**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL ORIGINAL JURISDICTION**

**WRIT PETITION (CIVIL) NO. 373 OF 2006**

INDIAN YOUNG LAWYERS
ASSOCIATION AND ORS. … PETITIONERS

VERSUS

THE STATE OF KERALA AND ORS. … RESPONDENTS

**J U D G M E N T**

**R.F. Nariman, J. (Concurring)**

1. The present writ petition raises far-reaching questions on the ambit of the fundamental rights contained in Articles 25 and 26 of the Constitution of India. These questions arise in the backdrop of an extremely famous temple at Sabarimala in which the idol of Lord Ayyappa is installed. According to the Respondents, the said temple, though open to all members of the public regardless of caste, creed, or religion, is a denominational temple which claims the fundamental right to manage its own affairs in matters relating to religion. The question

that arises is whether the complete exclusion of women between the ages of 10 and 50 from entry, and consequently, of worship in this temple, based upon a biological factor which is exclusive to women only, and which is based upon custom allegedly constituting an essential part of religion, can be said to be violative of their rights under Article 25. Consequently, whether such women are covered by Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is violative of their fundamental right under Article 25(1) and Article 15(1), and *ultra vires* the parent Act.

2. Before answering the question posed on the facts before us, it is necessary to cover the ground that has been covered by our previous decisions on the scope and effect of religious freedom contained in Articles 25 and 26.

3. In one of the earliest judgments dealing with religious freedom, namely, **Nar Hari Sastri and Ors. v. Shri Badrinath Temple Committee**, 1952 SCR 849, this Court was concerned with the temple at Badrinath, which is an ancient temple, being a public place of

worship for Hindus. A representative suit was filed under Order I Rule 8 of the Code of Civil Procedure, 1908 on behalf of all Deoprayagi Pandas who, as guides or escorts of pilgrims, sought a declaration that they cannot be obstructed from entering the precincts of the temple along with their "clients" for darshan of the deities inside the temple. This Court held:

> "It seems to us that the approach of the court below to this aspect of the case has not been quite proper, and, to avoid any possible misconception, we would desire to state succinctly what the correct legal position is. Once it is admitted, as in fact has been admitted in the present case, that the temple is a public place of worship of the Hindus, the right of entrance into the temple for purposes of 'darshan' or worship is a right which flows from the nature of the institution itself, and for the acquisition of such rights, no custom or immemorial usage need be asserted or proved. As the Panda as well as his client are both Hindu worshippers, there can be nothing wrong in the one's accompanying the other inside the temple and subject to what we will state presently, the fact that the pilgrim, being a stranger to the spot, takes the assistance of the Panda in the matter of 'darshan' or worship of the deities or that the Panda gets remuneration from his client for the services he renders, does not in any way affect the legal rights of either of them. In law, it makes no difference whether one performs the act of worship himself or is aided or guided by another in the performance of them. If the Pandas claim any special right which is not enjoyed ordinarily by members of the Hindu public, they would undoubtedly have to establish such rights on the basis of custom, usage or otherwise.

This right of entry into a public temple is, however, not an unregulated or unrestricted right. It is open to the trustees of a public temple to regulate the time of public visits and fix certain hours of the day during which alone members of the public would be allowed access to the shrine. The public may also be denied access to certain particularly sacred parts of the temple, *e.g*., the inner sanctuary or as it is said the 'Holy of Holies' where the deity is actually located. Quite apart from these, it is always competent to the temple authorities to make and enforce rules to ensure good order and decency of worship and prevent overcrowding in a temple. Good conduct or orderly behaviour is always an obligatory condition of admission into a temple [*Vide Kalidas Jivram* v. *Gor Parjaram*, I.L.R. 15 Bom. p. 309; *Thackeray* v. *Harbhum*, I.L.R. 8 Bom. p. 432], and this principle has been accepted by and recognised in the Shri Badrinath Temple Act, section 25 of which provides for framing of bye-laws by the temple committee *inter alia* for maintenance of order inside the temple and regulating the entry of persons within it [*Vide* Section 25(1)(m)].

The true position, therefore, is that the plaintiffs' right of entering the temple along with their Yajmans is not a precarious or a permissive right depending for its existence upon the arbitrary discretion of the temple authorities; it is a legal right in the true sense of the expression but it can be exercised subject to the restrictions which the temple committee may impose in good faith for maintenance of order and decorum within the temple and for ensuring proper performance of customary worship. In our opinion, the plaintiffs are entitled to a declaration in this form."

(at pp. 860-862)

4. In chronological sequence, next comes the celebrated **Shirur Math** case, *viz.*, **The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt**, 1954 SCR 1005. This case concerned itself with the settlement of a scheme in connection with a Math known as the Shirur Math, which, legislation in the form of the Madras Hindu Religious and Charitable Endowments Act, 1951, sought to interfere with. In history, the Shirur Math is stated to be one of the eight Maths situated at Udipi in the district of South Kanara and reputed to have been founded by Shri Madhwacharya, the well-known exponent of dualistic theism in Hinduism. This judgment being a seminal authority for a large number of aspects covered under Articles 25 and 26 needs to be quoted *in extenso*. The Court first dealt with the individual right contained in Article 25 as follows:

> "We now come to Article 25 which, as its language indicates, secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. A question is raised as to whether the word "persons" here means individuals only or includes corporate bodies as well. The

> question, in our opinion, is not at all relevant for our present purpose. A Mathadhipati is certainly not a corporate body; he is the head of a spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. It is his duty to practice and propagate the religious tenets, of which he is an adherent and if any provision of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guaranteed to every person under Article 25. Institutions as such cannot practice or propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of Article 25. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlour meeting."[1]
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> (emphasis supplied)
> (at p. 1021)

With regard to whether a Math could come within the expression "religious denomination" under Article 26, this Court laid down the following tests:

[1] In **State Trading Corporation of India Ltd. v. Commercial Tax Officer and Ors.**, (1964) 4 SCR 99, a majority of 9 Judges held that the S.T.C., which is a company registered under the Indian Companies Act, 1956, is not a citizen within the meaning of Article 19 of the Constitution of India. In a concurring judgment by Hidayatullah, J., the learned Judge, in arriving at this result, held that Articles 15, 16, 18 and 29(1) clearly refer to natural persons, i.e., individuals (*See* p. 127). The learned Judge went on to hold that in Articles 14, 20, 27 and 31, the word "person" would apply to individuals as well as to corporations (*See* p. 147). What is conspicuous by its absence is Article 25(1), which also uses the word "person", which, as **Shirur Math** (supra) states above, can apply only to natural persons. Consequently, the argument that an idol can exercise fundamental rights contained in Article 25(1), as urged by some of the Respondents, must be rejected.

"As regards Article 26, the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name".

It is well known that the practice of setting up Maths as centers of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, — in many cases it is the name of the founder, and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As Article 26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article."

(emphasis supplied)
(at pp. 1021-1022)

With regard to what constitutes “religion”, “religious practice”, and “essential religious practices”, as opposed to “secular practices”, this Court held:

> “It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of Article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the Article applies. What then are matters of religion? The word “religion” has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case [*Vide Davis* v. *Benson*, 133 US 333 at 342], it has been said “that the term ‘religion’ has reference to one’s views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with *cultus* of form or worship of a particular sect, but is distinguishable from the latter.” We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Article 44(2) of the Constitution of Eire and we have great

doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Article 25. Latham, C.J. of the High Court of Australia while dealing with the provision of section 116 of the Australian Constitution which *inter alia* forbids the Commonwealth to prohibit the "free exercise of any religion" made the following weighty observations [*Vide Adelaide Company* v. *Commonwealth*, 67 C.L.R. 116, 127]:

> "It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious opinions, it nevertheless may deal as it pleases with any *acts* which are done in pursuance of

> religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Articles 25 and 26 on grounds of public order, morality and health. Clause (2)(a) of Article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon clause (2)(a) of the Article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.

The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any

religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b). What Article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as “Jehovah’s Witnesses.” This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of “Jehovah’s Witnesses” incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them

> under the National Security Regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations [*Vide Adelaide Company* v. *Commonwealth*, 67 C.L.R. 116, 127]. These were undoubtedly political activities though arising out of religious belief entertained by a particular community. In such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery."
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> (emphasis supplied)
> (at pp. 1023-1026)

As to what matters a religious denomination enjoys complete autonomy over, this Court said:

> "…… As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and

> no outside authority has any jurisdiction to interfere with their decision in such matters. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under Article 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of Article 26."
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> (at pp. 1028-1029)

5. Close on the heels of this judgment, followed the judgment in **Ratilal Panachand Gandhi v. State of Bombay and Ors.**, 1954 SCR 1055. In this case, two connected appeals – one by the manager of a Swetamber Jain public temple and one by the trustees of the Parsi Punchayet, assailed the constitutional validity of the Bombay Public Trusts Act, 1950. Dealing with the freedoms contained in Articles 25 and 26, this Court held:

"Article 25 of the Constitution guarantees to every person and not merely to the citizens of India the freedom of conscience and the right freely to profess, practise and propagate religion. This is subject, in every case, to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the Article. Sub-clause (a) of clause (2) saves the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-clause (b) reserves the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices. Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people. What sub-clause (a) of clause (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.

So far as Article 26 is concerned, it deals with a particular aspect of the subject of religious freedom.

Under this article, any religious denomination or a section of it has the guaranteed right to establish and maintain institutions for religious and charitable purposes and to manage in its own way all affairs in matters of religion. Rights are also given to such denomination or a section of it to acquire and own movable and immovable properties and to administer such properties in accordance with law. The language of the two clauses (b) and (d) of Article 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here again it should be remembered that under Article 26(d), it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Article 26(d) of the Constitution.

The moot point for consideration, therefore, is where is the line to be drawn between what are matters of religion and what are not? Our Constitution-makers have made no attempt to define what ‘religion’ is and it is certainly not possible to frame an exhaustive definition of the word ‘religion’ which would be applicable to all classes of persons. As has been indicated in the Madras case referred to

above, the definition of 'religion' given by Fields, J. in the American case of *Davis* v. *Beason* [133 U.S. 333], does not seem to us adequate or precise. "The term 'religion' ", thus observed the learned Judge in the case mentioned above, "has reference to one's views of his relations to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His Will. It is often confounded with *cultus* or form of worship of a particular sect, but is distinguishable from the latter". It may be noted that 'religion' is not necessarily theistic and in fact there are well known religions in India like Buddhism and Jainism which do not believe in the existence of God or of any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been suggested by one of the learned Judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well. We may quote in this connection the observations of Latham, C.J. of the High Court of Australia in the case of *Adelaide Company* v. *Commonwealth* [67 C.L.R. 116, 124], where the extent of protection given to religious freedom by section 116 of the Australian Constitution came up for consideration.

> "It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious *opinions*, it nevertheless may deal as it pleases with any *acts* which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears

> to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."

In our opinion, as we have already said in the Madras case, these observations apply fully to the provision regarding religious freedom that is embodied in our Constitution.

Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate. Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly

be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar, J. in the case of *Jamshed ji* v. *Soonabai* [33 Bom. 122], and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad baj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think, are quite appropriate for our present purpose. "If this is the belief of the community" thus observed the learned Judge, "and it is proved undoubtedly to be the belief of the Zoroastrian community,—a secular Judge is bound to accept that belief—it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by Article 26(b) of our Constitution.

The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in cases of doubt, as Chief Justice Latham pointed out in the case [*Vide Adelaide Company* v. *The Commonwealth*, 67 C.L.R. 116, 129] referred to above, the court should take a common sense view and be actuated by considerations of practical necessity. It is in the light of these principles that we will proceed to examine the different provisions of the Bombay Public Trusts Act, the validity of which has been challenged on behalf of the appellants."

(at pp. 1062-1066)

6. We now come to the famous **Mulki Temple** case. In this judgment, namely, **Sri Venkataramana Devaru and Ors. v. State of Mysore and Ors.**, 1958 SCR 895, ("**Sri Venkataramana Devaru**"), an ancient temple dedicated to Sri Venkataramana, renowned for its sanctity, was before the Court in a challenge to the Madras Temple Entry Authorisation Act (V of 1947). It was noticed that the trustees of this temple were all members of a sect known as the Gowda Saraswath Brahmins. Even though the temple had originally been founded for the benefit of certain immigrant families of the Gowda Saraswath Brahmins, in the course of time, however, worshippers consisted of all classes of Hindus. Finding that the said temple is a public temple, it was further held that during certain religious ceremonies, persons other than Gowda Saraswath Brahmins had been wholly excluded, as a result of which, the temple was held to be a religious denomination within the meaning of Article 26. The Court then found that if an image becomes defiled or if there is any departure or violation of any of the rules relating to worship, as a result of entry of certain persons into the temple, an essential religious practice can be said to have been affected. The Court held:

"According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as *Samprokshana*) have to be performed for restoring the sanctity of the shrine. *Vide* judgment of Sadasiva Aiyar, J., in *Gopala Muppanar* v. *Subramania Aiyar* [(1914) 27 MLJ 253]. In *Sankaralinga Nadan* v. *Raja Rajeswara Dorai* [(1908) L.R. 35 I.A. 176], it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. The conclusion is also implicit in Art. 25 which after declaring that all persons are entitled freely to profess, practice and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism. We must, accordingly hold that if the rights of the appellants have to be determined solely with reference to Art 26(b), then section 3 of Act V of 1947, should be held to be bad as infringing it."

(emphasis supplied)
(at pp. 910-911)

The important question that then had to be decided was whether denominational institutions were within the reach of Article 25(2)(b). This was answered in the affirmative. It was then stated:

> "…… The fact is that though Art. 25(1) deals with rights of individuals, Art. 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Art. 25(1) and Art. 26(b).
>
> The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Art. 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Art. 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Art. 25(2)(b) will prevail. While, in the former case, Art. 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Art. 26(b). We must accordingly hold that Art. 26(b) must be read subject to Art. 25(2)(b)."
>
> (at pp. 917-918)

When there is no general or total exclusion of members of the public from worship in the temple, but exclusion from only certain religious services, it was held:

> "We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26(b), must yield to the overriding right declared by Art. 25(2)(b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Art. 25(2)(b) overrides that right so as extinguish it, but whether it is possible — so to regulate the rights of the persons protected by Art. 25(2)(b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2)(b) as to give effect to Art. 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected."
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> (at pp. 919-920)

7. In **Durgah Committee, Ajmer and Anr. v. Syed Hussain Ali and Ors.**, (1962) 1 SCR 383, ("**Durgah Committee**"), this Court was faced with a challenge to the vires of the Durgah Khwaja Saheb Act, 1955. The famous tomb of Khwaja Moin-ud-din Chishti of Ajmer was managed by a group of persons who belonged to the Chishti Order of Soofies. The argument that as people from all religious faiths came to worship at this shrine, and that, therefore, it could not be said to be a shrine belonging to any particular religious denomination, was negated as follows:

> "…… Thus on theoretical considerations it may not be easy to hold that the followers and devotees of the saint who visit the Durgah and treat it as a place of pilgrimage can be regarded as constituting a religious denomination or any section thereof. However, for the purpose of the present appeal we propose to deal with the dispute between the parties on the basis that the Chishtia sect whom the respondents purport to represent and on whose behalf — (as well as their own) — they seek to challenge the *vires* of the Act is a section or a religious denomination. This position appears to have been assumed in the High Court and we do not propose to make any departure in that behalf in dealing with the present appeal."
>
> (emphasis supplied)
> (at p. 401)

8. The judgment in **Shirur Math** (supra) was followed, as was **Sri Venkataramana Devaru** (supra), for the determining tests of what would constitute a "religious denomination" and what could be said to be essential and integral parts of religion as opposed to purely secular practices. An important sentence was added to what has already been laid down in these two judgments:

> "…… Similarly, even practices, though religious, may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. ……"
>
> (at p. 412)

9. In **Sardar Syedna Taher Saifuddin Saheb v. State of Bombay**, 1962 Supp. (2) SCR 496, this Court struck down the Bombay Prevention of Excommunication Act, 1949, with Chief Justice Sinha dissenting. Though the learned Chief Justice's judgment is a dissenting judgment, some of the principles laid down by the learned Chief Justice, not dissented from by the majority judgment, are apposite and are, therefore, set out hereunder:-

> "…… It is noteworthy that the right guaranteed by Art. 25 is an individual right as distinguished from the right of an organised body like a religious denomination or any section thereof, dealt with by

Art. 26. Hence, every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess, practice and propagate his religion, and everyone is guaranteed his freedom of conscience. …… The Constitution has left every person free in the matter of his relation to his Creator, if he believes in one. It is, thus, clear that a person is left completely free to worship God according to the dictates of his conscience, and that his right to worship as he pleased is unfettered so long as it does not come into conflict with any restraints, as aforesaid, imposed by the State in the interest of public order, etc. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs, by the State or by any other person. Thus, though his religious beliefs are entirely his own and his freedom to hold those beliefs is absolute, he has not the absolute right to act in any way he pleased in exercise of his religious beliefs. He has been guaranteed the right to practice and propagate his religion, subject to the limitations aforesaid. His right to practice his religion must also be subject to the criminal laws of the country, validly passed with reference to actions which the legislature has declared to be of a penal character. Laws made by a competent legislature in the interest of public order and the like, restricting religious practices, would come within the regulating power of the State. For example, there may be religious practices of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well-being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices. It must, therefore, be held that though the freedom of conscience is guaranteed to every individual so that he may hold any beliefs he likes, his actions in pursuance of those beliefs may

> be liable to restrictions in the interest of the community at large, as may be determined by common consent, that is to say, by a competent legislature. It was on such humanitarian grounds, and for the purpose of social reform, that so called religious practices like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a God to function as a *devadasi*, or of ostracizing a person from all social contacts and religious communion on account of his having eaten forbidden food or taboo, were stopped by legislation."
>
> (emphasis supplied)
> (at pp. 518-520)

The learned Chief Justice upheld the said Act, stating that the Act is aimed at fulfillment of the individual liberty of conscience guaranteed by Article 25(1) of the Constitution, and not in derogation of it. Also, the learned Chief Justice stated that the Act really carried out the strict injunction of Article 17 of the Constitution of India by which untouchability has been abolished, and held that, as excommunication is a form of untouchability, the Act is protected by Article 17 and must therefore be upheld.

The majority judgment, however, by K.C. Das Gupta, J. held the Act to be constitutionally infirm as it was violative of Article 26(b) as follows:

> "Let us consider first whether the impugned Act contravenes the provisions of Art. 26(b). It is

> unnecessary for the purpose of the present case to enter into the difficult question whether every case of excommunication by the Dai on whatever grounds inflicted is a matter of religion. What appears however to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism under the Canon Law) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community, through its religious head, "of its own affairs in matters of religion." The impugned Act makes even such excommunications invalid and takes away the power of the Dai as the head of the community to excommunicate even on religious grounds. It therefore, clearly interferes with the right of the Dawoodi Bohra community under clause (b) of Art. 26 of the Constitution."
>
> (at p. 535)

Holding that the said law is not referable to Article 25(2)(b), the Court then held:

> "It remains to consider whether the impugned Act comes within the saving provisions embodied in clause 2 of Art. 25. The clause is in these words:—
>
> "Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institution of a public character to all classes and section of Hindus."

Quite clearly, the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. Indeed, that was not even suggested on behalf of the respondent State. It was faintly suggested however that the Act should be considered to be a law "providing for social welfare and reform." The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and that the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform." The barring of excommunication on grounds other than religious grounds, say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause 2(b) of Art. 25. But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law insofar as it invalidates excommunication on religious grounds and takes away the Dai's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. As the Act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of

> the Dawoodi Bohra community under Art. 26(b) of the Constitution."
>
> (at pp. 536-537)

In an illuminating concurring judgment, N. Rajagopala Ayyangar, J. upheld the Act on the ground that excommunication is not so much a punishment but is really used as a measure of discipline for the maintenance of the integrity of the Dawoodi Bohra community. It therefore violates the right to practice religion guaranteed by Articles 25(1) and 26 in that it interferes with the right of the religious head – the Dai – to administer, as trustee, the property of the denomination so as to exclude excommunicated persons. The learned Judge, however, drew a distinction between the two parts of Article 25(2)(b), stating that the expression "social welfare and reform" could not affect essential parts of religious practice as follows:

> "But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform." To start with, it has to be admitted that this phrase is, as contrasted with the second portion of Art. 25(2)(b), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Art. 25(1) and the saving would cover beliefs and

practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Art. 25(1) for two reasons: (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom — a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform." (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Art. 25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform.

In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislature to "reform" a religion out of existence or identity. Art. 25(2)(a) having provided for legislation dealing with "economic, financial, political or secular activity which may be *associated* with religious practices", the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are *associated* with religion. Just as the activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Art. 25(2)(b) is not intended to cover the basic essentials of the creed of a religion which is protected by Art. 25(1)."

(at pp. 552-553)

10. As this view is the view of only one learned Judge, and as it does not arise for decision in the present case, suffice it to say that this view will need to be tested in some future case for its validity. It is instructive to remember that **Shirur Math** (supra) specifically contained a sentence which stated that there is a further right given to the State by Article 25(2)(b) under which, the State can legislate for social welfare and reform "even though by so doing it might interfere with religious practices". We, therefore, leave this part of Article 25(2)(b) to be focused and deliberated upon in some future case.

11. In **Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors.**, (1964) 1 SCR 561, otherwise referred to as the **Nathdwara Temple** case, this Court was concerned with the validity of the Nathdwara Temple Act, 1959. Referring to and following some of the judgments that have already been referred, this Court held that the Nathdwara temple was a public temple and that as the Act extinguished the secular office of the Tilkayat by which he was managing the properties of the Temple, no right under Article 26 could be said to have been effected. In an instructive passage, this Court

laid down certain tests as to what could be said to be an essential or integral part of religion as opposed to purely secular practice, and laid down what is to be done to separate what may not always be oil from water. The Court held as follows:

> "In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It is in the

light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of *The Durgah Committee Ajmer* v. *Syed Hussain Ali* [(1962) 1 SCR 383, 411], and observed that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 25(1).

In this connection, it cannot be ignored that what is protected under Arts. 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Art. 25(1) or Art. 26(b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practise religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matter of religion, then, of course, the rights guaranteed by Art. 25(1) and Art. 26(b) cannot be contravened.

It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day-to-day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Arts 25(1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Arts. 25(1) and 26(b), Latham C.J.'s observation in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The Commonwealth* [67 CLR 116, 123], that "what is religion to one is superstition to another", on which Mr. Pathak relies, is of no relevance. If an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Art. 25(1) and Art. 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious

> practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Art. 25(1) or Art 26(b). This aspect of the matter must be borne in mind in dealing with the true scope and effect of Art. 25(1) and Art. 26(b)."
>
> (at pp. 620-623)

12. In **Seshammal and Ors. v. State of Tamil Nadu**, (1972) 2 SCC 11, the validity of the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1970 was questioned by hereditary Archakas and Mathadhipatis of some ancient temples of Tamil Nadu, as the Amendment Act did away with the hereditary right of succession to the office of Archaka even if the Archaka was otherwise qualified. This Court repelled such challenge but in doing so, spoke of the importance of the consecration of an idol in a Hindu temple and the rituals connected therewith, as follows:

> "**11.** …… On the consecration of the image in the temple the Hindu worshippers believe that the Divine Spirit has descended into the image and from then on the image of the deity is fit to be worshipped. Rules with regard to daily and periodical worship have been laid down for securing the continuance of the Divine Spirit. The rituals have a two-fold object. One is to attract the lay worshipper to participate in the worship carried on

> by the priest or Archaka. It is believed that when a congregation of worshippers participates in the worship a particular attitude of aspiration and devotion is developed and confers great spiritual benefit. The second object is to preserve the image from pollution, defilement or desecration. It is part of the religious belief of a Hindu worshipper that when the image is polluted or defiled the Divine Spirit in the image diminishes or even vanishes. That is a situation which every devotee or worshipper looks upon with horror. Pollution or defilement may take place in a variety of ways. According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship. In fact, purificatory ceremonies have to be performed for restoring the sanctity of the shrine [1958 SCR 895 (910)]. Worshippers lay great store by the rituals and whatever other people, not of the faith, may think about these rituals and ceremonies, they are a part of the Hindu religious faith and cannot be dismissed as either irrational or superstitious."

Ultimately, it was held that since the appointment of an Archaka is a secular act, the Amendment Act must be regarded as valid.

13. We now come to a very important judgment contained in **Rev. Stainislaus v. State of Madhya Pradesh and Ors.**, (1977) 2 SCR 611. This judgment dealt with the constitutional validity of the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967, both of which statutes were upheld by the Court stating that they fall within the exception of "public order" as

both of them prohibit conversion from one religion to another by use of force, allurement, or other fraudulent means. In an instructive passage, this Court turned down the argument on behalf of the appellants that the word “propagate” in Article 25(1) would include conversion. The Court held:

> “We have no doubt that it is in this sense that the word ‘propagate’ has been used in Article 25(1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees “freedom of conscience” to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one’s own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the “freedom of conscience” guaranteed to all the citizens of the country alike.
>
> The meaning of guarantee under Article 25 of the Constitution came up for consideration in this Court in *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.* [1954 SCR 1055, 1062-63] and it was held as follows:
>
> > “Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or

> conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others."
>
> This Court has given the correct meaning of the Article, and we find no justification for the view that it grants a fundamental right to convert persons to one's own religion. It has to be appreciated that the freedom of religion enshrined in the Article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion."
>
> (at pp. 616-617)

14. In **S.P. Mittal v. Union of India and Ors.**, (1983) 1 SCC 51, ("**S.P. Mittal**"), this Court upheld the constitutional validity of the Auroville (Emergency Provisions) Act, 1980. After referring to **Shirur Math** (supra) and **Durgah Committee** (supra), the Court laid down three tests for determining whether a temple could be considered to be a religious denomination as follows:

> "**80.** The words 'religious denomination' in Article 26 of the Constitution must take their colour from the word 'religion' and if this be so, the expression

> ‘religious denomination’ must also satisfy three conditions:
>
> > “(1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;
> >
> > (2) common organization; and
> >
> > (3) designation by a distinctive name.”

A reference was made to Rule 9 of the Rules and Regulations of the Sri Aurobindo Society, and to an important argument made, that to be a religious denomination, the person who is a member of the denomination should belong to the religion professed by the denomination and should give up his previous religion. The argument was referred to in paragraph 106 as follows:

> “**106.** Reference was made to Rule 9 of the Rules and Regulations of Sri Aurobindo Society, which deals with membership of the Society and provides:
>
> > “9. Any person or institution or organisation either in India or abroad who subscribes to the aims and objects of the Society, and whose application for membership is approved by the Executive Committee, will be member of the Society. The membership is open to people everywhere without any distinction of nationality, religion, caste, creed or sex.”
>
> The only condition for membership is that the person seeking the membership of the Society must subscribe to the aims and objects of the Society. It

> was further urged that what is universal cannot be a religious denomination. In order to constitute a separate denomination, there must be something distinct from another. A denomination argues the counsel, is one which is different from the other and if the Society was a religious denomination, then the person seeking admission to the institution would lose his previous religion. He cannot be a member of two religions at one and the same time. But this is not the position in becoming a member of the Society and Auroville. A religious denomination must necessarily be a new one and new methodology must be provided for a religion. Substantially, the view taken by Sri Aurobindo remains a part of the Hindu philosophy. There may be certain innovations in his philosophy but that would not make it a religion on that account."

After referring to the arguments of both sides, the Court did not answer the question as to whether the Sri Aurobindo Society was a religious denomination, but proceeded on the assumption that it was, and then held that the Act did not violate either Article 25 or Article 26.

In a separate opinion by Chinnappa Reddy, J., without adverting to the argument contained in paragraph 106 of Misra, J.'s judgment, the learned Judge concluded that "Aurobindoism" could be classified as a new sect of Hinduism and the followers of Sri Aurobindo could, therefore, be termed as a religious denomination. This was done despite the fact that Sri Aurobindo himself disclaimed that he was

founding a new religion and that the Society had represented itself as a “non-political, non-religious organization” and claimed exemption from income tax on the ground that it was engaged in educational, cultural, and scientific research.

15. We then come to **Acharya Jagdishwaranand Avadhuta and Ors. v. Commissioner of Police, Calcutta and Anr.**, (1983) 4 SCC 522. This judgment concerned itself with whether “Ananda Marga” is a separate religious denomination. After referring to the tests laid down in **Shirur Math** (supra), **Durgah Committee** (supra), and **S.P. Mittal** (supra), this Court held that Ananda Margis belong to the Hindu religion, more specifically, being Shaivites, and therefore, could be held to be persons who satisfy all three tests – namely, that they are a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well-being; they have a common organization; and a distinctive name. In holding that the Tandava dance cannot be taken to be an essential religious right of the Anand Margis, this Court in paragraph 14 held:

> “**14.** The question for consideration now, therefore, is whether performance of Tandava dance is a religious rite or practice essential to the tenets of the

religious faith of the Ananda Margis. We have already indicated that Tandava dance was not accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced Tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances Tandava dance can be taken as an essential religious rite of the Ananda Margis. Even conceding that it is so, it is difficult to accept Mr. Tarkunde's argument that taking out religious processions with Tandava dance is an essential religious rite of Ananda Margis. In paragraph 17 of the writ petition the petitioner pleaded that "Tandava dance lasts for a few minutes where two or three persons dance by lifting one leg to the level of the chest, bringing it down and lifting the other". In paragraph 18 it has been pleaded that "when the Ananda Margis greet their spiritual preceptor at the airport, etc., they arrange for a brief welcome dance of Tandava wherein one or two persons use the skull and symbolic knife and dance for two or three minutes". In paragraph 26 it has been pleaded that "Tandava is a custom among the sect members and it is a customary performance and its origin is over four thousand years old, hence it is not a new invention of Ananda Margis". On the basis of the literature of the Ananda Marga denomination it has been contended that there is prescription of the performance of Tandava dance by every follower of Ananda Marga. Even conceding that Tandava dance has been prescribed as a religious rite for every follower of the Ananda Marga it does not follow as a necessary corollary that Tandava dance to be performed in the public is a matter of religious

> rite. In fact, there is no justification in any of the writings of Sri Ananda Murti that Tandava dance must be performed *in public*. At least none could be shown to us by Mr. Tarkunde despite an enquiry by us in that behalf. We are, therefore, not in a position to accept the contention of Mr. Tarkunde that performance of Tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi."

16. In **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors. v. State of U.P. and Ors.**, (1997) 4 SCC 606, ("**Sri Adi Visheshwara**"), this Court upheld the constitutional validity of the Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983. In so doing, they referred to the tests of a religious denomination laid down in the previous judgments of this Court, and then held:

> "**33.** Thus, it could be seen that every Hindu whether a believer of Shaiva form of worship or of panchratna form of worship, has a right of entry into the Hindu Temple and worship the deity. Therefore, the Hindu believers of Shaiva form of worship are not denominational worshippers. They are part of the Hindu religious form of worship. The Act protects the right to perform worship, rituals or ceremonies in accordance with established customs and practices. Every Hindu has right to enter the Temple, touch the Linga of Lord Sri Vishwanath and himself perform the pooja. The State is required under the Act to protect the religious practices of the Hindu form of worship of Lord Vishwanath, be it in any form, in accordance with Hindu Shastras, the customs or usages obtained in the Temple. It is not restricted to

any particular denomination or sect. Believers of Shaiva form of worship are not a denominational sect or a section of Hindus but they are Hindus as such. They are entitled to the protection under Articles 25 and 26 of the Constitution. However, they are not entitled to the protection, in particular, of clauses (b) and (d) of Article 26 as a religious denomination in the matter of management, administration and governance of the temples under the Act. The Act, therefore, is not ultra vires Articles 25 and 26 of the Constitution."

(emphasis supplied)

17. In **N. Adithayan v. Travancore Devaswom Board and Ors.**, (2002) 8 SCC 106, this Court held the appointment of a person who is not a Malayala Brahmin as a Pujari or priest of a temple in Kerala as constitutionally valid. After referring to various authorities of this Court, this Court held:

"**16.** It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such

rights of the State or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down.

**17.** Where a temple has been constructed and consecrated as per Agamas, it is considered necessary to perform the daily rituals, poojas and recitations as required to maintain the sanctity of the idol and it is not that in respect of any and every temple any such uniform rigour of rituals can be sought to be enforced, dehors its origin, the manner of construction or method of consecration. No doubt only a qualified person well versed and properly trained for the purpose alone can perform poojas in the temple since he has not only to enter into the sanctum sanctorum but also touch the idol installed therein. It therefore goes without saying that what is required and expected of one to perform the rituals and conduct poojas is to know the rituals to be performed and mantras, as necessary, to be recited for the particular deity and the method of worship ordained or fixed therefor. For example, in Saivite temples or Vaishnavite temples, only a person who learnt the necessary rites and mantras conducive to be performed and recited in the respective temples

and appropriate to the worship of the particular deity could be engaged as an Archaka. If traditionally or conventionally, in any temple, all along a Brahmin alone was conducting poojas or performing the job of Santhikaran, it may not be because a person other than the Brahmin is prohibited from doing so because he is not a Brahmin, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in public or private temples. Consequently, there is no justification to insist that a Brahmin or Malayala Brahmin in this case, alone can perform the rites and rituals in the temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long as anyone well versed and properly trained and qualified to perform the pooja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a court of law. There has been no proper plea or sufficient proof also in this case of any specific custom or usage specially created by the founder of the Temple or those who have the exclusive right to administer the affairs — religious or secular of the Temple in question, leave alone the legality, propriety and validity of the same in the changed legal position brought about by the Constitution and the law enacted by Parliament. The Temple also does not belong to any denominational category

> with any specialized form of worship peculiar to such denomination or to its credit. For the said reason, it becomes, in a sense, even unnecessary to pronounce upon the invalidity of any such practice being violative of the constitutional mandate contained in Articles 14 to 17 and 21 of the Constitution of India."

Finally, this Court held:

> "**18.** ……. Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country."

18. In **Dr. Subramanian Swamy v. State of Tamil Nadu and Ors.**, (2014) 5 SCC 75, this Court dealt with the claim by Podhu Dikshitars (Smarthi Brahmins) to administer the properties of a temple dedicated to Lord Natraja at the Sri Sabanayagar Temple at Chidambaram. This Court noticed, in paragraph 24, that the rights conferred under Article 26 are not subject to other provisions of Part III of the Constitution. It then went on to extract a portion of the Division Bench judgment of the Madras High Court, which held that the Podhu Dikshitars constitute a

religious denomination, or in any event, a section thereof, because they are a closed body, and because no other Smartha Brahmin who is not a Dikshitar is entitled to participate in either the administration or in the worship of God. This is their exclusive and sole privilege which has been recognized and established for several centuries. Another interesting observation of this Court was that fundamental rights protected under Article 26 cannot be waived. Thus, the power to supersede the administration of a religious denomination, if only for a certain purpose and for a limited duration, will have to be read as regulatory, otherwise, it will violate the fundamental right contained in Article 26.

19. In **Riju Prasad Sarma and Ors. v. State of Assam and Ors.**, (2015) 9 SCC 461, this Court dealt with customs based on religious faith which dealt with families of priests of a temple called the Maa Kamakhya Temple. After discussing some of the judgments of this Court, a Division Bench of this Court held:

> "**61.** There is no need to go into all the case laws in respect of Articles 25 and 26 because by now it is well settled that Article 25(2)(a) and Article 26(b) guaranteeing the right to every religious denomination to manage its own affairs in matters of

> religion are subject to and can be controlled by a law contemplated under Article 25(2)(b) as both the Articles are required to be read harmoniously. It is also well established that social reforms or the need for regulations contemplated by Article 25(2) cannot obliterate essential religious practices or their performances and what would constitute the essential part of a religion can be ascertained with reference to the doctrine of that religion itself. In support of the aforesaid established propositions, the respondents have referred to and relied upon the judgment in *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [AIR 1954 SC 282 : 1954 SCR 1005] and also upon *Sri Venkataramana Devaru* v. *State of Mysore* [AIR 1958 SC 255 : 1958 SCR 895]."

The observation that regulations contemplated by Article 25 cannot obliterate essential religious practices is understandable as regulations are not restrictions. However, social reform legislation, as has been seen above, may go to the extent of trumping religious practice, if so found on the facts of a given case. Equally, the task of carrying out reform affecting religious belief is left by Article 25(2) in the hands of the State (*See* paragraph 66).

20. In **Adi Saiva Sivachariyargal Nala Sangam and Ors. v. Government of Tamil Nadu and Anr.**, (2016) 2 SCC 725, ("**Adi Saiva Sivachariyargal Nala Sangam**"), this Court was concerned

with a Government Order issued by the Government of Tamil Nadu, which stated that any person who is a Hindu and possesses the requisite qualification and training, can be appointed as an Archaka in Hindu temples. The Court referred to Article 16(5) of the Constitution, stating that the exception carved out of the equality principle would cover an office of the temple, which also requires performance of religious functions. Therefore, an Archaka may, by law, be a person professing a particular religion or belonging to a particular denomination. The Court went on to hold that although what constitutes essential religious practice must be decided with reference to what the religious community itself says, yet, the ultimate constitutional arbiter of what constitutes essential religious practice must be the Court, which is a matter of constitutional necessity. The Court went on to state that constitutional legitimacy, as decided by the Courts, must supersede all religious beliefs and practices, and clarified that “complete autonomy”, as contemplated by **Shirur Math** (supra), of a denomination to decide what constitutes essential religious practice must be viewed in the context of the limited role of the State in matters relating to religious freedom as envisaged by Articles 25 and 26 of the

Constitution, and not of Courts as the arbiter of constitutional rights and principles.

21. A conspectus of these judgments, therefore, leads to the following propositions:

21.1. Article 25 recognises a fundamental right in favour of “all persons” which has reference to natural persons.

21.2. This fundamental right equally entitles all such persons to the said fundamental right. Every member of a religious community has a right to practice the religion so long as he does not, in any way, interfere with the corresponding right of his co-religionists to do the same.

21.3. The content of the fundamental right is the fleshing out of what is stated in the Preamble to the Constitution as “liberty of thought, belief, faith and worship”. Thus, all persons are entitled to freedom of conscience and the right to freely profess, practice, and propagate religion.

21.4. The right to profess, practice, and propagate religion will include all acts done in furtherance of thought, belief, faith, and worship.

21.5. The content of the right concerns itself with the word “religion”. “Religion” in this Article would mean matters of faith with individuals or communities, based on a system of beliefs or doctrines which conduce to spiritual well-being. The aforesaid does not have to be theistic but can include persons who are agnostics and atheists.

21.6. It is only the essential part of religion, as distinguished from secular activities, that is the subject matter of the fundamental right. Superstitious beliefs which are extraneous, unnecessary accretions to religion cannot be considered as essential parts of religion. Matters that are essential to religious faith and/or belief are to be judged on evidence before a court of law by what the community professing the religion itself has to say as to the essentiality of such belief. One test that has been evolved would be to remove the particular belief stated to be an essential belief from the religion – would the religion remain the same or would it be altered? Equally, if different groups of a religious community speak with different voices on the essentiality aspect presented before the Court, the Court is then to decide as to whether such matter is or is not essential. Religious activities may also be mixed up with secular activities, in which case the dominant nature

of the activity test is to be applied. The Court should take a common-sense view and be actuated by considerations of practical necessity.

21.7. The exceptions to this individual right are public order, morality, and health. “Public order” is to be distinguished from “law and order”. “Public disorder” must affect the public at large as opposed to certain individuals. A disturbance of public order must cause a general disturbance of public tranquility. The term “morality” is difficult to define. For the present, suffice it to say that it refers to that which is considered abhorrent to civilized society, given the mores of the time, by reason of harm caused by way, *inter alia*, of exploitation or degradation.[2] “Health” would include noise pollution and the control of disease.

21.8. Another exception to the fundamental right conferred by Article 25(1) is the rights that are conferred on others by the other provisions of Part III. This would show that if one were to propagate one’s religion

[2] We were invited by the learned *Amicus Curiae*, Shri Raju Ramachandran, to read the word “morality” as being “constitutional morality” as has been explained in some of our recent judgments. If so read, it cannot be forgotten that this would bring in, through the back door, the other provisions of Part III of the Constitution, which Article 26 is not subject to, in contrast with Article 25(1). In any case, the fundamental right under Article 26 will have to be balanced with the rights of others contained in Part III as a matter of harmonious construction of these rights as was held in **Sri Venkataramana Devaru** (supra). But this would only be on a case to case basis, without necessarily subjecting the fundamental right under Article 26 to other fundamental rights contained in Part III.

in such a manner as to convert a person of another religious faith, such conversion would clash with the other person's right to freedom of conscience and would, therefore, be interdicted. Where the practice of religion is interfered with by the State, Articles 14, 15(1), 19, and 21 would spring into action. Where the practice of religion is interfered with by non-State actors, Article 15(2) and Article 17[3] would spring into action.

21.9. Article 25(2) is also an exception to Article 25(1), which speaks of the State making laws which may regulate or restrict secular activity, which includes economic, financial or political activity, which may be associated with religious practice – *see* Article 25(2)(a).

21.10. Another exception is provided under Article 25(2)(b) which is in two parts. Any law providing for social welfare and reform in a religious community can also affect and/or take away the fundamental right granted under Article 25(1). A further exception is provided only insofar as persons professing the Hindu religion are concerned, which is to

[3] We were invited by the learned *Amicus Curiae*, Shri Raju Ramachandran, to construe Article 17 in wider terms than merely including those who were historically untouchables at the time of framing of the Constitution. We have refrained from doing so because, given our conclusion, based on Article 25(1), this would not directly arise for decision on the facts of this case.

throw open all Hindu religious institutions of a public character to all classes and sections of Hindus.

21.11. Contrasted with the fundamental right in Article 25(1) is the fundamental right granted by Article 26. This fundamental right is not granted to individuals but to religious denominations or sections thereof. A religious denomination or section thereof is to be determined on the basis of persons having a common faith, a common organization, and designated by a distinct name as a denomination or section thereof. Believers of a particular religion are to be distinguished from denominational worshippers. Thus, Hindu believers of the Shaivite and Vaishnavite form of worship are not denominational worshippers but part of the general Hindu religious form of worship.

21.12. Four separate and distinct rights are given by Article 26 to religious denominations or sections thereof, namely:

> "(a) to establish and maintain institutions for religious and charitable purposes;
> (b) to manage its own affairs in matters of religion;
> (c) to own and acquire movable and immovable property; and
> (d) to administer such property in accordance with law."

As in Article 25, it is only essential religious matters which are protected by this Article.

21.13. The fundamental right granted under Article 26 is subject to the exception of public order, morality, and health. However, since the right granted under Article 26 is to be harmoniously construed with Article 25(2)(b), the right to manage its own affairs in matters of religion granted by Article 26(b), in particular, will be subject to laws made under Article 25(2)(b) which throw open religious institutions of a public character to all classes and sections of Hindus.

21.14. Thus, it is clear that even though the entry of persons into a Hindu temple of a public character would pertain to management of its own affairs in matters of religion, yet such temple entry would be subject to a law throwing open a Hindu religious institution of a public character owned and managed by a religious denomination or section thereof to all classes or sections of Hindus. However, religious practices by the religious denomination or section thereof, which do not have the effect of either a complete ban on temple entry of certain persons, or are otherwise not discriminatory, may pass muster under Article 26(b). Examples of such practices are that only certain qualified

persons are allowed to enter the *sanctum sanctorum* of a temple, or time management of a temple in which all persons are shut out for certain periods.

22. At this stage, it is important to advert to a Division Bench judgment of the Kerala High Court reported as **S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram and Ors.**, AIR 1993 Ker 42. A petition filed by Shri S. Mahendran was converted into a PIL by the High Court. The petition complained of young women offering prayers at the Sabarimala Temple. The Division Bench set out three questions that arose, as follows:

> "**12.** The questions which require answers in this original petition are:
>
> (1) Whether woman [*sic* women] of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple.
>
> (2) Whether the denial of entry of that class of woman [*sic* women] amounts to discrimination and [*sic* is] violative of Articles 15, 25 and 26 of the Constitution of India, and
>
> (3) Whether directions can be issued by this Court to the Devaswom Board and the Government of Kerala to restrict the entry of such woman [*sic* women] to the temple?"

The Division Bench referred to the all-important “Vratham” (41-day penance), which, according to the Division Bench, ladies between the ages of 10 and 50 would not be physically capable of observing. In paragraph 7, the Division Bench stated that while the old customs prevailed, women did visit the temple, though rarely, as a result of which, there was no prohibition. The affidavit filed on behalf of the Travancore Devaswom Board stated that, even in recent years, many female worshippers in the age group of 10 to 50 had gone to the temple for the first rice-feeding ceremony of their children. The Board, in fact, used to issue receipts on such occasions on payment of the prescribed charge. However, on the advice of the priest i.e. the Thanthri, changes were effected in order to preserve the temple’s sanctity. The Division Bench found that women, irrespective of their age, were allowed to visit the temple when it opens for monthly poojas, but were not permitted to enter the temple during Mandalam, Makaravilakku, and Vishu seasons. After examining the evidence of one Thanthri, the Secretary of the Ayyappa Seva Sangham, and a 75-year old man who had personal knowledge of worshipping at the temple, the Division Bench stated that the usage of not permitting

women between the age group of 10 to 50 to worship in the temple had been established. This was further sanctified by Devaprasnams conducted at Sabarimala by astrologers, who reported that the deity does not like young ladies entering the precincts of the temple. It was then held in paragraph 38 that since women of the age group of 10 to 50 years would not be able to observe Vratham for a period of 41 days due to physiological reasons, they were not permitted to go on a pilgrimage of Sabarimala. It was also held that the deity is in the form of a *Naisthik Brahmachari*, as a result of which, young women should not offer worship in the temple, so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women. The conclusion of the Division Bench in paragraph 44 was, therefore, as follows:

> "**44.** Our conclusions are as follows:
>
> (1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.
>
> (2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.

> (3) Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a temple whereas the prohibition is only in respect of women of a particular age group and not women as a class."

23. In the present writ petition filed before this Court, an affidavit filed by a Thanthri of the Sabarimala temple dated 23.04.2016 makes interesting reading. According to the affidavit, two Brahmin brothers from Andhra Pradesh were tested by Sage Parasuram and were named "Tharanam" and "Thazhamon". The present Thanthri is a descendant of the Thazhamon brother, who is authorized to perform rituals in Sastha temples. The affidavit then refers to the Sabarimala Temple, which is dedicated to Lord Ayyappa, as a prominent temple in Kerala which is visited by over twenty million pilgrims and devotees every year. The temple is only open during the first five days of every Malayalam month, and during the festivals of Mandalam, Makaravilakku, and Vishu. Significantly, no daily poojas are performed in the said temple. It is stated in the affidavit that Lord Ayyappa had himself explained that the pilgrimage to Sabarimala can be undertaken

only by the performance of Vratham, which are religious austerities that train man for evolution to spiritual consciousness.

Paragraph 10 of the affidavit is important and states as follows:-

> "**10.** I submit that as part of observing "vrutham", the person going on pilgrimage to Sabarimala separates himself from all family ties and becomes a student celibate who is under Shastras banned any contact with females of the fertile age group. Everywhere when somebody takes on the "vrutham", either the women leave the house and take up residence elsewhere or the men separate themselves from the family so that normal Asauchas in the house do not affect his "vrutham". The problem with women is that they cannot complete the 41 days vrutham because the Asaucham of periods will surely fall within the 41 days. It is not a mere physiological phenomenon. It is the custom among all Hindus that women during periods do not go to Temples or participate in religious activity. This is as per the statement of the basic Thantric text of Temple worshipping in Kerala Thanthra Samuchayam, Chapter 10, Verse II. A true copy of the relevant page of Thanthra Samuchchaya is attached herewith and marked as Annexure A-1 (Pages 30-31)."

The affidavit then goes on to state that the Shastras forbid religious austerity by menstruating women, which is why women above the age of 10 and below the age of 50 are not allowed entering into the temple. The affidavit then states, in paragraph 15:

> "**15.** …… During this period, many women are affected by physical discomforts like headache, body pain, vomiting sensation etc. In such circumstances, intense and chaste spiritual disciplines for forty-one days are not possible. It is for the sake of pilgrims who practiced celibacy that youthful women are not allowed in the Sabarimala pilgrimage. ……"

The other reason given in the affidavit for the usage of non-entry of women between these ages is as follows:

> "**24.** That the deity at Sabarimala is in the form of a 'Naishtik Brahmachari' and that is the reason why young women are not permitted to offer prayers in the temple as the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women. ……"

It will thus be seen that women are barred entry to the temple at Sabarimala because of the biological or physiological phenomenon of menstruation, which forbids their participation in religious activity. The second reason given is that young women should not, in any manner, deflect the deity, who is in the form of a *Naisthika Brahmachari*, from celibacy and austerity.

24. All the older religions speak of the phenomenon of menstruation in women as being impure, which therefore, forbids their participation

in religious activity. Thus, in the Old Testament, in Chapter 15, Verse 19 of the book of Leviticus, it is stated:

> "19. And if a woman have an issue, and her issue in her flesh be blood, she shall be put apart seven days: and whosoever toucheth her shall be unclean until the even."[4]

Similarly, in the *Dharmasutra* of *Vasistha*, an interesting legend of how women were made to menstruate is stated as follows:

> "A menstruating woman remains impure for three days. She should not apply collyrium on her eyes or oil on her body, or bathe in water; she should sleep on the floor and not sleep during the day; she should not touch the fire, make a rope, brush her teeth, eat meat, or look at the planets; she should not laugh, do any work, or run; and she should drink out of a large pot or from her cupped hands or a copper vessel. For it is stated: 'Indra, after he had killed the three-headed son of *Tvastr*, was seized by sin, and he regarded himself in this manner: "An exceedingly great guilt attaches to me". And all creatures railed against him: "Brahmin-killer! Brahmin-killer!" He ran to the women and said: "Take over one-third of this my guilt of killing a Brahmin." They asked: "What will we get?" He replied: "Make a wish." They said: "Let us obtain offspring during our season, and let us enjoy sexual intercourse freely until we give birth." He replied: "So be it!" And they took the guilt upon themselves. That guilt of killing a Brahmin manifests itself every

[4] *Leviticus* 15:19 (King James Version).

> month. Therefore, one should not eat the food of a menstruating woman, for such a woman has put on the aspect of the guilt of killing a Brahmin'."[5]

To similar effect are Chapters 9 and 13 of Canto 6 of the *Bhagavata Purana* which read as follows:

> "6.9.9. In return for Lord Indra's benediction that they would be able to enjoy lusty desires continuously, even during pregnancy for as long as sex is not injurious to the embryo, women accepted one fourth of the sinful reactions. As a result of those reactions, women manifest the signs of menstruation every month."[6]
>
> "6.13.5. King Indra replied: When I killed *Visvarupa*, I received extensive sinful reactions, but I was favored by the women, land, trees and water, and therefore I was able to divide the sin among them. But now if I kill *Vrtrasura*, another *brahmana*, how shall I free myself from the sinful reactions?"[7]

Also, in the Qur'an, Chapter 2, Verse 222 states as follows:

> "222. They also ask you about (the injunctions concerning) menstruation. Say: "it is a state of hurt (and ritual impurity), so keep away from women during their menstruation and do not approach them

[5] DHARMASUTRAS – THE LAW CODES OF APASTAMBA, GAUTAMA, BAUDHAYANA, AND VASISTHA 264 (Translation by Patrick Olivelle, Oxford University Press, 1999).

[6] SRIMAD BHAGAVATAM – SIXTH CANTO (Translation by A.C. Bhaktivedanta Swami Prabhupada, The Bhaktivedanta Book Trust, 1976).

[7] *Id.*

> until they are cleansed. When they are cleansed, then (you can) go to them inasmuch as God has commanded you (according to the urge He has placed in your nature, and within the terms He has enjoined upon you). Surely God loves those who turn to Him in sincere repentance (of past sins and errors), and He loves those who cleanse themselves."[8]

In the Gospel of Mark, Jesus is said to have cured a woman who was ritualistically unclean, having had an issue of blood for 12 years, as follows:

> "25. And a certain woman, which had an issue of blood twelve years,
>
> 26. And had suffered many things of many physicians, and had spent all that she had, and was nothing bettered, but rather grew worse,
>
> 27. When she had heard of Jesus, came in the press behind, and touched his garment.
>
> 28. For she said, If I may touch but his clothes, I shall be whole.
>
> 29. And straightway the fountain of her blood was dried up; and she felt in her body that she was healed of that plague.
>
> 30. And Jesus, immediately knowing in himself that virtue had gone out of him, turned him about in the press, and said, Who touched my clothes?

[8] THE QUR'AN – WITH ANNOTATED INTERPRETATION IN MODERN ENGLISH, 2:222 (Translation by Ali Ünal, Tughra Books USA, 2015).

> 31. And his disciples said unto him, Thou seest the multitude thronging thee, and sayest thou, Who touched me?
>
> 32. And he looked round about to see her that had done this thing.
>
> 33. But the woman fearing and trembling, knowing what was done in her, came and fell down before him, and told him all the truth.
>
> 34. And he said unto her, Daughter, thy faith hath made thee whole; go in peace, and be whole of thy plague."[9]

One may immediately notice that the woman touching Jesus was without Jesus's knowledge, for upon coming to know of the woman's touch, Jesus "knew in himself that virtue had gone out of him".

Equally, in the *Bundahishn*, a text relating to creation in Zoroastrianism, it is stated that a primeval prostitute call Jeh, because of her misdeeds, brought upon herself, menstruation. Chapter 3, Verses 6 to 8 of the Bundahishn are as follows:

> "6. And, again, the wicked Jeh shouted thus: 'Rise up, thou father of us! for in that conflict I will shed thus much vexation on the righteous man and the laboring ox that, through my deeds, life will not be wanted, and I will destroy their living souls (nismo); I will vex the water, I will vex the plants, I will vex the

[9] *Mark* 5:25-34 (King James Version).

> fire of Ohrmazd, I will make the whole creation of Ohrmazd vexed.'
>
> 7. And she so recounted those evil deeds a second time, that the evil spirit was delighted and started up from that confusion; and he kissed Jeh upon the head, and the pollution which they call menstruation became apparent in Jeh.
>
> 8. He shouted to Jeh thus: 'What is thy wish? so that I may give it thee.' And Jeh shouted to the evil spirit thus: 'A man is the wish, so give it to me.'"[10]

In the selections of *Zadspram*, Chapter 34, Verse 31, it is stated:

> "31. And [the demon Whore] of evil religion joined herself [to the Blessed Man]; for the defilement of females she joined herself to him, that she might defile females; and the females, because they were defiled, might defile the males, and (the males) would turn aside from their proper work."[11]

However, in the more recent religions such as Sikhism and the Bahá'í Faith, a more pragmatic view of menstruation is taken, making it clear that no ritualistic impurity is involved. The Sri Guru Granth Sahib deems menstruation as a natural process – free from impurity[12] and

[10] THE BUNDAHISHN – "CREATION" OR KNOWLEDGE FROM THE ZAND (Translation by E. W. West, from *Sacred Books of the East*, vol. 5, 37, and 46, Oxford University Press, 1880, 1892, and 1897).

[11] THE SELECTIONS OF ZADSPRAM (VIZIDAGIHA I ZADSPRAM) (Joseph H. Peterson Ed., 1995) (Translation by E. W. West, from *Sacred Books of the East*, vol. 5, 37, and 46, Oxford University Press, 1880, 1892, and 1897).

[12] 2 SRI GURU GRANTH SAHIB: ENGLISH TRANSLATION OF THE ORIGINAL TEXT 466-467 (Translation by Dr. Gopal Singh, Allied Publishers Pvt. Ltd., 2005) [which translates *Raga Asa*, *Shaloka Mehla* 1 at p. 472 of the original text of Sri Guru Granth Sahib].

essential to procreation.[13] Similarly, in the Bahá'í Faith, the concept of ritual uncleanness has been abolished by Bahá'u'lláh.[14]

25. For the purpose of this case, we have proceeded on the footing that the reasons given for barring the entry of menstruating women to the Sabarimala temple are considered by worshippers and Thanthris alike, to be an essential facet of their belief.

26. The first question that arises is whether the Sabarimala temple can be said to be a religious denomination for the purpose of Article 26 of the Constitution. We have already seen with reference to the case law quoted above, that three things are necessary in order to establish that a particular temple belongs to a religious denomination. The temple must consist of persons who have a common faith, a common organization, and are designated by a distinct name. In answer to the question whether Thanthris and worshippers alike are designated by a distinct name, we were unable to find any answer. When asked whether all persons who visit the Sabarimala temple have a common

[13] 4 SRI GURU GRANTH SAHIB: ENGLISH TRANSLATION OF THE ORIGINAL TEXT 975 (Translation by Dr. Gopal Singh, Allied Publishers Pvt. Ltd., 2005) [which translates *Raga Maru*, *Mehla* 1 at p.1022 of the original text of Sri Guru Granth Sahib].

[14] KITÁB-I-AQDAS BY BAHÁ'U'LLÁH, note 106 at p. 122 (Translation by Shoghi Effendi, Bahá'í World Centre, 1992).

faith, the answer given was that all persons, regardless of caste or religion, are worshippers at the said temple. From this, it is also clear that Hindus of all kinds, Muslims, Christians etc., all visit the temple as worshippers, without, in any manner, ceasing to be Hindus, Christians or Muslims. They can therefore be regarded, as has been held in **Sri Adi Visheshwara** (supra), as Hindus who worship the idol of Lord Ayyappa as part of the Hindu religious form of worship but not as denominational worshippers. The same goes for members of other religious communities. We may remember that in **Durgah Committee** (supra), this Court had held that since persons of all religious faiths visit the Durgah as a place of pilgrimage, it may not be easy to hold that they constitute a religious denomination or a section thereof. However, for the purpose of the appeal, they proposed to deal with the dispute between the parties on the basis that the Chishtia sect, whom the respondents represented, were a separate religious denomination, being a sub-sect of Soofies. We may hasten to add that we find no such thing here. We may also add that in **S.P. Mittal** (supra), the majority judgment did not hold, and therefore, assumed that "Aurobindoism" was a religious denomination, given the fact that the Auroville Foundation Society claimed exemption from income tax on

the footing that it was a charitable, and not a religious organization, and held itself out to be a non-religious organization. Also, the powerful argument addressed, noticed at paragraph 106 of the majority judgment, that persons who joined the Auroville Society did not give up their religion, also added great substance to the fact that the Auroville Society could not be regarded as a religious denomination for the purpose of Article 26. Chinnappa Reddy, J. alone, in dissent, held the Auroville Society to be a religious denomination, without adverting to the fact that persons who are a part of the Society continued to adhere to their religion.

27. In these circumstances, we are clearly of the view that there is no distinctive name given to the worshippers of this particular temple; there is no common faith in the sense of a belief common to a particular religion or section thereof; or common organization of the worshippers of the Sabarimala temple so as to constitute the said temple into a religious denomination. Also, there are over a thousand other Ayyappa temples in which the deity is worshipped by practicing Hindus of all kinds. It is clear, therefore, that Article 26 does not get attracted to the facts of this case.

28. This being the case, even if we assume that there is a custom or usage for keeping out women of the ages of 10 to 50 from entering the Sabarimala temple, and that this practice is an essential part of the Thanthris' as well as the worshippers' faith, this practice or usage is clearly hit by Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, which states as follows:

> "**3.** *Places of public worship to be open to all section and classes of Hindus*:— Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may enter, worship, pray or perform:
>
> Provided that in the case of a public of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section, shall be subject to the right of that religious denomination or section as the

case may be, to manage its own affairs in matters of religion."

Since the proviso to the Section is not attracted on the facts of this case, and since the said Act is clearly a measure enacted under Article 25(2)(b), any religious right claimed on the basis of custom and usage as an essential matter of religious practice under Article 25(1), will be subject to the aforesaid law made under Article 25(2)(b). The said custom or usage must therefore, be held to be violative of Section 3 and hence, struck down.

29. Even otherwise, the fundamental right of women between the ages of 10 and 50 to enter the Sabarimala temple is undoubtedly recognized by Article 25(1). The fundamental right claimed by the Thanthris and worshippers of the institution, based on custom and usage under the selfsame Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa. The argument that all women are not prohibited from entering the temple can be of no avail, as women between the age

group of 10 to 50 are excluded completely. Also, the argument that such women can worship at the other Ayyappa temples is no answer to the denial of their fundamental right to practice religion as they see it, which includes their right to worship at any temple of their choice. On this ground also, the right to practice religion, as claimed by the Thanthris and worshippers, must be balanced with and must yield to the fundamental right of women between the ages of 10 and 50, who are completely barred from entering the temple at Sabarimala, based on the biological ground of menstruation.

Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 states as follows:

> "**3.** The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use of water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to place of public worship:
>
> xxx xxx xxx
>
> (b)Women at such time during which they are not by custom and usage allowed to enter a place of public worship.
>
> xxx xxx xxx"

The abovementioned Rule is *ultra vires* of Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, and is hit by Article 25(1) and by Article 15(1) of the Constitution of India as this Rule discriminates against women on the basis of their sex only.

30. The learned counsel appearing on behalf of the Respondents stated that the present writ petition, which is in the nature of a PIL, is not maintainable inasmuch as no woman worshipper has come forward with a plea that she has been discriminated against by not allowing her entry into the temple as she is between the age of 10 to 50. A similar argument was raised in **Adi Saiva Sivachariyargal Nala Sangam** (supra) which was repelled in the following terms:

> "**12.** …… The argument that the present writ petition is founded on a cause relating to appointment in a public office and hence not entertainable as a public interest litigation would be too simplistic a solution to adopt to answer the issues that have been highlighted which concerns the religious faith and practice of a large number of citizens of the country and raises claims of century-old traditions and usage having the force of law. The above is the second ground, namely, the gravity of the issues that arise, that impel us to make an attempt to answer the issues raised and arising in the writ petitions for determination on the merits thereof."

The present case raises grave issues relating to women generally, who happen to be between the ages of 10 to 50, and are not allowed entry into the temple at Sabarimala on the ground of a physiological or biological function which is common to all women between those ages. Since this matter raises far-reaching consequences relating to Articles 25 and 26 of the Constitution of India, we have found it necessary to decide this matter on merits. Consequently, this technical plea cannot stand in the way of a constitutional court applying constitutional principles to the case at hand.

31. A fervent plea was made by some of the counsels for the Respondents that the Court should not decide this case without any evidence being led on both sides. Evidence is very much there, in the form of the writ petition and the affidavits that have been filed in the writ petition, both by the Petitioners as well as by the Board, and by the Thanthri's affidavit referred to supra. It must not be forgotten that a writ petition filed under either Article 32 or Article 226 is itself not merely a pleading, but also evidence in the form of affidavits that are sworn. (*See* **Bharat Singh and Ors. v. State of Haryana and Ors.**, 1988 Supp (2) SCR 1050 at 1059).

32. The facts, as they emerge from the writ petition and the aforesaid affidavits, are sufficient for us to dispose of this writ petition on the points raised before us. I, therefore, concur in the judgment of the learned Chief Justice of India in allowing the writ petition, and declare that the custom or usage of prohibiting women between the ages of 10 to 50 years from entering the Sabarimala temple is violative of Article 25(1), and violative of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 made under Article 25(2)(b) of the Constitution. Further, it is also declared that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is unconstitutional being violative of Article 25(1) and Article 15(1) of the Constitution of India.

**……J.**
**(R.F. Nariman)**

**New Delhi;**
**September 28, 2018.**