their own residential house for religious worship by installing a deity therein and also arranging for its day to day worship with some Brahmin. If the house is big enough the house-holder may as well celebrate several religious festivals in front of the deity and it is not uncommon that for the performance of these festivals a space may be set apart for the purpose of accommodating the invitees to these festivals. The householder may also at times think of inviting some Shastries well versed in Purana and Hindu Shastras for giving religious discourses and the house-holder may on these occasions well invite his friends and relatives to attend them. This might also require some space and if such a space is provided in one's own house just about the place where the deity is installed it cannot be inferred that the temple housing the deity in such a house is open to the public and hence constitutes a public religious endowment.

13. As against these circumstances, there are some other circumstances which, in my opinion, irresistably point to the conclusion that the temple in question can never be regarded as a public religious endowment. Besides the recitals in the Danpatra both of 1936 and 1931, it is obvious that the Gram Panchayat has been levying a tax upon the house in which this temple is situated. If the temple is really a public religious endowment open to the use of the public, surely, the Gram Panchayat would not levy any such tax. It is true that the appellant, so far as the temple is concerned, is described as a Vahiwatdar in the Danpatra exh. 16. Accordingly, he cannot claim to be the owner of the deity or of the temple, although the two sisters who erected the temple and installed the deity might be said to be the owners of both of them. This, however, cannot lead one to a conclusion that the temple is a public religious endowment. As stated above, the appellant is undoubtedly a Vahiwatdar in charge of the management of the temple and worship of the deity. Therefore, the utmost that could be said about it is that it is a private religious endowment, originally intended for the benefit of the two sisters and later for the benefit of the appellant and the members of his family apart from the spiritual benefit that the two sisters might derive even after their death.

14. Turning to the oral evidence that was given before the Assistant Charity Commissioner, it is significant to note that none of the three persons who gave their evidence categorically stated that the temple in question was open to the use of the public. Each one of them, on the contrary, has categorically stated that he could not enter the temple as a matter of right. They admitted of course that they were invited to the temple by the appellant at the time of Datta Jayanti celebrations and that on that occasion some other people also would enter the temple without any invitation. The fact, however, that on occasions such as these some other people from the village would be able to make their way into the

temple without any invitation would not suggest that. the temple was open to the use of the public. It is not necessary for me to dwell on the oral evidence in any detail because, in my opinion, it does not help to prove that the temple in question was a public religious institution.

15. In view of all these circumstances, apart from the authorities with which I will presently deal, I have no doubt in my mind that the temple in this case is not a public religious endowment so as to be liable to be registered with the Charity Commissioner under the Bombay Public Trusts Act. As observed already, the temple in the hands of the appellant at the moment is only a private religious institution of which he was appointed Vahiwardar by the two, sisters under the Danpatra executed by them in the year 1936. The members of the public have no concern whatever with this temple and they cannot claim to enter and worship the deity in the temple as a matter of right.

16. The Bombay Public Trusts Act, 1950, defines "Public, trust:" in Clause 13 of Section 2 as follows:-

"public trust" means an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a wakf, [a dharmada] or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860;

According to this definition a "public trust" would certainly include a temple. Now a "temple" is defined in Clause 17 of the same section as follows:-

"temple" means a place by whatever designation known and used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship;" This definition of "Temple" clearly indicates that a "temple" can be a "public trust" only if (1) it is used as a place of public religious worship and (2) dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship. Now, in this case, there is no evidence whatever to show that the temple in question was used as a place of public religious worship at any time, nor is there any evidence to show that it was dedicated to the Hindu community or any section thereof as a place of public religious worship, nor is there any evidence to show that it was for the benefit of the Hindu community or any section thereof as a place of public religious worship, nor is there any evidence to show that it was used as of right by the Hindu community or any other section thereof as a place of public religious worship. It is only when the ingredients of the definition of "temple" given in cl. 17 of Section 2 of the Act are present in any particular case, that a temple can be said to be a public trust within the meaning of Clause 13 of Section 2.

17. Turning to the authorities which were cited by Mr. Joshi in support of Ms several contentions, reference may first be made to *Parmanand Vs. Nihal Chand*, in which the Privy Council dealt with the question of burden of proof in

cases where a question arises as to whether a particular property in the possession of a particular person is subject to a trust created for public purposes of a charitable or religious nature and it was held that such burden lay on the person who alleges it. In this case, the appellant filed an application before the Assistant Charity Commissioner seeking exemption from the requirement as to registration of public trust. The Assistant Charity Commissioner, however, thought that the temple in question was really a public trust and, therefore, he made the necessary enquiries into the question and came to the conclusion that it was a public trust liable to be registered under the Bombay Public Trusts Act. It is difficult, however, to say in a case such as this as to whether the burden lay on the Assistant Charity Commissioner to show that the temple in question was a public trust. The question of burden -of proof generally arises in cases of suits, and application before the Assistant Charity Commissioner not being in the nature of a suit it cannot be said that it was for the Assistant Charity Commissioner to prove that the temple in this case was a public trust. After all, the Assistant Charity Commissioner was empowered by the Bombay Public Trusts Act itself to make necessary enquiries for the purpose of determining as to whether a particular institution was in the nature of a public trust. There are, however, certain observations made by the Privy Council in the case cited above, which lend support to some of the observations I have made in the earlier part of the judgment and those observations are as follows (p. 911) :

It appears that holy scriptures were recited in the Gurdwara on various occasions, and that presents were made by the audience to the person or persons who made the recitations. But it is clear that recitations were suspended for several months. The recitations of holy books are, in no way, incompatible with the hypothesis that the trust, if any, was of a private nature. There can be no doubt that even in a private shrine the public may worship, but the question is whether they do so without any permission, leave or licence and as of right. This test has not been satisfied in the present case.

From these observations it will be clear that the provisions for Sabha Mandap in the house in which the present temple is situated and the holding of discourses in the Sabha Mandap before a gathering of people from the village do not necessarily lead to the conclusion that the temple is a public religious endowment. The real test to be applied is as to whether members of the public are entitled to attend the discourses as a matter of right or that they attend them as a matter of express or implied leave or license of the owner or Vahiwardar of the premises. In this case, however, there is no evidence whatever to show as to whether any religious discourses were held in the Sabha Mandap. All that has been deposed to by the three witnesses is that the appellant celebrates Datta Jayanti in the temple every year and on that occasion he invites people from the village to attend the celebrations. From this evidence, therefore, it cannot be said that any members of the public attend the Sabha Mandap-as a matter of right or that the celebrations are organised by the appellant at the instance of the members of the public or that the members of the public have a

right to worship the deity in the temple.

18. A reference was then made by Mr. Joshi to *Laxmanrao v. Govindrao A.I.R. [1950] Nag. 215*. This decision was relied upon by Mr. Joshi for the purpose of showing that remission of land revenue in respect of the land on which the temple stands is one of the decisive factors in determining whether the temple was a private or a public one. On this authority Mr. Joshi contended that in this particular case the Gram Panchayat levied a house tax in respect of the house in which the temple is situated and that the payment of the tax being a decisive factor as stated in that case, the temple in question can never be said to be a public one. This decision also supports the observations I have already made in the earlier part of the judgment to the effect that if the temple in question was ever intended to be a public trust no house tax could possibly be levied on the house in which the temple is situated and that in so far as the house tax was levied by the Gram Panchayat the temple could not be said to be in the nature of a public trust.

19. Mr. Joshi next referred to *AIR 1940 7 (Privy Council)*. This decision was relied upon by Mr. Joshi for the purpose of showing that even if members of the Hindu community of the village entered the temple for having Darshan of the deity without any express permission from the appellant it did not necessarily mean that the temple was a public temple. The observations on which reliance was placed by Mr. Joshi are as follows (pp. 7-8) :--

Where a grant of a temple is made to an individual or family and the family has treated the temple as family property, dividing the various forms of profit whether offerings or rents, it is not enough to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity:

In the light of these observations it was contended by Mr. Joshi that here was a case where the temple was built by the two sisters in their own residential house and inasmuch as there was no specific dedication of the temple to the Hindu community of the village and also inasmuch as the two sisters themselves for a considerable number of years managed the temple and the worship of the deity installed therein, it was impossible to say that the temple was a public temple. I am inclined to accept this contention. It is evident from the record of this case

that it was the two sisters who, out of their own moneys, had constructed the temple in question in their own house. Obviously, they must have done it with a view to derive both religious and spiritual benefit to themselves. Having constructed the temple and installed the deity of Shri Datta therein, they had carried on the management of the temple as well as the worship of the deity right from the start upto the time the Danpatra was executed in favour of the present appellant in 1936 and, therefore, it is a legitimate inference to draw that the temple was the private property of the two sisters themselves, and they had never dedicated it to the Hindu community of the village. Even after the appellant took up the management of the temple under the Danpatra executed in his favour there is nothing to show that inspite of the fact that the appellant was only appointed as a Vahiwardar under the Danpatra in respect of the temple, the temple was ever dedicated by the two sisters by any document or otherwise to the members of the Hindu community of the village. Besides, there is no evidence whatever to show that any offerings were made by any members of the public before the deity in the temple in question, Assuming, however, that as a matter of fact any such offerings were made by any members of the public, that would not on the strength of the observations of the Privy Council in the case cited above by itself deprive the appellant of his right to manage the temple under the Danpatra which was executed in his favour by the two sisters and compel him to manage the temple as if it was a public temple for and on behalf of the members of the Hindu community of the village. As their Lordships of the Privy Council observed in the above case, if any member of the Hindu community of the village entered the temple in question with a view to have Darshan or with a view to offer worship to the deity without permission of the appellant he could not be turned away just for that reason, because, it is a sentiment inherent among the Hindus not to turn away people who out of devotion and faith choose to enter a temple for the purpose of offering worship to the deity installed in the temple. It may be that such worshippers are not turned away because the owner or the manager of the temple is anxious to see that this temple becomes as popular among the members of the public as possible. It may be that by allowing the members of the public a free ingress to the temple for the purpose of offering worship to the deity, the owner or manager of the temple might be making some profit out of the offerings that might be made by such worshippers. All these, however, cannot change the character of the temple. For the purpose of changing the character of the temple, as already observed, there must be dedication of the temple to the public which is absolutely absent in the present case, or there should be a user by the public of the temple as a matter of right which is also absent in the present case. Therefore, inspite of the members of the public being freely allowed inside the temple to offer worship to the deity and inspite of such people making offerings to the deity which eventually go to the benefit of the owner or manager of the temple, the temple will nonetheless remain a private temple.

20. Reference was then made by Mr. Joshi to Amardas Mangaldas Sadhu Vs.

Harmanbhai Jethabhai Patel, . This case was relied upon by Mr. Joshi for the observation that the fact that worshippers are allowed to visit a temple does not necessarily warrant an inference that the temple is a public religious trust. I respectfully agree with this observation which aptly applies to the facts of the present case in so far as the appellant either expressly or impliedly allowed members of the Hindu community of the village to visit the temple in his house. As a matter of fact, there is no evidence in this case that any members of the public ever entered the temple in question as a matter of right, nor is there any evidence to suggest that they used to visit the temple for the purpose of offering worship to the deity installed therein. The evidence, on the contrary, shows that generally it is only on the invitation given by the appellant on the occasion of the Datta Jayanti that some of the members of the Hindu community of the village attend the temple. On other occasions some of the members of the public just happen to drop in with a view to have Darshan of the deity. That happens, however, only because, the appellant does not object to their entry into the temple. In other words, such people would enter into the temple only with the implied consent of the appellant. According to the observations in the decision quoted above, just because some of the persons of the Hindu community of the village are impliedly allowed by the appellant to enter the temple to offer their worship to the deity, it does not necessarily warrant an inference that the temple is a public religious trust. The facts of that case appear to be much stronger than the facts of the present case. There, the temple was built by the villagers and it was managed by Sadhus under the control of the villagers. Festivals also used to be observed at the temple and also several types of religious ceremonies used to be performed. Offerings of small sums of money also used to be made. In spite of it all, it was held that the temple was not a public trust, because there was nothing whatever to show that there was any dedication of the temple to the Hindu community of the village as a whole. In the present case, the temple was not built with the help of any outsiders. It was built by the two sisters out of their own money. Besides, the two sisters themselves for a considerable number of years managed the temple on their own and they were not under the control of any persons in that behalf. Festivals also used to be held in the temple during the time of their management, but they were all held at their own expenses which they defrayed out of the income of the properties which they had inherited from their own maternal grand father. According to the observations of Broomfield J. in that case, such festivals and ceremonies are observed and performed as much in private temples as in public temples. Likewise, offerings of small sums of money are also made as much in private temples as in public temples. These are, however, not the matters on which any inference can be drawn that the temple is a public institution.

21. In view of all these different authorities, I feel fortified in my conclusion on the facts of the present case that the temple in question was entirely the private property of the two sisters who constructed it in their own house and later they handed over the management of the temple to the appellant under the Danpatra

executed by them in his favour. I need not repeat that there is no evidence at all of any dedication of this temple to the members of the Hindu community of the village, nor is there any evidence to suggest that any members of the Hindu community of the village ever visited the temple as a matter of right. In the absence of any such evidence it must be held that the temple which was originally constructed by the two sisters out of their own funds, if not a private property of their own, was only a matter of private trust and not a public trust. The learned Judge, in my opinion, has approached the case from an erroneous point of view. He seems to have thrown the burden of proving that the temple is a private trust and not a public one upon the appellant himself forgetting that all the relevant authorities on the question really throw the burden on the person who alleges a certain institution to be a public institution. In this case, the appellant had made an application to the Charity Commissioner seeking exemption from the requirement of the Public Trusts Act as to the registration of the temple of which he was the Vahiwardar and claiming that it was only a private property of his own. It was then for the members of the Hindu community of the village to have come forward if they chose to claim that the temple was a public trust. It is clear, however, that none of the members of the Hindu community of the village so came forward inspite of a notice being issued by the Charity Commissioner inviting objections to the appellant's application. If any such member of the Hindu community of the village had come forward to make such a claim, the burden obviously would have been upon him to prove that the trust was a public trust. In the absence of any such member of the Hindu community coming forward to make such a claim, it was undoubtedly open to the Charity Commissioner to make an independent enquiry into the matter, but in course of such an enquiry, surely, he could not expect the appellant to prove that it was not a public trust. As a matter of fact, as stated above, he had made an application on the basis of the temple being a private property and hence not liable to be registered under the Public Trusts Act. On the evidence of the witnesses summoned by the Assistant Charity Commissioner himself from the village he came to the conclusion that there was a public trust in respect of the temple in question. His decision was confirmed by the Deputy Charity Commissioner in appeal. This latter decision was again confirmed by the learned District Judge in the application made to him u/s 72 of the Public Trusts Act. While considering this application, as stated above, the learned District Judge looked at the matter from a wrong perspective. Instead of finding as to whether there was enough material to show that the temple in question was a public trust, all along his judgment, he seems to have observed that the appellant had failed to prove that it was a private trust. Surely, in my opinion, this was not the correct approach to the matter at all as the Privy Council in one of the cases cited above has already stated that the burden in all these cases lies upon the person who alleges that a particular institution is a public trust. It is not for the other party to prove to the contrary. In the circumstances of this case, I am firmly of the view that the temple in question is not in the nature of a public trust and, therefore, the application made by the appellant should have been allowed.

22. Mr. Gainbhirwala, the learned Assistant Government Pleader, however, relying upon *Deoki Nandan Vs. Murlidhar*, , contended that the tests laid down by the Supreme Court in that case for ascertaining the nature of a particular religious institution as a public institution were fully satisfied in the present case and that, therefore, the temple in question was rightly held to be a public trust by the Court below. In that case a pious Hindu who was childless constructed a temple and was in management of it till his death. He executed a will whereby he bequeathed all his lands to the temple and made provision for its proper management. The question was whether the provisions of the will disclosed an intention on the part of the testator to dedicate the temple to the public or merely to the members of the family. It was held that the recital in the will that the testator had no sons coupled with provisions for the management of the trust by strangers was an indication that the dedication was to the public. It was also held that the performance of ceremonies at the consecration of the temple (*Prathishta*), the user of the temple and other evidence in the case showed that the dedication was for worship by the general public. It will be observed that the facts of that case are entirely different, from the facts of the present case. No question in that case arose as to whether the temple built by the testator was ever a public temple so long as he continued to manage it during his life time. The question as to whether the temple was a public trust or not arose only after his death and that question was decided on the strength of the recitals in the will which he had left pertaining to the management of the temple and also other circumstances of the case. Amongst the several recitals in the will, clause 2 thereof appointed a committee of four persons to look after the management of the temple and its property and out of these four persons two were not relations and belonged to a different caste altogether. Besides, there was evidence that after the death of the testator members of the public used to visit the temple, offer worships and make offerings. One of the tests that was applied by the Supreme Court was as to who were the beneficiaries of the trust created by the will. It was observed at page 762 as follows:-

When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that the purpose of the endowment is the maintenance of that worship for the benefit of the worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers.

23. It was in the light of these principles that the Supreme Court in that case

examined the facts of the case and eventually held that the temple in question was dedicated to the use of the public and, therefore, it was a public trust. Applying these principles to the facts of the present case it is clear that by the Danpatra executed by the two sisters in favour of the appellant there was no dedication to the deity of the properties which they had inherited from their maternal grand father. These properties were expressly gifted to the appellant to be enjoyed by him and his heirs and successors from generation to generation at their own sweet will. There can, therefore, be no question as to who is the beneficiary in respect of any property dedicated for the worship of the deity.. Even if these properties can be said to have been dedicated to the deity installed in the temple in question, even then the dedication cannot be said to be for the benefit of the general public. The recitals in the Danpatra clearly show the beneficiaries of the endowment are only the appellant and his heirs and successors. In order to enjoy these properties the appellant and his successors are obliged to perform the worship of the deity under the terms of the Danpatra, In these circumstances, this temple can well be said only to be a private trust if at all.

24. Mr. Ganibhirwala then relied upon Ranchhoddas Kalidas and Others Vs. Goswami Shree Mahalaxmi Vahuji and Others, , for the purpose of showing as to what principle should be applied for the purpose of determining as to whether a certain religious institution is in the nature of a public or private trust. In particular, Mr. Gambhirwala relied upon a passage in that decision which is as follows (p. 992) :--

...The decision of the question as to whether a temple is public or private would depend upon several considerations. There may be a clear case of a temple which has been built by devotees as a public temple, and properties dedicated by them to such a temple would clearly constitute a public charitable trust. A private temple may be dedicated to the public, but such a change must be established by clear evidence in that behalf. At a public temple, the devotees at large have a right of entry and a right of darshan of the deity. The devotees in such a temple offer gifts to the idol and these gifts, by their very nature, are gifts to the temple itself. Public festivals are held in which all the devotees have a right to participate. With regard to such public temples and idols, property, both movable and immovable, can be dedicated; no writing is necessary to evidence such dedication. It may be done even verbally. Dedication is often done by a gift viva voce, by a bequest, or by ceremonial relinquishment. Such a dedication can be absolute or partial. Where it is absolute, the property is given completely to the idol by the donor who has divested himself of all his rights in it. Where the dedication is partial, the donor has not divested himself completely of his title in the property, but a charge is created over the property for a specified portion of the income of the property to go towards the expenses of the idol and the temple. It is quite true that for dedication there must be clear, cogent and satisfactory evidence, if there is no writing executed for that purpose. The mere fact that a part of the income of the property is appropriated towards the

expenses of the temple, may be for several years, would not necessarily prove even a partial dedication of the property to the charity. The historical origin of the temple, the manner in which the affairs of the temple have been managed, the nature and extent of the gifts received by the temple, the rights exercised by the devotees in regard to the worship in the temple, the consciousness of the manager and the consciousness of the devotees themselves-these and similar other considerations have to be weighed in deciding the question as to whether a temple is public or private...

I am, with respect, in complete agreement with the observations made by the learned Judges in that case. There should never be any quarrel with regard to the principles laid down in that case. The question, however, is as to how far those principles can be applied to the facts of a particular case. Applying those principles to the facts of the present case, I do not find any warrant for a conclusion that the temple which was constructed by the two sisters out of their own funds was ever dedicated to the use of the public. On the contrary, there is ample evidence on the record of the case to show that for a considerable number of years the temple was treated by the two sisters as their own private property, and if it can ever be said to have changed its character by reason of the Danpatra in favour of the appellant under which he was appointed the Wahiwatdar of the temple, the character was only of a private trust and not a public trust at all. As I have stated above, under the Danpatra or under any other document, the properties of which the two sisters were the owners, were not dedicated to the deity as such. On the contrary, they were specifically gifted to the appellant in order to enable him to live and carry on the worship of the deity. In the absence of any such dedication of the property to the deity, as already observed, no question as to the beneficiaries in regard to such property arises in the case. This is purely a case of a private temple being managed by an individual under an authority given to him by the two sisters who were responsible for bringing the temple into being. Members of the Hindu community of the village have no concern whatever with this temple or the deity installed therein. They cannot enter the temple as of right nor can they offer their worship to the deity as of right.

25. For all these reasons, in my opinion, the learned District Judge was in error in confirming the orders passed by the Assistant Charity Commissioner and the Deputy Charity Commissioner and dismissing the application of the appellant. I, therefore, allow the appeal of the appellant, reverse the orders passed by the Assistant Charity Commissioner as also by the Deputy Charity Commissioner and hold that the temple in question is not a public trust and does not require to be registered with the authorities under the Bombay Public Trusts Act. The respondents to pay to the appellant the costs of this appeal. There will be no order as to costs of the application in the District Court.