REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 373 OF 2006

Indian Young Lawyers Association & Ors. **...Petitioner(s)**

VERSUS

The State of Kerala & Ors. **...Respondent(s)**

J U D G M E N T

Dipak Misra, CJI (for himself and A.M. Khanwilkar, J.)

Introduction

The irony that is nurtured by the society is to impose a rule, however unjustified, and proffer explanation or justification to substantiate the substratum of the said rule. Mankind, since time immemorial, has been searching for explanation or justification to substantiate a point of view that hurts humanity. The theoretical human values remain on paper. Historically, women have been treated with inequality and that is why, many have fought for their rights. Susan B. Anthony, known for her

feminist activity, succinctly puts, “Men, their rights, and nothing more; women, their rights, and nothing less.” It is a clear message.

2. Neither the said message nor any kind of philosophy has opened up the large populace of this country to accept women as partners in their search for divinity and spirituality. In the theatre of life, it seems, man has put the autograph and there is no space for a woman even to put her signature. There is inequality on the path of approach to understand the divinity. The attribute of devotion to divinity cannot be subjected to the rigidity and stereotypes of gender. The dualism that persists in religion by glorifying and venerating women as goddesses on one hand and by imposing rigorous sanctions on the other hand in matters of devotion has to be abandoned. Such a dualistic approach and an entrenched mindset results in indignity to women and degradation of their status. The society has to undergo a perceptual shift from being the propagator of hegemonic patriarchal notions of demanding more exacting standards of purity and chastity solely from women to be the cultivator of equality where the woman is in no way considered frailer, lesser or inferior to man. The law and the society are

bestowed with the Herculean task to act as levellers in this regard and for the same, one has to remember the wise saying of Henry Ward Beecher that deals with the changing perceptions of the world in time. He says:

> "Our days are a kaleidoscope. Every instant a change takes place in the contents. New harmonies, new contrasts, new combinations of every sort. Nothing ever happens twice alike. The most familiar people stand each moment in some new relation to each other, to their work, to surrounding objects. The most tranquil house, with the most serene inhabitants, living upon the utmost regularity of system, is yet exemplifying infinite diversities."[1]

3. Any relationship with the Creator is a transcendental one crossing all socially created artificial barriers and not a negotiated relationship bound by terms and conditions. Such a relationship and expression of devotion cannot be circumscribed by dogmatic notions of biological or physiological factors arising out of rigid socio-cultural attitudes which do not meet the constitutionally prescribed tests. Patriarchy in religion cannot be permitted to trump over the element of pure devotion borne out of faith and the freedom to practise and profess one's religion. The subversion and repression of women under the garb of biological or physiological factors cannot be given the seal of

[1] Henry Ward Beecher, 1813-1887 - *Eyes and Ears*

legitimacy. Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality.

4. It is a universal truth that faith and religion do not countenance discrimination but religious practices are sometimes seen as perpetuating patriarchy thereby negating the basic tenets of faith and of gender equality and rights. The societal attitudes too centre and revolve around the patriarchal mindset thereby derogating the status of women in the social and religious milieu. All religions are simply different paths to reach the Universal One. Religion is basically a way of life to realize one's identity with the Divinity. However, certain dogmas and exclusionary practices and rituals have resulted in incongruities between the true essence of religion or faith and its practice that has come to be permeated with patriarchal prejudices. Sometimes, in the name of essential and integral facet of the faith, such practices are zealously propagated.

The Reference

5. Having stated so, we will focus on the factual score. The instant writ petition preferred under Article 32 of the Constitution seeks issuance of directions against the Government of Kerala, Devaswom Board of Travancore, Chief Thanthri of Sabarimala Temple and the District Magistrate of Pathanamthitta to ensure entry of female devotees between the age group of 10 to 50 years to the Lord Ayyappa Temple at Sabarimala (Kerala) which has been denied to them on the basis of certain custom and usage; to declare Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (for short, "the 1965 Rules") framed in exercise of the powers conferred by Section 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (for brevity, "the 1965 Act") as unconstitutional being violative of Articles 14, 15, 25 and 51A(e) of the Constitution of India and further to pass directions for the safety of women pilgrims.

6. The three-Judge Bench in ***Indian Young Lawyers Association and others v. State of Kerala and others***[2], keeping in view the gravity of the issues involved, sought the assistance of Mr. Raju Ramachandran and Mr. K. Ramamoorthy,

2 (2017) 10 SCC 689

learned senior counsel as *Amici Curiae*. Thereafter, the three-Judge Bench analyzed the decision and the reasons ascribed by the Kerala High Court in ***S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthpuram and others***[3] wherein similar contentions were raised. The Bench took note of the two affidavits dated 13.11.2007 and 05.02.2016 and the contrary stands taken therein by the Government of Kerala.

7. After recording the submissions advanced by the learned counsel for the petitioners, the respondents as well as by the learned *Amici Curiae*, the three-Judge Bench considered the questions formulated by the counsel for the parties and, thereafter, framed the following questions for the purpose of reference to the Constitution Bench:

> "1. Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by 'morality' as used in Articles 25 and 26 of the Constitution?
>
> 2. Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?

3 AIR 1993 Kerala 42

3. Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?

4. Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex?

5. Whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is *ultra vires* the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and , if treated to be *intra vires*, whether it will be violative of the provisions of Part III of the Constitution?"

8. Because of the aforesaid reference, the matter has been placed before us.

9. It is also worthy to note here that the Division Bench of the High Court of Kerala, in ***S. Mahendran*** (supra), upheld the practice of banning entry of women belonging to the age group of 10 to 50 years in the Sabarimala temple during any time of the year. The High Court posed the following questions:

> "(1) Whether woman 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 amounts to discrimination and violative of Articles 15, 25 and 26 of the Constitution of India, and
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> (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 to the temple?"

10. The High Court, after posing the aforesaid questions, observed thus:

> "40. The deity in Sabarimala temple is in the form of a Yogi or a Bramchari according to the Thanthri of the temple. He stated that there are Sasta temples at Achankovil, Aryankavu and Kulathupuzha, but the deities there are in different forms. Puthumana Narayanan Namboodiri, a Thanthrimukhya recognised by the Travancore Devaswom Board, while examined as C.W. 1 stated that God in Sabarimala is in the form of aNaisthikBramchari. That, according to him, is the reason why young women are not permitted to offer prayers in the temple.
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> 41. Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that 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."

And again:

> "… We are therefore of the opinion that the usage of woman of the age group 10 to 50 not being permitted to enter the temple and its precincts had been made

> applicable throughout the year and there is no reason why they should be permitted to offer worship during specified days when they are not in a position to observe penance for 41 days due to physiological reasons. In short, woman after menarche up to menopause are not entitled to enter the temple and offer prayars there at any time of the year."

11. Analysing so, the High Court recorded its conclusions which read thus:

> "(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.
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> (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."

Submissions on behalf of the Petitioners

12. Learned counsel appearing for the petitioners have alluded to the geographical location, historical aspect along with the Buddhist connection of the Sabarimala temple and the religious history of Lord Ayyappa. They have, for the purpose of

appreciating the functioning of the Sabarimala temple, also taken us through the history of Devaswom in Travancore. As regards the statutory backing of the Devaswom Boards, the petitioners have drawn the attention of this Court to the 'Travancore - Cochin Hindu Religious Institutions Act, 1950', Section 4 of the said Act contemplates a Devaswom Board for bringing all incorporated and unincorporated Devaswoms and other Hindu religious institutions except Sree Padmanabhaswamy Temple.

13. It has been put forth by them that the aforesaid enactment has been subject to various amendments over a period of time, the last amendment being made in the year 2007 vide Amending Act of 2007 [published under Notification No. 2988/Leg.A1/2007 in K.G. ext. No. 694 dated 12.04.2007] which led to the inclusion of women into the management Board. The petitioners have also referred to Section 29A of the said Act which stipulates that all appointments of officers and employees in the Devaswom Administrative Service of the Board shall be made from a select list of candidates furnished by the Kerala Public Service Commission. It has been submitted by the petitioners that after the 1950 Act, no individual Devaswom Board can act differently both in matters of religion and administration as they have lost

their distinct character and Sabarimala no more remained a temple of any religious denomination after the tak over of its management.

14. As far as the funding aspect is considered, it is contended that prior to the adoption of the Constitution, both the Travancore and Tamil Nadu Devaswom Boards were funded by the State but after six years of the adoption of the Constitution, the Parliament, in the exercise of its constituent power, inserted Article 290-A vide the 7th Amendment whereby a sum of rupees forty six lakhs and fifty thousand only is allowed to be charged upon the Consolidated Fund of the State of Kerala which is paid to the Travancore Devaswom Board. It has been asseverated by the petitioners that after the insertion of Article 290-A in the Constitution and the consequent State funding, no individual ill-practice could be carried on in any temple associated with the statutory Devaswom Board even in case of Hindu temple as this constitutional amendment has been made on the premise that no ill-practice shall be carried on in any temple which is against the constitutional principles.

15. It is urged that since all Devaswoms are Hindu Temples and they are bound to follow the basic tenets of Hindu religion,

individual ill-practice of any temple contrary to the basic tenets of Hindu religion is impermissible, after it being taken over by statutory board and state funding in 1971. It is propounded that for the purpose of constituting a 'religious denomination; not only the practices followed by that denomination should be different but its administration should also be distinct and separate. Thus, even if some practices are distinct in temples attached to statutory board, since its administration is centralized under the Devaswom Board, it cannot attain a distinct identity of a separate religious denomination.

16. It is contended that in legal and constitutional parlance, for the purpose of constituting a religious denomination, there has to be strong bondage among the members of its denomination. Such denomination must be clearly distinct following a particular set of rituals/practices/usages having their own religious institutions including managing their properties in accordance with law. Further, the petitioners have averred that religious denomination which closely binds its members with certain rituals/practices must also be owning some property with perpetual succession which, as per the petitioners, the Constitution framers kept in mind while framing Article 26 of the Constitution and,

accordingly, religious denominations have been conferred four rights under clauses (a) to (d) of Article 26. These rights, it is submitted, are not disjunctive and exclusive in nature but are collectively conferred to establish their identity. To buttress this view, the petitioners have placed reliance on the views of the views of H.M. Seervai[4] wherein the learned author has stated that the right to acquire property is implicit in clause (a) as no religious institution could be created without property and similarly, how one could manage its own affairs in matters of religion under clause (b) if there is no religious institution. Thus, for a religious denomination claiming separate and distinct identity, it must own some property requiring constitutional protection.

17. The petitioners have pressed into service the decisions of this Court in ***Sardar Syedna Taher Saifuddin Saheb v. State of Bombay***[5], ***Raja Bira Kishore Deb v. State of Orissa***[6], ***Shastri Yagnapurushadiji and others v. Muldas Bhundardas Vaishya and another***[7] and ***S.P. Mittal v. Union of India and others***[8] wherein the concept of religious denomination was

4 Third Edition, Vol. 1, 1983 pg. 931
5 [1962] Suppl. 2 SCR 496
6 (1964) 7 SCR 32
7 (1966) 3 SCR 242 : AIR 1966 SC 1119
8 (1983) 1 SCC 51

discussed by this Court. It is the stand of the petitioners that some mere difference in practices carried out at Hindu Temples cannot accord to them the status of separate religious denominations.

18. The contention of the petitioners is that Sabarimala Temple is not a separate religious denomination, for the religious parctices performed in Sabarimala Temple at the time of 'Puja' and other religious ceremonies are akin to any other practice performed in any Hindu Temple. It does not have its separate administration, but is administered by or through a statutory body constituted under the 'Travancore - Cochin Hindu Religious Institutions Act, 1950' and further, as per Section 29(3A) of the said Act, the Devaswom Commissioner is required to submit reports to the government, once in three months, with respect to the working of the Board.

19. They have placed reliance on the decision of this Court in ***The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt***[9] wherein it was observed thus:

[9] [1954] SCR 1005

> "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 ablations 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)."

20. As per the petitioners, this Court in ***Shirur Mutt*** (supra), while giving freedom under clauses (a) and (b) of Article 26, made it clear that what is protected is only the 'essential part' of religion or, in other words, the essence of 'practice' practised by a religious denomination and, therefore, the petitioners submit that before any religious practice is examined on the touchstone of constitutional principles, it has to be ascertained positively whether the said practice is, in pith and substance, really the 'essence' of the said religion.

21. The petitioners have also cited the judgment in ***Durgah Committee, Ajmer v. Syed Hussain Ali***[10] wherein Gajendragadkar, J. clarified that clauses (c) and (d) do not create any new right in favour of religious denominations but only safeguard their rights. Similarly, in matters of religious affairs, it is observed that the same is also not sacrosanct as there may be many ill-practices like superstitions which may, in due course of time, become mere accretions to the basic theme of that religious denomination. After so citing, the petitioners have submitted that even if any accretion added for any historical reason has become an essence of the said religious denomination, the same shall not be protected under Article 26(b) if it is so abhorring and is against the basic concept of our Constitution.

22. It is also the case of the petitioners that discrimination in matters of entry to temples is neither a ritual nor a ceremony associated with Hindu religion as this religion does not discriminate against women but, on the contrary, Hindu religion accords to women a higher pedestal in comparison to men and such a discrimination is totally anti-Hindu, for restriction on the entry of women is not the essence of Hindu religion. It has also

[10] (1962) 1 SCR 383

been submitted by the petitioners that even if Sabarimala temple is taken as a religious denomination, their basic tenets are not confined to taking of oath of celibacy for certain period of pilgrimage as all pilgrims are allowed freely in the temple and there is no such practice of not seeing the sight of women during this period.

23. Further, mere sight of women cannot affect one's celibacy if one has taken oath of it, otherwise such oath has no meaning and moreover, the devotees do not go to the Sabarimala temple for taking the oath of celibacy but for seeking the blessings of Lord Ayyappa. Maintaining celibacy is only a ritual for some who want to practise it and for which even the temple administration has not given any justification. On the contrary, according to the temple administration, since women during menstrual period cannot trek very difficult mountainous terrain in the dense forest and that too for several weeks, this practice of not permitting them has started.

24. It is averred by the petitioners that though no right is absolute, yet entry to temple may be regulated and there cannot be any absolute prohibition or complete exclusionary rule from entry of women to a temple. For substantiating this view, the

petitioners have pressed into service the judgment of this Court in ***Shirur Mutt*** (supra), the relevant portion of which reads thus:

> "We agree, however, with the High Court in the view taken by it about section 21. This section empowers the Commissioner and his subordinate officers and also persons authorised by them to enter the premises of any religious institution or place of worship for the purpose of exercising any power conferred, or any duty imposed by or under the Act. It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed. Section 21, it is to be noted, does not confine the right of entry to the outer portion of the premises; it does not even exclude the inner sanctuary the Holy of Holies" as it is said, the sanctity of which is `zealously preserved. It does not say that the entry may be made after due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution. We think that as the section stands, it interferes with the fundamental rights of the Mathadhipati and the denomination of which he is head guaranteed under articles 25 and 26 of the Constitution."

25. The judgment of this Court in ***Sri Venkatramana Devaru v. State of Mysore and others***[11] has been cited to submit that a religious denomination cannot completely exclude or prohibit any

[11] (1958) SCR 895 : 1958 AIR 55

class or section for all times. All that a religious denomination may do is to restrict the entry of a particular class or section in certain rituals. The relevant portion of ***Devaru*** (supra) reads as under:

> "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) over-rides that right so as to 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. <u>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),</u> 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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> (Emphasis is ours)

26. After referring to Sections 3 and 4 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 and Rule 3 (b) framed thereunder, the petitioners have submitted that the expression 'at any such time' occurring in Rule 3(b) does not lead to complete exclusion/prohibition of any woman. In other words, if at such time during which, by any custom or usage, any woman was not allowed, then the said custom or usage shall continue and to substantiate this claim, the petitioners have cited the example that if during late night, by custom or usage, women are not allowed to enter temple, the said custom or usage shall continue, however, it does not permit complete prohibition on entry of women. Further, the petitioners have submitted that any other interpretation of Rule 3(b) would render the said rule open to challenge as it would not only be violative of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 but also of Article 25(2)(b) of the Constitution read with Articles 14 and 15.

Submissions on behalf of Intervenor in I.A No. 10 of 2016

27. It has been submitted on behalf of the intervenor that the exclusionary practice of preventing women between the age of 10

to 50 years based on physiological factors exclusively to be found in female gender violates Article 14 of the Constitution of India, for such a classification does not have a constitutional object. It is also the case of the applicant/intervenor that even if it is said that there is classification between men and women as separate classes, there cannot be any further sub-classification among women on the basis of physiological factors such as menstruation by which women below 10 years and above 50 years are allowed.

28. It has been averred by the applicant/intervenor that as per Article 14, any law being discriminatory in nature has to have the existence of an intelligible differentia and the same must bear a rational nexus with the object sought to be achieved. The object as has been claimed is to prevent the deity from being polluted, which, in the view of the applicant/intervenor, runs counter to the constitutional object of justice, liberty, equality and fraternity as enshrined in the Preamble to our Constitution. That apart, the applicant/intervenor has submitted that though the classification based on menstruation may be intelligible, yet the object sought to be achieved being constitutionally invalid, the question of nexus need not be delved into.

29. Referring to the decision of this Court in ***Deepak Sibal v. Punjab University and another***[12], the applicant/intervenor has submitted that the exclusionary practice *per se* violates the sacrosanct principle of equality of women and equality before law and the burden of proving that it does not so violate is on the respondent no. 2, the Devaswom Board, which the said respondent has not been able to discharge.

30. It has also been asseverated by the applicant/intervenor that the exclusionary practice is manifestly arbitrary in view of the judgment of this Court in ***Shayara Bano v. Union of India and others***[13] as it is solely based on physiological factors and, therefore, neither serves any valid object nor satisfies the test of reasonable classification under Article 14 of the Constitution.

31. It has also been put forth by the applicant/intervenor that the exclusionary practice *per se* violates Article 15(1) of the Constitution which amounts to discrimination on the basis of sex as the physiological feature of menstruation is exclusive to females alone. In support of the said submission, the applicant/intervenor has placed reliance upon the judgments of this Court in ***Anuj Garg and others v. Hotel Association of***

[12] (1989) 2 SCC 145
[13] (2017) 9 SCC 1

India and others[14] and ***Charu Khurana and others v. Union of India and others***[15], to accentuate that gender bias in any form is opposed to constitutional norms.

32. It is also the case of the applicant/intervenor that exclusionary practice has the impact of casting a stigma on women of menstruating age for it considers them polluted and thereby has a huge psychological impact on them which resultantly leads to violation of Article 17 as the expression 'in any form' in Article 17 includes untouchability based on social factors and is wide enough to cover menstrual discrimination against women. It has further been submitted by applicant/intervenor that Article 17 applies to both State and non-State actors and has been made operative through a Central legislation in the form of Protection of Civil Rights Act, 1955. The judgment of the High Court in ***S. Mahendran*** (supra), in the view of the applicant/intervenor, is not in consonance with the provisions of the 1955 Act.

33. Drawing support from the decisions of this Court in ***National Legal Services Authority v. Union of India and***

[14] (2008) 3 SCC 1
[15] (2015) 1 SCC 192

others[16] and **Justice *K.S. Puttaswamy and another v. Union of India and others***[17], the applicant/intervenor has averred that the exclusionary practice pertaining to women is violative of Article 21 of the Constitution as it impacts the ovulating and menstruating women to have a normal social day to day rendezvous with the society including their family members and, thus, undermines their dignity by violating Article 21 of the Constitution.

34. It has also been submitted that the exclusionary practice violates the rights of Hindu women under Article 25 of the Constitution as they have the right to enter Hindu temples dedicated to the public. As per the applicant/intervenor, there is a catena of judgments by this Court wherein the rights of entry into temples of all castes have been upheld on the premise that they are Hindus and similarly, women who assert the right to enter the Sabarimala temple are also Hindus.

35. The applicant/intervenor has referred to Section 4 of the Kerala Places of Public Worship (Authorization of Entry) Act, 1965 and Rule 3(b) made under the said section which disentitles certain categories of people from entering any place of public

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[16] (2014) 5 SCC 438
[17] (2017) 10 SCC 1

worship and this includes women who, by custom or usage, are not allowed to enter a place of public worship. It has further been submitted by the applicant/intervenor that Rule 3(b) is *ultra vires* the 1965 Act and is also unconstitutional for it violates Articles 14, 15, 17, 21 and 25 of the Constitution in so far as it prohibits women from entering a public temple. The said Rule 3(b), as per the applicant/intervenor, is not an essential practice protected under Article 26 of the Constitution for it is not a part of religion as the devotees of Lord Ayyappa are just Hindus and they do not constitute a separate religious denomination under Article 26 of the Constitution as they do not have a common faith or a distinct name. To substantiate this view, the applicant/intervenor has drawn the attention of this Court to the judgment in ***S.P. Mittal*** (supra).

36. It has been submitted by the applicant/intervenor that even if we assume that Sabarimala is a religious denomination, the exclusion of women is not an essential practice as it does not satisfy the test of essential practice as has been laid down by this Court in ***Commissioner of Police and others v Acharya Jagadishwarananda Avadhuta and another***[18].

[18] (2004) 12 SCC 770

37. Referring to the judgment of this Court in ***Devaru*** (supra), the applicant/intervenor has submitted that the right to manage its own affairs conferred upon a religious denomination under Article 26(b) is subject to be rights guaranteed to Hindu women under Article 25(2)(b). As per the applicant/intervenor, a harmonious construction of Articles 25 and 26 of the Constitution reveals that neither Article 26 enables the State to make a law excluding any women from the right to worship in any public temple nor does it protect any custom that discriminates against women and, thus, such exclusion amounts to destruction of the rights of women to practise religion guaranteed under Article 25.

38. The applicant/intervenor has also drawn the attention of this Court to the Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and the fact that India is a party to this Convention for emphasizing that it is the obligation of the State to eradicate taboos relating to menstruation based on customs or traditions and further the State should refrain from invoking the plea of custom or tradition to avoid their obligation. The judgment of this Court in ***Vishaka***

and others v. State of Rajasthan and others[19] has been cited to submit that international conventions must be followed when there is a void in the domestic law or when there is any inconsistency in the norms for construing the domestic law.

Submissions on behalf of Intervenor in I.A No. 34/2017

39. The intervenor, All India Democratic Women's Association, has filed I.A No. 34/2017 wherein it has submitted that the meaning of the Constitution cannot be frozen and it must continuously evolve with the changing times. Further, the applicant submits that merely because Article 26 does not specify that it is subject to Part III or Article 25 of the Constitution, it cannot be said that it is insulated against Part III and especially Articles 14, 15 19, 21 and 25 of the Constitution. To emphasize the same, the applicant/intervenor has relied upon the observations made in ***Devaru*** case where the Court has stated that the rule of construction is well settled that when there are two provisions in an enactment which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. The Court observed that applying this rule of harmonious construction, if the contention of the

[19] (1997) 6 SCC 241

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. The Court further observed that if the contention of the respondents is accepted, then full effect can be given to Article 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 Article 25(2)(b) will prevail and therefore while, in the former case, Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26(b) and, hence, it must be accordingly held that Article 26(b) must be read subject to Article 25(2)(b).

Submissions on behalf of Respondent No. 1

40. The State of Kerala, the first respondent herein, as indicated earlier, had taken contrary stands at different times. An affidavit was filed on 13.11.2007 which indicated that the Government was not in favour of discrimination towards any woman or any section of the society. The said stand was changed in the affidavit dated 5.2.2016 taking the stand that the earlier affidavit was contrary to the judgment of the Kerala High Court. On 7.11.2016 on a query being made by the Court, the learned

counsel for the State submitted that it wanted to place reliance on the original affidavit dated 13.11.2007. It is contended by Mr. Jaideep Gupta, learned senior counsel appearing for the State of Kerala, that the 1965 Act and the Rules framed thereunder are in consonance with Article 25(2)(b) of the Constitution. Reference has been made to Section 3 of the Act, for the said provision deals with places of public worship to be open to Hindus generally or any section or class thereof. The concept of prohibition is not conceived of. It is urged by Mr. Gupta that there is no restriction in view of the legislation in the field. In essence, the stand of the State is that it does not conceive of any discrimination as regards the entry of women into the temple where male devotees can enter.

Submissions on behalf of Respondent No. 2

41. The respondent no. 2 has submitted that Sabarimala is a temple of great antiquity dedicated to Lord Ayyappa who the petitioner avers to be a deity depicting "a hyper masculine God born out of the union of two male Gods Shiva and Mohini, where Mohini is Vishnu in a female form."

42. Thereafter, the respondent no. 2 reiterated the submissions of the respondent no. 4 pertaining to the observance of 41 days

'Vruthum' and the fact that the Sabarimala Temple is supposed to depict 'Naishtika Brahmacharya'. In addition to this, the respondent no. 2 has also referred to a Ph.D thesis by Radhika Sekar in the Department of Sociology and Anthropology at Carleton University, Ottawa, Ontario in October 1987 titled "The Process of Pilgrimage : The Ayyappa Cultus and Sabarimala Yatra" which has established the very *raison d'etre* for the existence of the denominational Temple of Sabarimala based upon deep penance, celibacy and abstinence by all visitors, male and female. The respondent no. 2 has also drawn the attention of the Court to the fact that the Sabarimala temple is open only during specific defined periods, that is, on the Malayalam month viz. 17th November to 26th December, for the first five days of each Malayalam month which starts approximately in the middle of each English calendar month and also during the period of Makar Sankranti, viz. approximately from January 1 to mid-January of each year.

Submissions on behalf of Respondent No. 4

43. At the outset, the respondent no. 4 has drawn the attention of the Court to the history of Kerala in general and Sabarimala in particular and has highlighted the existence of stone inscriptions

which state that the priest Kantaru Prabhakaru had made an idol consecration at Sabarimala years back and after the rampage of fire at Sabarimala, it was Kantaru Shankaru who consecrated the existing idol in Sabarimala. The respondent no. 4 has submitted that the Thantri is the vedic head priest of Hindu temples in Kerala and the popularity of any temple depends to a great extent on the Thantri and Santhikkaran (Archaka) who must be able to induce a spiritual reverence among worshippers and explain the significance of the Mantras they recite and poojas they perform.

44. The respondent no. 4 has averred that the custom and usage of young women (aged between 10 to 50 years) not being allowed to enter the Sabarimala temple has its traces in the basic tenets of the establishment of the temple, the deification of Lord Ayyappa and His worship. As per the respondent no. 4, Ayyappa had explained the manner in which the Sabarimala pilgrimage was to be undertaken emphasizing the importance of 'Vrutham' which are special observances that need to be followed in order to achieve spiritual refinement, and that as a part of the 'Vruthum', the person going on pilgrimage separates himself from all family ties for 41 days and during the said period either the woman

leaves the house or the man resides elsewhere in order to separate himself from all family ties. Thereafter, the respondent no. 4 has pointed out that the problem with women is that they cannot complete the 41 days Vruthum as their periods would eventually fall within the said period and it is a custom among all Hindus that women do not go to temples or participate in religious activities during periods and the same is substantiated by the statement of the basic Thantric text of temple worshipping in Kerala Thantra Samuchayam, Chapter 10, Verse II.

45. The respondent no. 4 has emphasized that the observance of 41 days Vruthum is a condition precedent for the pilgrimage which has been an age old custom and anyone who cannot fulfill the said Vruthum cannot enter the temple and, hence, women who have not attained puberty and those who are in menopause alone can undertake the pilgrimage at Sabarimala. The respondent no. 4 has also averred that the said condition of observance of 41days Vruthum is not applicable to women alone and even men who cannot observe the 41 days Vruthum due to births and deaths in the family, which results in breaking of Vruthum, are also not allowed to take the pilgrimage that year.

46. The respondent no. 4 has also drawn the attention of the Court to the fact that religious customs as well as the traditional science of Ayurveda consider menstrual period as an occasion for rest for women and a period of uncleanliness of the body and during this period, women are affected by several discomforts and, hence, observance of intense spiritual discipline for 41 days is not possible. The respondent no. 4 has also contented that it is for the sake of pilgrims who practise celibacy that young women are not allowed in the Sabarimala pilgrimage.

47. The respondent no. 4, thereafter, contends that the prohibition is not a social discrimination but is only a part of the essential spiritual discipline related to this particular pilgrimage and is clearly intended to keep the mind of the pilgrims away from the distraction related to sex as the dominant objective of the pilgrimage is the creation of circumstances in all respects for the successful practice of spiritual self-discipline.

48. The respondent no. 4 has also averred that for climbing the 18 holy steps, one has to carry the *irumudikettu (the sacred package of offerings)* and for making the pilgrimage really meaningful, austerities for a period of 41 days have to be observed and, hence, for a meaningful pilgrimage, it is always

prudent if women of the forbidden age group hold themselves back.

49. The respondent no. 4 further submits that 'devaprasanam' is a ritual performed for answering questions pertaining to religious practices when the Thantris are also unable to take decisions and that 'devaprasanams' conducted in the past also reveal that the deity does not want young women to enter the precincts of the temple. As per the respondent no. 4, the philosophy involved in evolving a particular aspect of power in a temple is well reflected in the following *mantra* chanting during the infusion of divine power:

> "O the Supreme Lord! It is well known that You pervade everything and everywhere' yet I am invoking You in this *bimbham*very much like a fan that gathers and activates the all-pervading air at a particular spot. At the fire latent in wood expresses itself through friction, O Lord be specially active in this *bimbham*as a result of sacred act."

50. The respondent no. 4 is of the view that it is the particular characteristic of the field of power, its maintenance and impact which the 'Devaprasanam' deals with and 'Devaprasanam' confirms that the practice of women of particular age group not participating in the temple should be maintained.

51. To bolster his stand, the respondent no. 4 has also placed reliance upon the decision of the Kerala High Court in ***S. Mahendran*** (supra) wherein the then Thantri Shri Neelakandaru had deposed as C.W 6 and he stated that the present idol was installed by his paternal uncle Kantaru Shankaru and he confirmed that women of age group 10 to 50 years were not allowed to enter the temple even before 1950s. The said witness also deposed that his paternal uncle had instructed him and the temple officials to follow the old customs and usages.

52. The respondent no. 4 has also drawn the attention of the Court to the opinion of this Court in ***Seshammal and others v. State of Tamil Nadu***[20], wherein it was observed that 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 and the rules with regard to daily and periodical worship have been laid down for securing the continuance of the divine spirit and as per the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship.

53. The respondent no. 4 has also submitted that the deity at Sabarimala in the form of 'Naishtik Brahmachari' and that is also

[20] (1972) 2 SCC 11

a reason why young women are not allowed inside the temple so as to prevent even the slightest deviation from celibacy and austerity observed by the deity.

Submissions on behalf of Intervenor in I.A Nos. 12 and 13

54. Another applicant/intervenor has filed I.A Nos. 12 and 13 and his main submission is that this Court may remove the restriction which bars women between the age group of 10 to 50 years from entering the Sabarimala temple for all days barring the period between 16th November to 14th January (60 days) as during the said period, Lord Ayyappa sits in the Sabarimala temple and Lord Ayyappa visits other temples all across the country during the remaining days. The applicant/intervenor further highlights that during the said period, the pilgrims coming to the temple must strictly follow the rituals which includes taking a 41 days Vruthum and one of the rituals pertains to not touching the ladies including daughters and wives as well. The applicant/intervenor has further submitted that if the restriction under Section 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 is allowed to operate only for the said period of 60 days, it would not amount to any violation of Articles 14, 15 and 17 of the Constitution and

it would also be well within the ambit of Articles 25 and 26 of the Constitution.

Rejoinder Submissions on behalf of the Petitioners

55. In reply to the contention of the respondent no. 2-Devaswom Board that the writ jurisdiction does not lie in the present matter, the petitioners submit that the validity of Section 3(b) could not have been challenged in suit proceedings as the present writ petition has been filed against the State authorities and the Chief Thantri who has been impleaded as the respondent no. 4 is appointed by a Statutory Board; and since now 'custom and usage' fall under the ambit of Article 13, they have become subject to the constitutional provisions contained in Part III whose violation can only be challenged in writ jurisdiction.

56. Thereafter, the petitioners have submitted that the respondent no. 2 has merely pressed the theory of intelligible differentia to justify encircling of women of prohibited age without elaborating the object sought to be achieved and whether the differentia even has any nexus with the object and the object of preventing deflecting of the idol from the stage of celibacy cannot be achieved from the present classification.

57. Further, the petitioners have submitted that the respondent no. 2 has wrongly stated that the Sabarimala temple is a religious denomination, for any temple under a statutory board like a Devaswom Board and financed out of the Consolidated Fund of Kerala and whose employees are employed by the Kerala Service Commission cannot claim to be an independent 'religious denomination'.

58. Besides, the petitioners have contended that several ill-practices in existence and falling within the ambit of religion as cited by the respondent no. 2 may not be acceptable today and the said practices have not come up before this Court and should not be taken cognizance of. Further, it is the view of the petitioners that the said practices cannot be held to be the essence of religion as they had evolved out of convenience and, in due course of time, have become crude accretions. To prove its point, the petitioners have cited the examples of the practices of dowry and restriction of women from entering mosques which, although had come into existence due to certain factors existing at the relevant time, no longer apply.

59. Thereafter, the petitioners have contended that if Sabarimala does not come in the category of religious

denomination, then it cannot claim the right under Article 26 and it would come within the purview of Article 12 making it subject to Articles 14 and 15 and, hence, the State would be restrained from denying equal protection of law and cannot discriminate on the basis of sex. Even if it is concluded that Sabarimala is a religious denomination, then as per the ***Devaru*** case, there has to be a harmonious construction between Articles 25 and 26 of the Constitution and, thus, to completely deny women of the age group of 10 to 50 years from entering the temple would be impermissible as per the ***Devaru*** case. Finally, the petitioners have submitted that in legal and constitutional parlance, after coming into effect of the Constitution of India, 'dignity of women' under Article 51A(e) is an essential ingredient of constitutional morality.

Rejoinder Submissions on behalf of Intervenor in I.A No. 10 of 2016

60. The applicant/intervenor has submitted that the law relating to entry into temple for darshan is separate and distinct from the law relating to management of religious affairs. The former is governed by Article 25 and the latter is governed by Article 26. Further, the applicant/intervenor has pointed out that even those institutions which are held to be denominations and

claim protection under Article 26 cannot deny entry to any person for the purpose of *darshan* and the *ex facie* denial of women between the age group of 10 to 50 years violates Articles 14, 15, 21 and 25 of the Constitution.

61. Thereafter, the applicant/intervenor has averred that the question whether Sabarimala is a denomination or not is irrelevant for the reason that even if it is concluded that Sabarimala is a denomination, it can claim protection of only essential practices under Article 26(b) and denial of entry to women between the age of 10 to 50 years cannot be said to be an essential aspect of the Hindu religion. Further, the applicant/intervenor has also averred that Sabarimala does not satisfy the test of religious denomination as laid down in ***S.P. Mittal*** (supra).

62. The applicant/intervenor has also submitted that the respondents, by referring to the practice as a custom with aberrations, have themselves suggested that there has been no continuity in the applicability of the said custom and that it has also been established in the evidence before the High Court that women irrespective of their age were permitted to enter the Sabarimala for the first rice feeding ceremony of their children

and it is only since the last 60 years after the passing of the Notification in 1955 that women between the age of 10 to 50 years were prohibited from entering the temple. The applicant/intervenor has also pointed out that even if the said practice is considered to be a custom, it has to still pass the test of constitutional morality and constitutional legitimacy and the applicant/intervenor has relied upon the decision of this Court in ***Adi Saiva Sivachariyargal Nala Sangam and others v. Government of Tamil Nadu and others*** [21] wherein it was observed:

> "48. Seshammal vs State of T.N., (1972) 2 SCC 11] is not an authority for any proposition as to what an Agama or a set of Agamas governing a particular or group of temples lay down with regard to the question that confronts the court, namely, whether any particular denomination of worshippers or believers have an exclusive right to be appointed as Archakas to perform the poojas. Much less, has the judgment taken note of the particular class or caste to which the Archakas of a temple must belong asprescribed by the Agamas. All that it does and says is that some of the Agamas do incorporate a fundamental religious belief of the necessity of performance of the poojas by Archakas belonging to a particular and distinct sect/group/denomination, failing which, there will be defilement of deity requiring purification ceremonies. Surely, if the Agamas in question do not proscribe any group of citizens from being appointed as Archakas on the basis of caste or class the sanctity of Article 17 or any other provision of Part III of the Constitution or even theProtection of Civil Rights Act, 1955 will not be

[21] (2016) 2 SCC 725

> violated. What has been said in Seshammal [Seshammal v. State of T.N., (1972) 2 SCC 11] (supra) is that if any prescription with regard to appointment of Archakas is made by the Agamas, Section 28 of the Tamil Nadu Act mandates the trustee to conduct the temple affairs in accordance with such custom or usage. The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. The constitutional legitimacy, naturally, must supersede all religious beliefs or practices."

63. In reply to the contention of the respondents that the basis for exclusion of women is that women cannot observe the 41 days Vruthum and also on the ground that Ayyappa is a celibate God, the applicant/intervenor has submitted that the meaning of celibacy is the abstinence from sex and the respondents by suggesting that women cannot practice Vruthum which requires abstinence from sex are stigmatizing women and stereotyping them as being weak and lesser human beings than men. Hence, the classification, in view of the applicant/intervenor, is not based on intelligible differentia.

64. The applicant/intervenor has also submitted that menstruating women and untouchables are being treated as similar in terms of entry to temple and, hence, the custom in dispute amounts to 'untouchability'.

65. The applicant/intervenor has, thereafter, drawn the attention of the Court to the fact that although the respondents aver that they do not intend to discriminate on the basis of gender, yet the Court has to test the violation of the fundamental rights not on the basis of intention but the impact of the impugned action. The applicant/intervenor has stated that the respondents have wrongly placed reliance upon the decision in ***T.M.A. Pai Foundation and others v. State of Karnataka and others***[22] as in the present case, the issue is not one pertaining to the rights of minorities but concerning the unconstitutional acts of the majority.

66. The applicant/intervenor has also submitted that the age-old practice of considering women as impure while they are menstruating amounts to untouchability and stigmatizes them as lesser human beings and is, therefore, violative of Articles14, 15, 17 and 21 of the Constitution.

Submissions of learned Amicus Curiae, Sr. Advocate Mr. Raju Ramchandran, assisted by Mr. K. Parameshwar

67. It is submitted on the behalf of learned Senior Advocate Mr. Raju Ramchandran, that the Sabarimala Sree Dharma Sastha Temple, Kerala is a public temple being used as a place of

[22] (1995) 5 SCC 220

worship where members of the public are admitted as a matter of right and entry thereto is not restricted to any particular denomination or part thereof. As per the learned Amicus, the public character of the temple gives birth to the right of the devotees to enter it for the purpose of darshan or worship and this universal right to entry is not a permissive right dependent upon the temple authorities but a legal right in the true sense of the expression. To advance this view, the learned Amicus has relied upon the decisions of this Court in ***Deoki Nandan v. Murlidhar and others***[23] and ***Sri Radhakanta Deb and another v. Commissioner of Hindu Religious Endowments, Orissa***[24].

68. As regards the nature of the right claimed by the petitioners herein, learned Senior Advocate, Mr. Raju Ramchandran, the learned Amicus, has submitted that it is the freedom of conscience and the right to practise and profess their religion which is recognized under Article 25 of the Constitution of India. This right, as per the learned Amicus, encompasses the liberty of belief, faith and worship, pithily declared as a constitutional vision in the Preamble to the Constitution of India.

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[23] AIR 1957 SC 133
[24] (1981) 2 SCC 226

69. Learned Senior Advocate Mr. Raju Ramchandran, the learned Amicus, submits that the right of a woman to visit and enter a temple as a devotee of the deity and as a believer in Hindu faith is an essential aspect of her right to worship without which her right to worship is significantly denuded. Article 25 pertinently declares that all persons are 'equally' entitled to freely practise religion. This, in view of the learned Amicus, implies not just inter-faith but intra-faith parity. Therefore, the primary right under Article 25(1) is a non-discriminatory right and is, thus, available to men and women professing the same faith.

70. Further, it has been put forth that the constitutional intent in keeping the understanding of untouchability in Article 17 open-textured was to abolish all practices based on the notion of purity and pollution. This Article proscribes untouchability 'in any form' as prohibited and the exclusion of menstruating women from religious spaces and practices is no less a form of discrimination than the exclusion of oppressed castes. After referring to Section 7(c) of the Civil Rights Act, 1955, which criminalizes the encouragement and incitement to practise untouchability in 'any form whatsoever' and the Explanation II appended to the said Section, the learned Amicus has submitted

that untouchability cannot be understood in a pedantic sense but must be understood in the context of the Civil Rights Act to include any exclusion based on the notions of purity and pollution.

71. It is also the view of the learned Amicus that the phrase 'equally entitled to' in Article 25(1) finds resonance in Section 3(a) of the Civil Rights Act, 1955 which criminalizes exclusion of people to those places which are "open to other persons professing the same religion or any section thereof, as such person" and prevention of worship "in the same manner and to the same extent as is permissible to other persons professing the same religion or any section thereof, as such persons". That apart, the learned Amicus has drawn our attention to Section 2(d) of the 1955 Act which defines 'place of public worship' to mean, *inter alia*, 'by whatever name belonging to any religious denomination or any section thereof, for the performance of any religious service' and, therefore, the Amicus submits that a temple is a public temple and irrespective of its denominational character, it cannot prevent the entry of any devotee aspiring to enter and worship.

72. After placing reliance on the decision of this Court in ***K.S. Puttaswamy*** (supra), the Amicus has submitted that the exclusionary practice in its implementation results in involuntary disclosure by women of both their menstrual status and age which amounts to forced disclosure that consequently violates the right to dignity and privacy embedded in Article 21 of the Constitution of India.

73. It has also been submitted by the Amicus Curiae that Article 25(2)(b) is not a mere enabling provision but is a substantive right as it creates an exception for laws providing for social reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and thereby embodies the constitutional intent of abhorring exclusionary practices. Further, referring to the judgment of this Court in ***Devaru*** (supra), the learned Amicus has submitted that Article 25(2)(b) does not merely seek to prevent exclusionary practices on the basis of caste only, for the rights under Part III of the Constitution must be given a broad meaning and any exception must be given a narrow construction.

74. Further, it has been submitted by the learned Amicus that the exclusionary practice in the present case cannot be justified

either on the grounds of health, public order or morality for the term 'morality' used in Article 25 or 26 is not an individualized or sectionalized sense of morality subject to varying practices and ideals of every religion but it is the morality informed by the constitutional vision. The judgments of this Court in ***Adi Saiva Sivachariyargal Nala Sangam*** (supra), ***Manoj Narula v. Union of India***[25] and ***National Legal Services Authority*** (supra) have been pressed into service by the Amicus to accentuate that any subjective reading of the term 'morality' in the context of Article 25 would make the liberty of faith and worship otiose and the exclusion of women as in the present case is a matter of institutional practice and not morality.

75. The Amicus has also cited the judgments of this Court in ***Acharya Jagadishwarananda Avadhuta*** (supra) to submit that in order to claim protection of the doctrine of essential religious practices, the practice to exclude women from entry to the Sabarimala temple must be shown by the respondents to be so fundamental to the religious belief without which the religion will not survive. On the contrary, no scriptural evidence has

[25] (2014) 9 SCC 1

been led by the respondents herein to demonstrate that the exclusion of women is an essential part of their religion.

76. After referring to Section 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 which makes a place of worship open to all sections and classes, Mr. Raju Ramchandran, learned senior counsel, is of the view that the said Section is nothing but a statutory enunciation of rights embodied under Article 25(2)(b) and similarly, the emphasis on the word 'like' in Section 3 is the statutory reflection of the phrase 'equally' found in Article 25(1). That apart, it is the case of the learned Amicus curiae that the expression 'section' or 'class' in Section 2(c) of the 1965 Act must necessarily include all sexes if Section 3 is to be in consonance with a woman's right to worship under Article 25 and in consonance with Article 15. As per the learned Amicus, women between the age of 10 to 50 years are a section or class of Hindus who are within the inclusive provision of Section 3 and the proviso to Section 3 brings in the right conferred in Article 26, for the inter-play between Section 3 and the proviso must be governed by how Articles 25(2)(b) and 26 are reconciled by the judgment of this Court in ***Devaru*** (supra).

77. It have been asseverated by Mr. Raju Ramchandran, learned senior counsel, that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is *ultra vires* Sections 3 and 4 of the 1965 Act, for the reason that it protects 'custom and usage' which may prohibit entry when Section 3 expressly overrides custom and usage. The said rule, in view of the learned Amicus, discriminates against women when Section 4 makes it clear that rules made under it cannot be discriminatory against any section or class. It is submitted that the power entrusted under the 1965 Act to make rules, *inter alia*, for due observance of religious rights and ceremonies is for the furtherance of a devotee's right to worship under Article 25, whereas to the contrary, Rule 3(b), by saving 'custom and usage', militates against the very purpose of the 1965 Act which is to protect the right to worship guaranteed under Article 25.

78. It has also been pointed out that there is another Rule, similar to Rule 3(b), in the form of Rule 6(c) framed under the 1950 Act, which was relied upon by the High Court and this Rule 6(c) has not been assailed by the petitioners in the present writ petition, but in view of the learned Amicus, this Rule 6(c) would

also be unconstitutional for the same reason that Rule 3(b) is unconstitutional.

79. The burden to prove that the devotees of Lord Ayyappa form a denomination within the meaning of Article 26, as per the learned Amicus, is on the respondents, which they have failed to discharge as none of the three tests for determination of denominational status, i.e., (i) common faith, (ii) common organization and (iii) designation by a distinctive name, have been established by the respondents. Further, the Amicus has submitted that the decision of the Kerala High Court in ***S. Mahendran*** (supra) does not indicate finding of a denominational status.

80. It is also submitted by the learned Amicus that Devaswom Board in its counter affidavit before the Kerala High Court in ***S. Mahendran*** (supra), had asserted, as is reflected vide para 7 of the judgment, that there was no such prohibition against women entering the temple and that there was no evidence to suggest any binding religious practice and, likewise, the High Court, in its judgment vide para 34, found the exclusionary practice as just a usage and not a religious custom or essential religious practice.

81. The learned Amicus also averred that even if we are to assume that the devotees of Lord Ayyappa constitute a separate denomination, the rights conferred under Article 26 being subject to the constitutional standard of morality, exclusion of women from entry would violate this standard of morality for a denomination's right to manage its affairs in matters of religion under Article 26(b) is subject to Article 25(2)(b) as has been succinctly explained by this Court in ***Devaru*** (supra) by observing thus:

> "And lastly, it is argued that whereas Article 25 deals with the rights of individuals, Article 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to that denomination, that would remain unaffected by Article 25(2)(b). This contention ignores the true nature of the right conferred by Article 25(2)(b). That is a right conferred on "all classes and sections of Hindus" to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Article 25(1) or against a denomination under Article 26(b). The fact is that though Article 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 Article 25(1) and Article 26(b)."

Submissions of learned Amicus Curiae, Senior Advocate Mr. K. Ramamoorthy

82. It has been asseverated by learned Senior Advocate Mr. K. Ramamoorthy, learned Amicus curiae, that in all prominent Hindu temples in India, there had been some religious practices based on religious beliefs, which are essential part of the Hindu religion as considered by people for a long time. It has been submitted that the devotees of Lord Ayyappa could also be brought within the ambit of religious denomination who have been following the impugned religious practice which has been essential part of religion.

83. Mr. K. Ramamoorthy, learned senior counsel, has submitted that the petitioners herein have not disputed that the impugned religious practice in Sabarimala temple is not a religious practice based on religious belief for several centuries, rather the petitioners have only argued that such a practice is violative of Article 25 of the Constitution. It is also submitted by Mr. K. Ramamoorthy that in any of the judgments cited by the petitioners, the question never arose as to what the religious practice on the basis of religious belief is and, accordingly, the question as to whether religious practices based on religious

beliefs in all prominent temples in India are violative of Articles14, 15, 17, 21 and 25 of the Constitution is to be considered herein.

84. It has been put forth by Mr. K. Ramamoorthy that the protection of Articles 25 and 26 are not limited to the matters of doctrine or belief, rather they extend to acts done in pursuance of religion and, therefore, contain a guarantee for rituals, observations, ceremonies and modes of worship which are integral parts of religion. It has been submitted that what constitutes an essential part of a religious practice is to be decided with reference to the practices which are regarded by a large section of the community for several centuries and, therefore, would have to be treated as a part of the religion.

85. It has also been averred that Ayyappa temple by itself is a denomination as contemplated under Article 26 having regard to the nature of worship and the practices followed by the temple and similarly, the devotees of Ayyappa temple would also constitute a denomination who have accepted the impugned religious practice based on religious belief which has been in vogue for several centuries unbroken and accepted by all sections of Hindus.

86. It has been submitted that it is too late in the day to contend that religious practice based on religious faith, adhered to and followed by millions of Hindus for so long in consonance with the natural rights of men and women is violative of fundamental rights. It is also the case of the Amicus Mr. K. Ramamoorthy that to project such a religious practice as being contrary to natural law is a shock to the judgment of the community, as calling such a religious practice contrary to fundamental rights amounts to offending the common sense and wisdom of our ancestors in faithfully following the command of the divine. Further, no group or individual can force other Hindus to follow their view in the domain of religious faith.

87. As regards the challenge raised by the petitioners against Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, it is asseverated by Mr. K. Ramamoorthy that the question which arises is whether the State Government, with reference to such a religious practice, could make a rule so that the general public would know the denominational character of the temple and the religious practice followed by the temple.

Followers of Lord Ayyappa do not constitute a religious denomination

88. Article 26 of the Constitution of India guarantees to every religious denomination the right (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. However, these rights are subject to public order, morality and health.

89. The important question that emerges is as to what constitutes a religious denomination. The said question has been the subject matter of several decisions of this Court beginning from ***Shirur Mutt*** (supra) wherein the Court observed thus:

> "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 centres of the logical 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 balled 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 UdipiMaths 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."

90. In ***S.P. Mittal*** (supra), the challenge was with regard to the validity of the Auroville (Emergency) Provisions Act, 1980 as being violative of Articles 25 and 26 of the Constitution. Sri Aurobindo postulated the philosophy of cosmic salvation and along with the disciples found the Aurobindo Society for preaching and propagating the teachings of Sri Aurobindo and The Mother through its centres in India as well as abroad. After the death of Sri Aurobindo, the Mother proposed an international cultural township, Auroville, in the then Pondicherry. The society received funds as grants from the Central Government, State

Government and other organizations in India as well as from outside India for development of the township at Auroville. Upon the death of the Mother, the Government started receiving complaints about the mismanagement of the society and, accordingly, enacted the Auroville (Emergency) Provisions Act, 1980. The Supreme Court, by a majority of 4:1, ruled that neither the society nor the township of Auroville constituted a religious denomination, for the teachings and utterances of Sri Aurobindo did not constitute a religion and, therefore, taking over of the Auroville by the Government did not infringe the society's right under Articles 25 and 26 of the Constitution.

91. The Court referred, *inter alia,* to the MoA of the society along with Rule 9 of the Rules and Regulations of Sri Aurobindo Society which dealt with membership and read thus:

> "9. Any person or institution for 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."

After so referring, the Court opined thus:

> "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."

92. The Court in ***S.P Mittal*** (supra) reiterated and concurred with the definition of 'religious denomination' which was also accepted in ***Shirur Mutt*** (supra) and observed as under:

> "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 organisation, and
>
> (3) designation by a distinctive name."

93. In the case of ***Nallor Marthandam Vellalar and others v. Commissioner, Hindu Religious and Charitable Endowment and others***[26], the question that arose before the Court was whether the temple at Nellor owned by the Vellala Community of Marthandam constituted a 'religious denomination' within the meaning of Article 26 of the Constitution. It was argued in this case that the Vellala Community observed special religious practices and beliefs which are integral part of their religion and that the front mandappam of the sanctorium is open to access only to the members of their community and no one else and outsiders can offer worship from the outer compound. The Court held that the temple at Nellor owned by the Vellala Community of Marthandam did not constitute a religious denomination as there was no evidence to prove that the members of the Vellala Community had common religious tenets peculiar to themselves other than those which are common to the entire Hindu community and further, the Court, following the principle laid down in ***S.P. Mittal*** (supra), observed:

> "It is settled position in law, having regard to the various decisions of this Court that the words

[26](2003) 10 SCC 712

> "religious denomination" take their colour from the word `religion'. The expression "religious denomination" must satisfy three requirements – (1) it must be collection of individuals who have a system of belief or doctrine which they regard as conducive to their spiritual well-being, i.e., a common faith; (2) a common organisation; and (3) designation of a distinctive name. It necessarily follows that the common faith of the community should be based on religion and in that they should have common religious tenets and the basic cord which connects them, should be religion and not merely considerations of caste or community or societal status."

94. As is decipherable form the above decisions of this Court, for any religious mutt, sect, body, sub-sect or any section thereof to be designated as a religious denomination, it must be a collection of individuals having a collective common faith, a common organization which adheres to the said common faith, and last but not the least, the said collection of individuals must be labeled, branded and identified by a distinct name.

95. Though, the respondents have urged that the pilgrims coming to visit the Sabarimala temple being devotees of Lord Ayyappa are addressed as Ayyappans and, therefore, the third condition for a religious denomination stands satisfied, is unacceptable. There is no identified group called Ayyappans. Every Hindu devotee can go to the temple. We have also been apprised that there are other temples for Lord Ayyappa and there

is no such prohibition. Therefore, there is no identified sect. Accordingly, we hold, without any hesitation, that Sabarimala temple is a public religious endowment and there are no exclusive identified followers of the cult.

96. Coming to the first and the most important condition for a religious denomination, i.e., the collection of individuals ought to have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, there is nothing on record to show that the devotees of Lord Ayyappa have any common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are just Hindus and do not constitute a separate religious denomination. For a religious denomination, there must be new methodology provided for a religion. Mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account.

Enforceability of Fundamental Rights under Article 25(1) against the Travancore Devaswom Board

97. Having stated that the devotees of Lord Ayyappa do not constitute a religious denomination within the meaning of Article 26 and that Sabarimala Temple is a public temple by virtue of the

fact that Section 15 of the 1950 Act vests all powers of direction, control and supervision over it in the Travancore Devaswom Board which, in our foregoing analysis, has been unveiled as 'other authority' within the meaning of Article 12, resultantly fundamental rights including those guaranteed under Article 25(1) are enforceable against the Travancore Devaswom Board and other incorporated Devaswoms including the Sabarimala Temple. We have also discussed the secular character of the Indian Constitution as well as the broad meaning assigned to the term religion occurring in various Articles of the Constitution including Article 25(1).

98. Now adverting to the rights guaranteed under Article 25(1) of the Constitution, be it clarified that Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women.

99. It needs to be understood that the kernel of Article 26 is 'establishment of a religious institution' so as to acclaim the status of religious denomination. Whereas, Article 25(1) guarantees the right to practise religion to every individual and

the act of practice is concerned, primarily, with religious worship, rituals and observations as held in ***Rev. Stainislaus v. State of Madhya Pradesh and others***[27]. Further, it has been held in ***Shirur Mutt*** (supra) that the logic underlying the constitutional guarantee regarding 'practice' of religion is that religious practices are as such a part of religion as religious faith or doctrines.

100. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors, specifically attributable to women. Women of any age group have as much a right as men to visit and enter a temple in order to freely practise a religion as guaranteed under Article 25(1). When we say so, we are absolutely alive to the fact that whether any such proposed exclusion of women from entry into religious places forms an essential part of a religion would be examined at a subsequent stage.

101. We have no hesitation to say that such an exclusionary practice violates the right of women to visit and enter a temple to freely practise Hindu religion and to exhibit her devotion towards Lord Ayyappa. The denial of this right to women significantly denudes them of their right to worship. We concur with the view

[27] (1977) 1 SCC 677

of the Amicus Curiae, learned senior counsel, Mr. Raju Ramachandran, that the right guaranteed under Article 25(1) is not only about inter-faith parity but it is also about intra-faith parity. Therefore, the right to practise religion under Article 25(1), in its broad contour, encompasses a non-discriminatory right which is equally available to both men and women of all age groups professing the same religion.

102. Though not in reference to men or women, yet in the context of any Hindu worshipper seeking entry in a temple which is a public place of worship for Hindus, the observations of the Supreme Court in ***Nar Hari Shastri and others v. Shri Badrinath Temple Committee***[28] are quite instructive wherein the Court opined thus:

> "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....."

And again:

[28] AIR 1952 SC 245

> "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."

103. Another authoritative pronouncement in regard to the freedom to practise a religion freely without with any fictitious and vague constraint is the case of ***Acharya Jagadishwarananda Avadhuta*** (supra), wherein the Court observed thus:

> "The full concept and scope of religious freedom is that there are no restraints upon the free exercise of religion according to the dictates of one's conscience or upon the right freely to profess, practice and propagate religion save those imposed under the police power of the State and the other provisions of Part II of the Constitution. This means the right to worship God according to the dictates of one's conscience. Man's relation to his God is made no concern for the State. Freedom of conscience and religious belief cannot, however, be, set up to avoid those duties which every citizen owes to the nation; e.g. to receive military training, to take an oath expressing willingness to perform military service and so on."

104. Therefore, it can be said without any hesitation or reservation that the impugned Rule 3(b) of the 1965 Rules,

framed in pursuance of the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of such women to practise their religious belief which, in consequence, makes their fundamental right under Article 25(1) a dead letter. It is clear as crystal that as long as the devotees, irrespective of their gender and/or age group, seeking entry to a temple of any caste are Hindus, it is their legal right to enter into a temple and offer prayers. The women, in the case at hand, are also Hindus and so, there is neither any viable nor any legal limitation on their right to enter into the Sabarimala Temple as devotees of Lord Ayyappa and offer their prayers to the deity.

105. When we say so, we may also make it clear that the said rule of exclusion cannot be justified on the ground that allowing entry to women of the said age group would, in any way, be harmful or would play a jeopardizing role to public order, morality, health or, for that matter, any other provision/s of Part III of the Constitution, for it is to these precepts that the right guaranteed under Article 25(1) has been made subject to.

106. The term 'morality' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine

the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. We must remember that when there is a violation of the fundamental rights, the term 'morality' naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution.

107. In ***Manoj Narula*** (supra), this Court has reflected upon the predominant role that the concept of constitutional morality plays in a democratic set-up and opined thus:

> "The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality."

108. That apart, this Court, in ***Government of NCT of Delhi v. Union of India and others***[29], observed thus:

> "Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document. When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to the citizenry remains unperturbed."

109. Elaborating further, in ***Navtej Singh Johar and others v. Union of India and others***[30], this Court observed:

> "The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State."

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[29] (2018) 8 SCALE 72
[30] (2018) 10 SCALE 386

And again:

> "115. The society as a whole or even a minuscule part of the society may aspire and prefer different things for themselves. They are perfectly competent to have such a freedom to be different, like different things, so on and so forth, provided that their different tastes and liking remain within their legal framework and neither violates any statute nor results in the abridgement of fundamental rights of any other citizen. The Preambular goals of our Constitution which contain the noble objectives of Justice, Liberty, Equality and Fraternity can only be achieved through the commitment and loyalty of the organs of the State to the principle of constitutional morality"

110. The right guaranteed under Article 25(1) has been made subject to, by the opening words of the Article itself, public order, morality, health and other provisions of Part III of the Constitution. All the three words, that is, order, morality and health are qualified by the word 'public'. Neither public order nor public health will be at peril by allowing entry of women devotees of the age group of 10 to 50 years into the Sabarimala temple for offering their prayers. As regards public morality, we must make it absolutely clear that since the Constitution was not shoved, by any external force, upon the people of this country but was rather adopted and given by the people of this country to

themselves, the term public morality has to be appositely understood as being synonymous with constitutional morality.

111. Having said so, the notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple for the simple reason that public morality must yield to constitutional morality.

Whether exclusionary practice is an essential practice as per Hindu religion

112. We have, in the earlier part of this judgment, determined that the devotees of Lord Ayyappa, who though claim to be a separate religious denomination, do not, as per the tests laid down by this Court in several decisions, most prominent of them being ***S.P. Mittal*** (supra), constitute a separate religious denomination within the meaning of Article 26 of the Constitution. This leads us to a mathematical certainty that the devotees of Lord Ayyappa are the followers of Hindu religion. Now, what remains to be seen is whether the exclusion of women of the age group of 10 to 50 years is an essential practice under

the Hindu religion in the backdrop of the peculiar attending circumstances attributable to the Sabarimala temple. For ascertaining the said question, we first need to understand what constitutes an essential practice for a particular religion which has been the subject matter of several decisions of this Court. Article 25 merely protects the freedom to practise rituals, ceremonies, etc. which are an integral part of a religion as observed by this Court in ***John Vallamattom and another v. Union of India***[31]. While saying so, the Court ruled that a disposition towards making gift for charitable or religious purpose can be designated as a pious act of a person, but the same cannot be said to be an integral part of any religion.

113. The role of essential practices to a particular religion has been well demonstrated by Lord Halsbury in ***Free Church of Scotland v. Overtoun***[32] wherein it was observed:

> "In the absence of conformity to essentials, the denomination would not be an entity cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with

[31] (2003) 6 SCC 611
[32] (1904) AC 515

> nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension."

114. This Court, in ***Shirur Mutt*** (supra), for the first time, held that what constitutes an essential part of a religion will be ascertained with reference to the tenets and doctrines of that religion itself. The Court had opined thus:

> "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."

115. In ***Mohd. Hanif Quareshi v. State of Bihar***[33], this Court rejected the argument of the petitioner that sacrifice of cow on Bakr-id was an essential practice of Mohammedan religion and ruled that it could be prohibited by the State under Clause 2(a) of Article 25.

116. Similarly, in ***State of West Bengal and others v. Ashutosh Lahiri and others***[34], this Court, while approving the judgment of the High Court, observed that the State of West Bengal had wrongly invoked Section 12 of the West Bengal Animal Slaughter Control Act, 1950 on the ground that exemption of slaughtering healthy cows was required to be given

[33] AIR 1958 SC 731
[34] AIR 1995 SC 464

for the Muslim community. While holding so, the Court opined thus:

> "...before the State can exercise the exemption power under Section 12 in connection with slaughter of any healthy animal covered by the Act, it must be shown that such exemption is necessary to be granted for sub-serving an essential religious, medicinal or research purpose. If granting of such exemption is not essential or necessary for effectuating such a purpose no such exemption can be granted so as to by-pass the thrust of the main provisions of the Act."

117. In ***Durgah Committee, Ajmer and others v. Syed Hussain Ali and others***[35], the Court, although speaking in the context of Article 26, warned that some practices, though religious, may have sprung from merely superstitious beliefs and may, in that sense, be extraneous and unessential accretions to religion itself and unless such practices are found to constitute an essential and integral part of a religion, their claim for protection as essential practices may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of the religion and no other.

118. The Court, in this case, has excluded such practices from protection which, though may have acquired the characteristic of

[35] AIR 1961 SC 1402

religious practices, are found, on careful scrutiny, to be an outcome of some superstitious beliefs which may render them unessential and not an integral part of the religion.

119. In ***Acharya Jagadishwarananda Avadhuta and others v. Commissioner of Police, Calcutta***[36], popularly known as the first *Ananda Marga* case, this Court held that Tandav dance in processions or at public places by the Ananda Margis carrying lethal weapons and human skulls was not an essential religious rite of the followers of Ananda Marga and, therefore, the order under Section 144 Cr.PC. prohibiting such processions in the interest of public order and morality was not violative of the rights of the Ananda Marga denomination under Articles 25 and 26 of the Constitution more so when the order under Section 144 Cr.PC. did not completely ban the processions or gatherings at public places but only prohibited carrying of daggers, trishuls and skulls which posed danger to public order and morality.

120. In ***N. Adithayan v. Travancore Devaswom Board and others***[37], the Court very succinctly laid down as to what should be the approach of the court for deciding what constitutes an essential practice of a religion in the following words:

[36] (1983) 4 SCC 522

[37] (2002) 8 SCC 106

> "The legal position that the protection under Article 25 and 26 extend 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..."
>
> (Emphasis is ours)

121. In ***Commissioner of Police and others v. Acharya Jagadishwarananda Avadhuta and others*** (supra), being the second *Ananda Marga* case, the Court has elaborately discussed the true nature of an essential practice and has further laid down the test for determining whether a certain practice can be characterized as essential to a particular religion in order to guarantee protection under the Constitution. The Court has opined:

> "The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background etc. of the given religion. (See generally the Constitution bench decisions in The Commissioner v. L T Swamiar of Srirur Mutt 1954 SCR 1005, SSTS Saheb v. State of Bombay 1962 (Supp) 2 SCR 496, and

> Seshammal v. State of Tamilnadu : [1972]3SCR815 , regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not). What is meant by 'an essential part or practices of a religion' is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the nonessential part or practices."

122. In the light of the above authorities, it has to be determined whether the practice of exclusion of women of the age group of 10 to 50 years is equivalent to a doctrine of Hindu religion or a practice that could be regarded as an essential part of the Hindu

religion and whether the nature of Hindu religion would be altered without the said exclusionary practice. The answer to these questions, in our considered opinion, is in the firm negative. In no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity. In the absence of any scriptural or textual evidence, we cannot accord to the exclusionary practice followed at the Sabarimala temple the status of an essential practice of Hindu religion.

123. By allowing women to enter into the Sabarimala temple for offering prayers, it cannot be imagined that the nature of Hindu religion would be fundamentally altered or changed in any manner. Therefore, the exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the Hindu religion without which Hindu religion, of which the devotees of Lord Ayyappa are followers, will not survive.

124. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices.

125. This view of ours is further substantiated by the fact that where a practice changes with the efflux of time, such a practice cannot, in view of the law laid down in ***Commissioner of Police and others*** (supra), be regarded as a core upon which a religion is formed. There has to be unhindered continuity in a practice for it to attain the status of essential practice. It is further discernible from the judgment of the High Court in ***S. Mahendran*** (supra) that the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conduced poojas in every month for five days for the first rice feeding ceremony of their children. The Devaswom Board also took a stand before the High Court that restriction of entry for women was only during Mandalam, Makaeavilakku and Vishnu days. The same has also been pointed out by learned Senior Counsel, Ms. Indira Jaising,

that the impugned exclusionary practice in question is a 'custom with some aberrations' as prior to the passing of the Notification in 1950, women of all age groups used to visit the Sabarimala temple for the first rice feeding ceremony of their children.

126. Therefore, there seems to be no continuity in the exclusionary practice followed at the Sabarimala temple and in view of this, it cannot be treated as an essential practice.

Analysis of the 1965 Act and Rule 3(b) of the 1965 Rules

127. We may presently deal with the statutory provisions of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965. Section 2 of the said Act is the definition clause and reads as under:

> "**2. Definitions.**- In this Act, unless the context otherwise requires,-
>
> (a) "Hindu" includes a person professing the Buddhist, Sikh or Jaina religion;
>
> (b) "place of public worship" means a place, by whatever name known or to whomsoever belonging, which is dedicated to, or for the benefit of, or is used generally by, Hindus or any section or class thereof, for the performance of any religious service or for offering prayers therein, and includes all lands and subsidiary shrines, mutts, devasthanams, namaskara mandapams and nalambalams, appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water courses the waters of which are worshipped or are used for

> bathing or for worship, but does not include a "sreekoil";
>
> (c) "section or class" includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever. ”

128. As per clause (a) of Section 2, the term 'Hindu' includes a person professing Buddhist, Sikh or Jaina religion. The word 'person' occurring in this clause, for the pure and simple reason of logic, must include all genders. Clause (c) defines 'section or class' as any division, sub-division, caste, sub-caste, sect or denomination whatsoever. Nowhere the definition of section or class suggests being limited to male division, sub-division, caste and so forth.

129. Section 3 of the Act stipulates that places of public worship will be open to all sections and classes of Hindus and reads thus:

> “**Section 3 : Places of public worship to open to all sections 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 so enter, worship, pray or perform:
>
> Provided that in the case of a place 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. "

130. Section 3 of the Act being a non-obstante clause declares that 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 be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping, offering prayers or performing any religious service at such place of public worship in the like manner and to the like extent as any other Hindu of whatsoever section or class may so be eligible to enter, worship, pray or perform.

131. A careful dissection of Section 3 reveals that places of public worship in the State of Kerala, irrespective of any contrary law, custom, usage or instrument having effect by virtue of any such

law or any decree or order of Court, shall be open to all sections and classes of Hindus. The definition of 'section or class' and 'Hindu' has to be imported, for the purposes of Section 3, from the definition clauses 2(a) and 2(c) which, as per our foregoing analysis, includes all the genders, provided they are Hindus. It further needs to be accentuated that the right provided under Section 3 due to its non-obstante nature has to be given effect to regardless of any law, custom or usage to the contrary.

132. The proviso to Section 3 stipulates that in case the place of public worship is a temple founded for the benefit of any religious denomination or section thereof, then the rights warranted under Section 3 becomes subject to the right of that religious denomination or section to manage its own affairs in matters of religion. Having said so, we have, in the earlier part of this judgment, categorically stated that devotees and followers of Lord Ayyappa do not constitute a religious denomination and, therefore, the proviso to Section 3 cannot be resorted to in the case at hand.

133. The importance and the gravity of the right stipulated under Section 3 of this Act, for all sections and classes of Hindus which include women, is very well manifest and evident from the fact

that its violation has been made penal under Section 5 of the 1965 Act which reads as under:

> **"Section 5 : Penalty**
>
> Whoever, in contravention of Section 3,-
>
> (a) prevents or attempts to prevent any person belonging to any section or class of Hindus from entering, worshipping or offering prayers, performing any religious service, in any place of public worship; or
>
> (b) obstructs, or causes or attempts to cause obstruction to, or by threat of obstruction or otherwise discourages, any such person from doing or performing any of the acts aforesaid, shall be publishable with imprisonment which may extent to six months, or with fine which may extent to five hundred rupees, or with both:
>
> Provided that in a case where a sentence of fine only is awarded, such fine shall not be less than fifty rupees. "

134. Proceeding ahead, Section 4 of the 1965 Act confers the power to make regulations for the maintenance of order and decorum and performance of rites and ceremonies with regard to places of public worship in Kerala:

> **"Section 4 : Power to make regulations for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship**
>
> (1) The trustee or any other person in charge of any place public worship shall have power, subject to the control of the competent authority and any rules which

> may be made by that authority, to make regulations for the maintenance of order and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein:
>
> Provided that no regulation made under this sub-section shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular section or class.
>
> (2) The competent authority referred to in sub-section (1) shall be,-
>
> (i) In relation to a place of public worship situated in any area to which Part I of the Travancore-Cochin Hindu Religious Institutions Act, 1950 (Travancore-Cochin Act XV of 1950), extends, the Travancore Devaswom Board;
>
> (ii) in relation to a place of public worship situated in any area to which Part II of the said Act extends, the Cochin Devaswom Board; and
>
> (iii) in relation to a place of public worship situated in any other area in the State of Kerala, the Government."

135. The proviso to Section 4 being an exception to Section 4(1) is a classic example of a situation where the exception is more important than the rule itself. It needs to be borne in mind that the language of the proviso to Section 4 of the 1965 Act, in very clear and simple terms, states that the regulations made under clause (1) of Section 4 shall not discriminate against any Hindu on the ground that he/she belongs to a particular section or

class. As stated earlier, a particular section or class for the purposes of this Act includes women of all age groups, for Hindu women of any age group also constitute a class or section of Hindus.

136. The State of Kerala, by virtue of clause (1) of Section 4, has framed the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965. The relevant rule which is also the most prominent bone of contention in the present case is Rule 3(b). The relevant part of Rule 3 reads thus:

> "**Rule 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 the 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 the place of public worship:
>
> x x x
>
> (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.
>
> x x x"

137. The law is well-settled on the point that when a rule-making power is conferred under any statute on an authority, the said power has to be exercised within the confines of the statute and

no transgression of the same is permissible. In this context, we may refer to the decision in ***Union of India and others v. S. Srinivasan***[38] wherein it has been ruled:

> "At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it."

138. In ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav***[39], the Court held that for a rule to have the effect of a statutory provision, it must fulfill two conditions, firstly it must conform to the provisions of the statute under which it is framed and secondly, it must also come within the scope and purview of the rule making power of the authority framing the rule and if either of these two conditions is not fulfilled, the rule so framed would be void. In ***Kunj Behari Lai Butail and others v. State of H.P. and others***[40], it has been laid down that for holding a rule to be valid, it must first be determined as to what is the object of the enactment and then it has to be seen if the

[38] (2012) 7 SCC 683
[39] AIR 1988 SC 876
[40] AIR 2000 SC 1069

rules framed satisfy the test of having been so framed as to fall within the scope of such general power conferred and if the rule making power is not expressed in such a usual general form, then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act. Another authority which defines the limits and confines within which the rule-making authority shall exercise its delegating powers is ***Global Energy Limited and another v. Central Electricity Regulatory Commission***[41], where the question before the Court was regarding the validity of clauses (b) and (f) of Regulation 6- A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. The Court gave the following opinion:

> "It is now a well-settled principle of law that the rulemaking power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the Regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act."

139. It was clearly held in this case that the rule-making power, which is provided under a statute with the aim of facilitating the

[41] (2009) 15 SCC 570

implementation of the statute, does not confer power on any authority to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act. The Court, further, went on to hold that:

> "The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the contest of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters."

140. At this stage, we may also benefit from the observations made in ***State of T.N. and another v. P. Krishnamurthy and others***[42] wherein it was stated that where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. This implies that if a rule is directly hit for being violative of the provisions of the

[42] (2006) 4 SCC 517

enabling statute, then the Courts need not have to look in any other direction but declare the said rule as invalid on the said ground alone.

141. Rule 3(b) seeks to protect custom and usage by not allowing women, Hindu women to be specific, to enter a place of public worship at such times during which they are not so allowed to enter by the said custom or usage. A cursory reading of Rule 3(b) divulges that it is *ultra vires* both Section 3 as well as Section 4 of the 1965 Act, the reason being that Section 3 being a non-obstante provision clearly stipulates that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary.

142. That apart, Rule 3(b) is also *ultra vires* Section 4 of the 1965 Act as the proviso to Section 4(1) creates an exception to the effect that the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

143. The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act, clearly indicates that

custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and the fundamental right to practise religion guaranteed under Article 25(1). It is clear as crystal that the provisions of the 1965 Act are liberal in nature so as to allow entry to all sections and classes of Hindus including Scheduled Castes and Scheduled Tribes. But framing of Rule 3(b) of the 1965 Rules under the garb of Section 4(1) would violate the very purpose of the 1965 Act.

Conclusions

144. In view of our aforesaid analysis, we record our conclusions in seriatim:

(i) In view of the law laid down by this Court in ***Shirur Mutt*** (supra) and ***S.P. Mittal*** (supra), the devotees of Lord Ayyappa do not constitute a separate religious denomination. They do not have common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of

Lord Ayyappa are exclusively Hindus and do not constitute a separate religious denomination.

(ii) Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors specifically attributable to women.

(iii) The exclusionary practice being followed at the Sabrimala temple by virtue of Rule 3(b) of the 1965 Rules violates the right of Hindu women to freely practise their religion and exhibit their devotion towards Lord Ayyappa. This denial denudes them of their right to worship. The right to practise religion under Article 25(1) is equally available to both men and women of all age groups professing the same religion.

(iv) The impugned Rule 3(b) of the 1965 Rules, framed under the 1965 Act, that stipulates exclusion of entiy of women of the age group of 10 to 50 years, is a clear violation of the right of Hindu women to practise their religious beliefs

which, in consequence, makes their fundamental right of religion under Article 25(1) a dead letter.

(v) The term 'morality' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. Since the Constitution has been adopted and given by the people of this country to themselves, the term public morality in Article 25 has to be appositely understood as being synonymous with constitutional morality.

(vi) The notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple.

(vii) The practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple cannot be regarded as an essential part as claimed by the respondent Board.

(viii) In view of the law laid down by this Court in the second ***Ananda Marga*** case, the exclusionary practice being

followed at the Sabarimala Temple cannot be designated as one, the non-observance of which will change or alter the nature of Hindu religion. Besides, the exclusionary practice has not been observed with unhindered continuity as the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conducted poojas in every month for five days for the first rice feeding ceremony of their children.

(ix) The exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the religion.

(x) A careful reading of Rule 3(b) of the 1965 Rules makes it luculent that it is *ultra vires* both Section 3 as well as Section 4 of the 1965 Act, for the simon pure reason that Section 3 being a non-obstante provision clearly stipulates that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary.

(xi) Rule 3(b) is also *ultra vires* Section 4 of the 1965 Act as the proviso to Section 4(1) creates an exception to the effect that

the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

(xii) The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act clearly indicate that custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and incrementally impair the fundamental right to practise religion guaranteed under Article 25(1). Therefore, we hold that Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act.

145. In view of the aforesaid analysis and conclusions, the writ petition is allowed. There shall be no order as to costs.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

New Delhi;
September 28, 2018