REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 373 OF 2006

Indian Young Lawyers Association & Ors. …Petitioners

Versus

State of Kerala & Ors. …Respondents

J U D G M E N T

INDU MALHOTRA, J.

1. The present Writ Petition has been filed in public interest by a registered association of Young Lawyers. The Intervenors in the Application for Intervention have averred that they are gender rights activists working in and around the State of Punjab, with a focus on issues of gender equality and justice, sexuality, and menstrual discrimination.

The Petitioners have *inter alia* stated that they learnt of the practise of restricting the entry of women in the age group of 10 to 50 years in the Sabarimala Temple in Kerala from three newspaper articles written by Barkha Dutt (Scent of a Woman, Hindustan Times; July 1, 2006), Sharvani Pandit (Touching Faith, Times of India; July 1, 2006), and Vir Sanghvi (Keeping the Faith, Losing our Religion, Sunday Hindustan Times; July 2, 2006).

The Petitioners have challenged the Constitutional validity of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (hereinafter referred to as "the 1965 Rules"), which restricts the entry of women into the Sabarimala Temple as being *ultra vires* Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (hereinafter referred to as "the 1965 Act").

Further, the Petitioners have prayed for the issuance of a Writ of Mandamus to the State of Kerala, the Travancore Devaswom Board, the Chief Thanthri of Sabarimala Temple and the District Magistrate of Pathanamthitta to ensure that female devotees between the age group of 10 to 50 years are permitted to enter the Sabarimala Temple without any restriction.

2. SUBMISSIONS OF PETITIONERS AND INTERVENORS

The Petitioners and the Intervenors were represented by Mr. R.P. Gupta, and Ms. Indira Jaising, Senior Advocate. Mr. Raju Ramachandran, learned Senior Advocate appeared as *Amicus Curiae* who supported the case of the Petitioners.

(i) In the Writ Petition, the Petitioners state that the present case pertains to a centuries old custom of prohibiting entry of women between the ages of 10 years to 50 years into the Sabarimala Temple of Lord Ayyappa.

The customary practise, as codified in Rule 3(b) of the 1965 Rules read with the Notifications issued by the Travancore Devaswom

Board dated October 21, 1955 and November 27, 1956, does not meet the tests of Articles 14, 15 and 21 of the Constitution.

This exclusionary practise violates Article 14 as the classification lacks a Constitutional object. It is manifestly arbitrary as it is based on physiological factors alone, and does not serve any valid object.

(ii) The customary practise violates Article 15(1) of the Constitution as it is based on 'sex' alone.

The practise also violates Article 15(2)(b) since the Sabarimala Temple is a public place of worship being open and dedicated to the public and is partly funded by the State under Article 290A.

(iii) Article 25 guarantees the Fundamental Right to an individual to worship or follow any religion.

The 1965 Act has been passed in furtherance of the goals enshrined in Article 25(2)(b) as a 'measure of social reform'. The Act contains no prohibition against women from entering any public temple.

(iv) Rule 3(b) of the 1965 Rules is *ultra vires* the Act insofar as it prohibits the entry of women.

(v) The Petitioners contend that a religious denomination must have the following attributes:

- It has its own property & establishment capable of succession by its followers.
- It has its distinct identity clearly distinguishable from any established religion.

- It has its own set of followers who are bound by a distinct set of beliefs, practises, rituals or beliefs.
- It has the hierarchy of its own administration, not controlled by any outside agency.

It was contended that the devotees of Lord Ayyappa do not constitute a religious denomination under Article 26 as they do not have a common faith, or a distinct name. The devotees of Lord Ayyappa are not unified on the basis of some distinct set of practises. Every temple in India has its own different set of rituals. It differs from region to region. A minor difference in rituals and ceremonies does not make them a separate religious denomination.

The devotees of Lord Ayyappa do not form a religious denomination since the tests prescribed by this Court have not been satisfied in this case. Even assuming that the devotees of Lord Ayyappa constitute a religious denomination, their rights under Article 26(b) would be subject to Article 25(2)(b) in line with the decision of this Court in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.*[1].

It was further submitted that there are no exclusive followers of this Temple except general Hindu followers visiting any Hindu temple.

Reliance was placed on the judgments of this Court in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*[2], *Raja Bira Kishore*

[1] 1958 SCR 895 : AIR 1958 SC 255
[2] 1962 Supp (2) SCR 496 : AIR 1962 SC 853

Deb, Hereditary Superintendent, Jagannath Temple, P.O. and District Puri v. *State of Orissa*[3], and in *S.P. Mittal* v. *Union of India & Ors.*[4].

(vi) Even if the Sabarimala Temple is taken to be a religious denomination, the restriction on the entry of women is not an essential religious practise.

The prohibition on women between the ages of 10 to 50 years from entering the temple does not constitute the core foundation of the assumed religious denomination. Any law or custom to be protected under Article 26 must have Constitutional legitimacy.

(vii) The exclusionary practise is violative of Article 21, as it has the impact of casting a stigma on women as they are considered to be polluted, which has a huge psychological impact on them, and undermines their dignity under Article 21.

The exclusionary practise is violative of Article 17 as it is a direct form of "Untouchability". Excluding women from public places such as temples, based on menstruation, is a form of 'untouchability'. This Article is enforceable both against non-State as well as State actors.

(viii) Mr. Raju Ramachandran, learned *Amicus Curiae*, submitted that the Sabarimala Temple is a place of public worship. It is managed and administered by a statutory body i.e. the Travancore Devaswom Board. According to him, a public temple by its very character is established, and maintained for the benefit of its devotees. The right

[3] (1964) 7 SCR 32 : AIR 1964 SC 1501
[4] (1983) 1 SCC 51

of entry emanates from this public character, and is a legal right which is not dependent upon the temple authorities.

The Travancore Devaswom Board is a statutorily created authority under the Travancore – Cochin Hindu Religious Institutions Act, 1950, and receives an annual payment from the Consolidated Fund of India under Article 290A. It would squarely fall within the ambit of "other authorities" in Article 12, and is duty bound to give effect to the Fundamental Rights.

(ix) The Fundamental Right to worship under Article 25(1) is a non-discriminatory right, and is equally available to both men and women alike. The right of a woman to enter the Temple as a devotee is an essential aspect of her right to worship, and is a necessary concomitant of the right to equality guaranteed by Articles 15.

The non-discriminatory right of worship is not dependent upon the will of the State to provide for social welfare or reform under Article 25(2)(b).

Article 25(2)(b) is not merely an enabling provision, but provides a substantive right. The exclusion of women cannot be classified as an essential religious practise in the absence of any scriptural evidence being adduced on the part of the Respondents.

(x) The exclusionary practise results in discrimination against women as a class, since a significant section of women are excluded from entering the Temple. Placing reliance on the "impact test" enunciated by this Court in *Bennett Coleman & Co. & Ors.* v. *Union of India &*

Ors.[5], he submitted that the discrimination is only on the ground of "sex" since the biological feature of menstruation emanates from the characteristics of the particular sex.

(xi) Article 17 prohibits untouchability "in any form" in order to abolish all practises based on notions of purity, and pollution. The exclusion of menstruating women is on the same footing as the exclusion of oppressed classes.

(xii) The term "morality" used in Articles 25 and 26 refers to Constitutional Morality, and not an individualised or sectionalised sense of morality. It must be informed by Articles 14, 15, 17, 38, and 51A.

(xiii) Mr. Ramachandran, learned *Amicus Curiae* submitted that Rule 3(b) of the 1965 Act is *ultra vires* Section 3 of the 1965 Act insofar as it seeks to protect customs and usages, which Section 3 specifically over-rides. The justification for Rule 3 cannot flow from the proviso to Section 3, since the proviso can only be interpreted in line with the decision of this Court in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra). It is *ultra vires* Section 4 since it provides that the Rules framed thereunder cannot be discriminatory against any section or class.

3. SUBMISSIONS OF THE RESPONDENTS

The State of Kerala was represented by Mr. Jaideep Gupta, Senior Advocate. The Travancore Dewaswom Board was represented by Dr. A.M.

[5] (1972) 2 SCC 788

Singhvi, Senior Advocate. The Chief Thanthri was represented by Mr. V. Giri, Senior Advocate. The Nair Service Society was represented by Mr. K. Parasaran, Senior Advocate. The *Raja* of *Pandalam* was represented by Mr. K. Radhakrishnan. Mr. J. Sai Deepak appeared on behalf of Respondent No. 18 and Intervenor by the name of People for Dharma. Mr. Ramamurthy, Senior Advocate appeared as *Amicus Curiae* who supported the case of the Respondents.

4. The State of Kerala filed two Affidavits in the present Writ Petition.

The State of Kerala filed an Affidavit dated November 13, 2007 supporting the cause of the Petitioners. The State however prayed for the appointment of an "appropriate commission" to submit suggestions/views on whether entry of women between the ages of 10 to 50 years should be permitted. Some of the averments made in the said Affidavit are pertinent to note, and are being reproduced herein below for reference:

> *"…As such, Government cannot render an independent direction against the present prevailing custom, regard being had to the finality of the said judgment [Kerala High Court's decision in S. Mahendran (supra)] over the disputed questions of facts which requires the necessity of adducing evidence also…*
> *…Thus, Government is of the opinion that no body should be prohibited from their right to worship, but considering the fact that the matter of entry to Sabarimala is a practise followed for so many years and connected with the belief and values accepted by the people and since there is a binding High Court judgment in that regard, Government felt that this Hon'ble Court may be requested to appoint an appropriate commission consisting of eminent scholars with authentic knowledge in Hinduism and reputed and uncorrupt social reformers to submit suggestions/views on the issue whether it is open to all women, irrespective of their age to enter the temple and make worship…"*
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> (Emphasis supplied)

In the subsequent Additional Affidavit dated February 4, 2016 filed by the State, it was submitted that the assertions made in the previous Affidavit dated November 13, 2007 erroneously sought to support the Petitioners. It was submitted that it was not open for the State Government to take a stand at variance with its position before the Kerala High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors.*[6] and in contravention of the directions issued therein. It was asserted that the practise of restricting the entry of women between the ages of 10 to 50 years is an essential and integral part of the customs and usages of the Temple, which is protected under Articles 25 and 26 of the Constitution. Being a religious custom, it is also immune from challenge under other provisions of Part III of the Constitution in light of the ruling of this Court in *Riju Prasad Sharma & Ors.* v. *State of Assam & Ors.*[7].

However, during the course of hearing before the three-Judge Bench at the time of reference, it was submitted that the State would be taking the stand stated in the Affidavit dated November 13, 2007.

5. The submissions made by the Respondent No.2 – Travancore Devaswom Board, Respondent No. 4 – the Thanthri of the Temple, Respondent No. 6 – the Nair Service Society, Respondent Nos. 18 and 19 are summarised hereinbelow:

[6] AIR 1993 Ker 42
[7] (2015) 9 SCC 461

(i) The Sabarimala Temple, dedicated to Lord Ayyappa, is a prominent temple in Kerala which is visited by over twenty million pilgrims and devotees every year. As per a centuries old tradition of this temple, and the '*acharas*', beliefs and customs followed by this Temple, women in the age group of 10 to 50 years are not permitted to enter this Temple.

This is attributable to the manifestation of the deity at the Sabarimala Temple which is in the form of a '*Naishtik Bramhachari*', who practises strict penance, and the severest form of celibacy.

According to legend, it is believed that Lord Ayyappa, the presiding deity of Sabarimala had his human sojourn at *Pandalam* as the son of the King of *Pandalam*, known by the name of *Manikandan*, who found him as a radiant faced infant on the banks of the river Pampa, wearing a bead ('*mani*') around his neck. *Manikandan's* feats and achievements convinced the King and others of his divine origin.

The Lord told the King that he could construct a temple at Sabarimala, north of the holy river Pampa, and install the deity there. The King duly constructed the temple at Sabarimala and dedicated it to Lord Ayyappa. The deity of Lord Ayyappa in Sabarimala Temple was installed in the form of a '*Naishtik Brahmachari*' i.e. an eternal celibate.

Lord Ayyappa is believed to have explained the manner in which the pilgrimage to the Sabarimala Temple is to be undertaken, after observing a 41-day '*Vratham*'.

It is believed that Lord Ayyappa himself undertook the 41-day '*Vratham*' before he went to Sabarimala Temple to merge with the deity. The whole process of the pilgrimage undertaken by a pilgrim is to replicate the journey of Lord Ayyappa. The mode and manner of worship at this Temple as revealed by the Lord himself is chronicled in the '*Sthal Purana*' i.e. the '*Bhuthanatha Geetha*'.

The 41 day "*Vratham*" is a centuries old custom and practise undertaken by the pilgrims referred to as '*Ayyappans*'. The object of this *'Vratham'* is to discipline and train the devotees for the evolution of spiritual consciousness leading to self-realization. Before embarking on the pilgrimage to this shrine, a key essential of the '*Vratham*' is observance of a '*Sathvic*' lifestyle and '*Brahmacharya*' so as to keep the body and mind pure. A basic requirement of the '*Vratham'* is to withdraw from the materialistic world and step onto the spiritual path.

When a pilgrim undertakes the '*Vratham*', the pilgrim separates himself from the women-folk in the house, including his wife, daughter, or other female members in the family.

The "*Vratham*" or penance consists of:

- Forsaking all physical relations with one's spouse;
- Giving up anything that is intoxicating, including alcohol, cigarettes and '*tamasic'* food;
- Living separately from the rest of the family in an isolated room or a separate building;

- Refraining from interacting with young women in daily life, including one's daughter, sister, or other young women relatives;
- Cooking one's own food;
- Observing cleanliness, including bathing twice a day before prayers;
- Wearing a black *mundu* and upper garments;
- Having only one meal a day;
- Walking barefoot.

On the 41st day, after puja, the pilgrim takes the *irimudi* (consisting of rice and other provisions for one's own travel, alongwith a coconut filled with ghee and puja articles) and starts the pilgrimage to climb the 18 steps to reach the '*Sannidhanam'*, for *darshan* of the deity. This involves walking from River Pampa, climbing 3000 feet to the *Sannidhanam*, which is a climb of around 13 kilometres through dense forests.

As a part of this system of spiritual discipline, it is expressly stipulated that women between the ages of 10 to 50 years should not undertake this pilgrimage.

(ii) This custom or usage is understood to have been prevalent since the inception of this Temple, which is since the past several centuries. Reliance was placed on a comprehensive thesis by Radhika Sekar on

this Temple.[8] Relevant extracts from the thesis are reproduced hereinbelow:

> "*The cultus members maintain the strictest celibacy before they undertake their journey through the forests to the Sabarimala shrine. This emphasis on celibacy could be in order to gain protection from other forest spirits, for as mentioned earlier, Yaksas are said to protect "sages and celibates…*
> *…Though there is no formal declaration, it is understood that the Ayyappa (as he is now called) will follow the strictest celibacy, abstain from intoxicants and meat, and participate only in religious activities. He may continue to work at his profession, but he may not indulge in social enterprises. Ayyappas are also required to eat only once a day (at noon) and to avoid garlic, onion and stale food. In the evening, they may eat fruit or something very light. As far as the dress code is concerned, a degree of flexibility is allowed during the vratam period. The nature of one's profession does not always permit this drastic change in dress code. For example, Ayyappas in the army or police force wear their regular uniforms and change into black only when off duty. Black or blue vestis and barefootedness are, however, insisted upon during the actual pilgrimage…*
> *…The rule of celibacy is taken very seriously and includes celibacy in thought and action. Ayyappas are advised to look upon all women older than them as mothers and those younger as daughters or sisters. Menstrual taboos are now strictly imposed….. Sexual cohabitation is also forbidden. During the vratam, Ayyappas not only insist on these taboos being rigidly followed but they go a step further and insist on physical separation. It is not uncommon for a wife, daughter or sister to be sent away during her menses if a male member of the household has taken the vratam…."*
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> (Emphasis supplied)

In the Memoir of the Survey of the Travancore and Cochin States written by Lieutenants Ward and Conner, reference has been made regarding the custom and usage prevalent at Sabarimala Temple. The Memoir of the Survey was originally published in two parts in 1893 and 1901 giving details of the statistical and geographical

[8] Radhika Sekar, *The Process of Pilgrimage: The Ayyappa Cultus and Sabarimalai Yatra* (Faculty of Graduate Studies, Department of Sociology and Anthropology at Carleton University, Ottawa, Ontario; October 1987)

surveys of the Travancore and Cochin States. Reference was sought to be made to the following excerpt from the survey:

> *"…old women and young girls, may approach the temple, but those who have attained puberty and to a certain time of life are forbid to approach, as all sexual intercourse in that vicinity is averse to this deity…"* [9]

(iii) Dr. Singhvi submitted that a practise started in hoary antiquity, and continued since time immemorial without interruption, becomes a usage and custom. Reliance, in this regard, was placed on the judgments of *Ewanlangki-E-Rymbai* v. *Jaintia Hills District Council & Ors.*[10], *Bhimashya & Ors.* v. *Janabi (Smt) Alia Janawwa*[11], and *Salekh Chand (Dead) by LRs* v. *Satya Gupta & Ors.*[12].

The custom and usage of restricting the entry of women in the age group of 10 to 50 years followed in the Sabarimala Temple is pre-constitutional. As per Article 13(3)(a) of the Constitution, "law" includes custom or usage, and would have the force of law.

The characteristics and elements of a valid custom are that it must be of immemorial existence, it must be reasonable, certain and continuous. The customs and usages, religious beliefs and practises as mentioned above are peculiar to the Sabarimala Temple, and have admittedly been followed since centuries.

(iv) The exclusion of women in this Temple is not absolute or universal. It is limited to a particular age group in one particular temple, with the view to preserve the character of the deity. Women outside the

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[9] Lieutenants Ward and Conner, *Memoir of the Survey of the Travancore and Cochin States* (First Reprint 1994, Government of Kerala) at p. 137
[10] (2006) 4 SCC 748
[11] (2006) 13 SCC 627
[12] (2008) 13 SCC 119

age group of 10 to 50 years are entitled to worship at the Sabarimala Temple. The usage and practise is primary to preserve the sacred form and character of the deity. It was further submitted that the objection to this custom is not being raised by the worshippers of Lord Ayyappa, but by social activists.

(v) It was further submitted that there are about 1000 temples dedicated to the worship of Lord Ayyappa, where the deity is not in the form of a '*Naishtik Brahmachari*'. In those temples, the mode and manner of worship differs from Sabarimala Temple, since the deity has manifested himself in a different form. There is no similar restriction on the entry of women in the other Temples of Lord Ayyappa, where women of all ages can worship the deity.

(vi) Mr. Parasaran, Senior Advocate submitted that the restriction on entry of women is a part of the essential practise of this Temple, and the pilgrimage undertaken. It is clearly intended to keep the pilgrims away from any distraction related to sex, as the dominant objective of the pilgrimage is the creation of circumstances in all respects for the successful practise of the spiritual self-discipline.

The limited restriction on the entry of women from 10 to 50 years, in the Sabarimala Temple is a matter of 'religion' and 'religious faith and practise', and the fundamental principles underlying the '*prathishtha*' (installation) of the Sabarimala Temple, as well as the custom and usage of worship of the deity - Lord Ayyappa.

(vii) With respect to the contention that the custom is violative of women's right to gender equality, Mr. V. Giri, Senior Advocate *inter*

alia submitted that if women as a class were prohibited from participation, it would amount to social discrimination. However, this is not so in the present case. Girls below 10 years, and women after 50 years can freely enter this Temple, and offer worship Further, there is no similar restriction on the entry of women at the other Temples of Lord Ayyappa.

The classification of women between the ages of 10 to 50 years, and men of the same age group, has a reasonable nexus with the object sought to be achieved, which is to preserve the identity and manifestation of the Lord as a '*Naishtik Brahmachari*'.

(viii) It was submitted by the Respondents that in order to preserve the character of the deity, and the sanctity of the idol at the Sabarimala Temple, the limited restriction is imposed on the entry of women only during the period notified by the Travancore Devaswom Board. There is no absolute restriction on women *per se.* Such practise is consistent with the '*Nishta*' or '*Naishtik Buddhi*' of the deity. This being the underlying reason behind the custom, there is no derogation of the dignity of women. It is only to protect the manifestation and form of the deity, which is sacred and divine, and preserve the penance undertaken by the devotees.

(ix) It was further submitted that it is the duty of the Travancore Devaswom Board under Section 31 of the Travancore - Cochin Hindu Religious Institutions Act, 1950 to administer the temple in accordance with the custom and usage of the Temple.

(x) It was submitted that issues of law and fact should be decided by a competent civil court, after examination of documentary and other evidence.

(xi) Mr. Parasaran, Senior Advocate further submitted that religion is a matter of faith. Religious beliefs are held to be sacred by those who have faith. Reliance was placed on the judgment of this Court in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Swamiar Thirtha Swamiar of Shirur Mutt* (supra) wherein the definition of religion from an American case was extracted i.e. "*the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His Will*".

Learned Senior Counsel also relied upon the case of *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra) wherein it was observed as follows:

> *"The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation."*

In *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.*[13], emphasis was laid on the mode of worship adopted when Lord Krishna was worshipped in the form of a child.

Religion does not merely lay down a code of ethical rules for its followers to accept, but also includes rituals and observances, ceremonies and modes of worship which are regarded as integral parts of the religion.

[13] (1964) 1 SCR 561 at 582 : AIR 1963 SC 1638

(xii) 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 satisfy three conditions as laid down in *S.P. Mittal* v. *Union of India & Ors.* (supra):

> "*80. (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.*"

Religious *maths*, religious sects, religious bodies, sub-sects or any section thereof have been held to be religious denominations. Reliance was placed on the judgments in *Commissioner., Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra); *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.*,[14] and *Dr. Subramanian Swamy* v. *State of T.N. & Ors.*[15].

Relying on the judgment in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors. case* (supra), Dr. Singhvi submitted that religion, in this formulation, is a much wider concept, and includes:

- Ceremonial law relating to the construction of Temples;
- Installation of Idols therein;
- Place of consecration of the principle deity;
- Where the other Devatas are to be installed;
- Conduct of worship of the deities;
- Where the worshippers are to stand for worship;

[14] (1962) 1 SCR 383 : AIR 1961 SC 1402
[15] (2014) 5 SCC 75

- Purificatory ceremonies and their mode and manner of performance;
- Who are entitled to enter for worship; where they are entitled to stand and worship; and, how the worship is to be conducted.

(xiii) It was categorically asserted by the Respondents that the devotees of Lord Ayyappa constitute a religious denomination, who follow the '*Ayyappan Dharma*', where all male devotees are called '*Ayyappans*' and all female devotees below 10 years and above 50 years of age are called '*Malikapurams*'. A devotee has to abide by the customs and usages of this Temple, if he is to mount the '*pathinettu padikal*' and enter the Sabarimala Temple.

This set of beliefs and faiths of the '*Ayyappaswamis*', and the organization of the worshippers of Lord Ayyappa constitute a distinct religious denomination, having distinct practises.

(xiv) It was further submitted that the status of this temple as a religious denomination, was settled by the judgment of the Division Bench of the Kerala High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board & Ors.* (supra). The High Court decided the case after recording both documentary and oral evidence. The then Thanthri – Sri Neelakandaru, who had installed the deity was examined by the High Court as C.W.6, who stated that women during the age group of 10 to 50 years were prohibited from entering the temple much before the 1950s.

This judgment being a declaration of the status of this temple as a religious denomination, is a judgment *in rem*. The said judgment has not been challenged by any party. Hence, it would be binding on all parties, including the Petitioners herein.

The following observation from the judgment of this Court in *Dr. Subramanian Swamy* v. *State of Tamil Nadu & Ors.* (supra) was relied upon:

> "*The declaration that Dikshitars are religious denomination or section thereof is in fact a declaration of their status and making such declaration is in fact a judgment in rem.*"
>
> (Internal quotations omitted)

(xv) Unlike Article 25, which is subject to the other provisions of Pat III of the Constitution, Article 26 is subject only to public order, morality, and health, and not to the other provisions of the Constitution. As a result, the Fundamental Rights of the denomination is not subject to Articles 14 or 15 of the Constitution.

With respect to Article 25(1), it was submitted that the worshippers of Lord Ayyappa are entitled to the freedom of conscience, and the right to profess, practise and propagate their religion. The right to profess their faith by worshipping at the Sabarimala Temple, can be guaranteed only if the character of the deity as a '*Naishtik Brahmachari*' is preserved. If women between the age of 10 to 50 years are permitted entry, it would result in changing the very character/nature of the deity, which would directly impinge on the right of the devotees to practise their religion guaranteed by Article 25(1) of the Constitution.

The right of the devotees under Article 25(1) cannot be made subject to the claim of the Petitioners to enter the temple under Articles 14 and 15 of the Constitution, since they do not profess faith in the deity of this Temple, but claim merely to be social activists.

(xvi) Article 25(2)(b) declares that nothing in Article 25(1) shall prevent the State from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The 'throwing open' to 'all classes and sections of Hindus' was intended to redress caste-based prejudices and injustices in society.

Article 25(2)(b) cannot be interpreted to mean that customs and usages forming an essential part of the religion, are to be overridden.

Article 25(2)(b) would have no application since there is no ban, but only a limited restriction during the notified period, based on faith, custom and belief, which has been observed since time immemorial.

(xvii) The Respondents submitted that the plea of the Petitioners with reference to Article 17, was wholly misconceived. The object and core of Article 17 was to prohibit untouchability based on 'caste' in the Hindu religion. No such caste-based or religion-based untouchability is practised at the Sabarimala Temple.

The customs practised by the devotees at the Sabarimala Temple do not flow from any practise associated with untouchability under Article 17. The custom is not based on any alleged impurity or disability. Hence, the contention was liable to be rejected.

6. DISCUSSION AND ANALYSIS

We have heard the arguments of the Counsel representing various parties, and perused the pleadings and written submissions filed by them.

6.1. The issues raised in the present Writ Petition have far-reaching ramifications and implications, not only for the Sabarimala Temple in Kerala, but for all places of worship of various religions in this country, which have their own beliefs, practises, customs and usages, which may be considered to be exclusionary in nature. In a secular polity, issues which are matters of deep religious faith and sentiment, must not ordinarily be interfered with by Courts.

6.2. In the past, the Courts, in the context of Hindu temples, have been asked to identify the limits of State action under Articles 25 and 26 on the administration, control and management of the affairs of temples, including the appointment of *archakas*. For instance, in the case of *Adi Saiva Sivachariyargal Nala Sangam & Ors.* v. *Government of Tamil Nadu & Anr.*[16], this Court was asked to consider the issue of appointment of *archakas* in Writ Petitions filed by an association of *archakas* and individual *archakas* of Sri Meenakshi Amman Temple of Madurai.

The present case is a PIL filed by an association of lawyers, who have invoked the writ jurisdiction of this Court to review certain practises being followed by the Sabarimala Temple on the grounds of

[16] (2016) 2 SCC 725

gender discrimination against women during the age-band of 10 to 50 years.

7. MAINTAINABILITY & JUSTICIABILITY

7.1. Article 25 of the Constitution guarantees to all persons the freedom of conscience, and the right freely to profess, practise and propagate religion. This is however subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

7.2. The right to move the Supreme Court under Article 32 for violation of Fundamental Rights, must be based on a pleading that the Petitioners' personal rights to worship in this Temple have been violated. The Petitioners do not claim to be devotees of the Sabarimala Temple where Lord Ayyappa is believed to have manifested himself as a '*Naishtik Brahmachari*'. To determine the validity of long-standing religious customs and usages of a sect, at the instance of an association/Intervenors who are "*involved in social developmental activities especially activities related to upliftment of women and helping them become aware of their rights*"[17], would require this Court to decide religious questions at the behest of persons who do not subscribe to this faith.

The right to worship, claimed by the Petitioners has to be predicated on the basis of affirmation of a belief in the particular manifestation of the deity in this Temple.

[17] Paragraph 2 of the Writ Petition.

7.3. The absence of this bare minimum requirement must not be viewed as a mere technicality, but an essential requirement to maintain a challenge for impugning practises of any religious sect, or denomination. Permitting PILs in religious matters would open the floodgates to interlopers to question religious beliefs and practises, even if the petitioner is not a believer of a particular religion, or a worshipper of a particular shrine. The perils are even graver for religious minorities if such petitions are entertained.

Dr. A.M. Singhvi, Senior Advocate appeared on behalf of the Travancore Devaswom Board, and submitted an illustrative list of various religious institutions where restrictions on the entry of both men and women exist on the basis of religious beliefs and practises being followed since time immemorial.[18]

7.4. In matters of religion and religious practises, Article 14 can be invoked only by persons who are similarly situated, that is, persons belonging to the same faith, creed, or sect. The Petitioners do not state that they are devotees of Lord Ayyappa, who are aggrieved by the practises followed in the Sabarimala Temple. The right to equality under Article 14 in matters of religion and religious beliefs has to be viewed differently. It has to be adjudged amongst the worshippers of

[18] Annexure C-8 in the Non-Case Law Convenience Compilation submitted by Dr. A.M. Singhvi, Senior Advocate enlists places of worship where women are not allowed. This list includes the Nizamuddin Dargah in New Delhi, Lord Kartikeya Temple in Pehowa, Haryana and Pushkar, Rajasthan; Bhavani Deeksha Mandapam in Vijaywada; Patbausi Satra in Assam; Mangala Chandi Temple in Bokaro, Jharkhand.
Annexure C-7 in the Non-Case Law Convenience Compilation submitted by Dr. A.M. Singhvi, Senior Advocate enlists places of worship where women are not allowed. This list includes the Temple of Lord Brahma in Pushkar, Rajasthan; the Bhagati Maa Temple in Kanya Kumari, Kerala; the Attukal Bhagavathy Temple in Kerala; the Chakkulathukavu Temple in Kerala; and the Mata Temple in Muzaffarpur, Bihar.

a particular religion or shrine, who are aggrieved by certain practises which are found to be oppressive or pernicious.

7.5. Article 25(1) confers on every individual the right to freely profess, practise and propagate his or her religion.[19] The right of an individual to worship a specific manifestation of the deity, in accordance with the tenets of that faith or shrine, is protected by Article 25(1) of the Constitution. If a person claims to have faith in a certain deity, the same has to be articulated in accordance with the tenets of that faith.

In the present case, the worshippers of this Temple believe in the manifestation of the deity as a '*Naishtik Brahmachari*'. The devotees of this Temple have not challenged the practises followed by this Temple, based on the essential characteristics of the deity.

7.6. The right to practise one's religion is a Fundamental Right guaranteed by Part III of the Constitution, without reference to whether religion or the religious practises are rational or not. Religious practises are Constitutionally protected under Articles 25 and 26(b). Courts normally do not delve into issues of religious practises, especially in the absence of an aggrieved person from that particular religious faith, or sect.

In *Hans Muller of Nurenburg* v. *Superintendent, Presidency Jail, Calcutta & Ors.*[20], this Court held that a person can impugn a particular law under Article 32 only if he is aggrieved by it.

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[19] H.M. Seervai, *Constitutional Law of India : A Critical Commentary,* Vol. II (4th Ed., Reprint 1999), at Pg. 1274, para 12.35.
[20] (1955) 1 SCR 1284 : AIR 1955 SC 367.

7.7. Precedents under Article 25 have arisen against State action, and not been rendered in a PIL.

An illustrative list of such precedents is provided hereinbelow:

(i) In *Commissioner, Hindu Religious Endowments, Madras* v. *Shri Lakshimdra Thirtha Swamiar of Sri Shirur Mutt* (supra), this Court had interpreted Articles 25 and 26 at the instance of the *Mathadhipati* or superior of the Shirur Mutt who was in-charge of managing its affairs. The *Mathadhipati* was aggrieved by actions taken by the Hindu Religious Endowments Board, which he claimed were violative of Articles 25 and 26.

(ii) In *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.*(supra), this Court dealt with the question whether the rights under Article 26(b) are subject to Article 25(2)(b), at the instance of the Temple of *Sri Venkataramana* and its trustees who belonged to the sect known as *Gowda Saraswath Brahmins*.

(iii) In *Mahant Moti Das* v. *S.P. Sahi, The Special Officer In Charge of Hindu Religious trust & Ors.*[21], this Court considered the Constitutional validity of actions taken by the Bihar State Board of Religious Trusts under the Bihar Hindu Religious Trusts Act, 1950 as being violative of the Fundamental Rights of *Mahants* of certain *Maths* or *Asthals* guaranteed, *inter alia*, under Articles 25 and 26.

[21] 1959 Supp (2) SCR 563 : AIR 1959 SC 942

(iv) In *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), this Court was called upon to decide the Constitutionality of the Durgah Khwaja Saheb Act, 1955 in view of Articles 25 and 26, *inter alia*, at the instance of *Khadims* of the Tomb of *Khwaja Moin-ud-din Chisti* of Ajmer. The *Khadims* claimed to be a part of a religious denomination by the name of *Chishtia Soofies*.

(v) In *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay* (supra), this Court was called upon to test the Constitutionality of the Bombay Prevention of Excommunication Act, 1949 on the ground that it violated Fundamental Rights guaranteed under Articles 25 and 26 to the petitioner who was the *Dai-ul-Mutlaq* or Head Priest of the *Dawoodi Bohra* Community.

(vi) In *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.*[22], three children belonging to a sect of Christianity called Jehovah's Witnesses had approached the Kerala High Court by way of Writ Petitions to challenge the action of the Headmistress of their school, who had expelled them for not singing the National Anthem during the morning assembly. The children challenged the action of the authorities as being violative of their rights under Articles 19(1)(a) and Article 25. This Court held that the refusal to sing the National Anthem emanated from the genuine and conscientious religious belief of the children, which was protected under Article 25(1).

[22] (1986) 3 SCC 615

In a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practises followed by any group, sect or denomination, could cause serious damage to the Constitutional and secular fabric of this country.

8. APPLICABILITY OF ARTICLE 14 IN MATTERS OF RELIGION AND RELIGIOUS PRACTISES

8.1. Religious customs and practises cannot be solely tested on the touchstone of Article 14 and the principles of rationality embedded therein. Article 25 specifically provides the equal entitlement of every individual to freely practise their religion. Equal treatment under Article 25 is conditioned by the essential beliefs and practises of any religion. Equality in matters of religion must be viewed in the context of the worshippers of the same faith.

8.2. The twin-test for determining the validity of a classification under Article 14 is:

- The classification must be founded on an intelligible differentia; and
- It must have a rational nexus with the object sought to be achieved by the impugned law.

The difficulty lies in applying the tests under Article 14 to religious practises which are also protected as Fundamental Rights under our Constitution. The right to equality claimed by the Petitioners under Article 14 conflicts with the rights of the worshippers of this shrine which is also a Fundamental Right

guaranteed by Articles 25, and 26 of the Constitution. It would compel the Court to undertake judicial review under Article 14 to delineate the rationality of the religious beliefs or practises, which would be outside the ken of the Courts. It is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like *Sati*.

8.3. The submissions made by the Counsel for the Petitioners is premised on the view that this practise constitutes gender discrimination against women. On the other hand, the Respondents submit that the present case deals with the right of the devotees of this denomination or sect, as the case may be, to practise their religion in accordance with the tenets and beliefs, which are considered to be "essential" religious practises of this shrine.

8.4. The Petitioners and Intervenors have contended that the age group of 10 to 50 years is arbitrary, and cannot stand the rigours of Article 14. This submission cannot be accepted, since the prescription of this age-band is the only practical way of ensuring that the limited restriction on the entry of women is adhered to.

8.5. The right to gender equality to offer worship to Lord Ayyappa is protected by permitting women of all ages, to visit temples where he has not manifested himself in the form of a '*Naishtik Brahamachari*', and there is no similar restriction in those temples. It is pertinent to mention that the Respondents, in this context, have submitted that there are over 1000 temples of Lord Ayyappa, where he has manifested in other forms, and this restriction does not apply.

8.6. The prayers of the Petitioners if acceded to, in its true effect, amounts to exercising powers of judicial review in determining the validity of religious beliefs and practises, which would be outside the ken of the courts. The issue of what constitutes an essential religious practise is for the religious community to decide.

9. APPLICABILITY OF ARTICLE 15

9.1. Article 15 of the Constitution prohibits differential treatment of persons on the ground of 'sex' alone.

The limited restriction on the entry of women during the notified age-group but in the deep-rooted belief of the worshippers that the deity in the Sabarimala Temple has manifested in the form of a '*Naishtik Brahmachari*'.

9.2. With respect to the right under Article 15, Mr. Raju Ramachandran, *Amicus Curiae* had submitted that the Sabarimala Temple would be included in the phrase "*places of public resort*", as it occurs in Article 15(2)(b).

In this regard, reference may be made to the debates of the Constituent Assembly on this issue. Draft Article 9 which corresponds to Article 15 of the Constitution, is extracted for ready reference:

> "*9. Prohibition of discrimination on grounds of religion, race, caste or sex – The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or any of them*
>
> *(1) In particular, no citizen shall, on grounds only of religion, race, caste, sex or any of them, be subject to*

any disability, liability, restriction or condition with regard to—

a. access to shops, public restaurants, hotels and places of public entertainments, or

b. the use of wells, tanks, roads and places of public resort maintained wholly or partly out of the revenues of the State or dedicated to the use of the general public.

(2) Nothing in this article shall prevent the State from making any special provision for women and children."[23]

Professor K.T. Shah proposed Amendment No. 293 for substitution of sub-clauses (a) & (b) as follows:

"*any place of public use or resort, maintained wholly or partly out of the revenues of the State, or in any way aided, recognised, encouraged or protected by the State, or place dedicated to the use of general public like schools, colleges, libraries, temples, hospitals, hotels and restaurants, places of public entertainment, recreation or amusement, like theatres and cinema-houses or concert-halls; public parks, gardens or museums; roads, wells, tanks or canals; bridges, posts and telegraphs, railways, tramways and bus services; and the like.*"[24]

(Emphasis supplied)

The Vice-President took up Amendment No. 296 for vote, which was moved for addition to sub-clause (a). The Amendment was proposed as under:

"*After the words of Public entertainment the words or places of worship be inserted.*"[25]

(Emphasis supplied and internal quotations omitted)

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[23] *Draft Constitution of India*, Drafting Committee of the Constituent Assembly of India (Manager Government of India Press, New Delhi, 1948) available at http://14.139.60.114:8080/jspui/bitstream/123456789/966/7/Fundamental%20Rights%20%285-12%29.pdf

[24] Statement of Professor K.T. Shah, Constituent Assembly Debates (November 29, 1948)

[25] Statement of Vice-President, Constituent Assembly Debates (November 29, 1948)

Amendment No. 301 was also proposed by Mr. Tajamul Hussain for inclusion of: "*places of worship*", "*Dharamshalas, and Musafirkhanas*" at the end of sub-clause (a).[26]

All these proposals were voted upon, and rejected by the Constituent Assembly.[27] The Assembly considered it fit not to include 'places of worship' or 'temples' within the ambit of Draft Article 9 of the Constitution.

The conscious deletion of "temples" and "places of worship" from the Draft Article 9(1) has to be given due consideration. The contention of the learned *Amicus Curiae* that the Sabarimala Temple would be included within the ambit of 'places of public resort' under Article 15(2) cannot be accepted.

10. ROLE OF COURTS IN MATTERS CONCERNING RELIGION

10.1. The role of Courts in matters concerning religion and religious practises under our secular Constitutional set up is to afford protection under Article 25(1) to those practises which are regarded as "essential" or "integral" by the devotees, or the religious community itself.

In *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.* (supra), this Court noted that the personal views of judges are irrelevant in ascertaining whether a particular religious belief or practise must receive the protection guaranteed under Article 25(1). The following

[26] Statement of Mr. Mohd. Tahir, Constituent Assembly Debates (November 29, 1948)
[27] Constituent Assembly Debates (November 29, 1948)

observations of Chinnappa Reddy, J. are instructive in understanding the true role of this Court in matters of religion:

> "19…*We may refer here to the observations of Latham, C.J. in Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth, a decision of the Australian High Court quoted by Mukherjea, J. in the Shirur Mutt case. Latham, C.J. had said:*
>
> > The *Constitution protects religion within a community organised under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organised. This view makes it possible to reconcile religious freedom with ordered government. It does not mean that the mere fact that the Commonwealth Parliament passes a law in the belief that it will promote peace, order and good government of Australia precludes any consideration by a court of the question whether that question by Parliament would remove all reality from the constitutional guarantee. That guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament. If the guarantee is to have any real significance it must be left to the courts of justice to determine its meaning and to give effect to it by declaring the invalidity of laws which infringes it and by declining to enforce them. The courts will therefore have the responsibility of determining whether a particular law can fairly be regarded, as a law to protect the existence of the community, or whether, on the other hand, it is a law for prohibiting the free exercise of any religion…*
>
> *What Latham, C.J. has said about the responsibility of the court accords with what we have said about the function of the court when a claim to the Fundamental Rights guaranteed by Article 25 is put forward…*
>
> *…20…In Ratilal's case we also notice that Mukherjea, J. quoted as appropriate Davar, J.'s following observations in Jamshed Ji* v. *Soonabai:*
>
> > *If this is the belief of the Zoroastrian community, - a secular Judge is bound to accept that belief – it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind.*
>
> *We do endorse the view suggested by Davar, J.'s observation that the question is not whether a particular religious belief is genuinely and conscientiously held as a part of the profession or practise of religion. Our personal views and reactions are*

irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the inhibitions contained therein."
(Emphasis supplied; internal quotations and footnotes omitted)

10.2. At this juncture, it would be apposite to deal with certain observations made by Gajendragadkar, J. in *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), and *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra).

In *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), a reference was made as to how practises emanating from superstition "*…may in that sense be extraneous, and unessential accretions to religion itself…*".[28]

Similarly, in *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra), an argument was made by Senior Advocate G.S. Pathak relying on the statement of Latham, C.J. in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The Commonwealth* (supra) that "*…what is religion to one is superstition to another…*"[29]. The argument was rejected by Gajendragadkar, J. as being "*…of no relevance…*".[30]

Mr. H.M. Seervai, well-known Constitutional expert and jurist, in his seminal treatise titled '*Constitutional Law of India: A Critical Commentary*', has remarked that the observations of Gajendragadkar, J. in *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra) are *obiter*. It is inconsistent with the observations of Mukherjea, J. in the previous decision of a

[28] (1962) 1 SCR 383 : AIR 1961 SC 1402 : at paragraph 33
[29] (1964) 1 SCR 561 : AIR 1963 SC 1638, at paragraph 59
[30] (1964) 1 SCR 561 : AIR 1963 SC 1638, at paragraph 59

Constitution Bench of seven Judges in *Commissioner, Hindu Religious Endowments, Madras* v. *Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra), and a Constitution Bench of five Judges in *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.*[31]. Mr. Seervai comments as under:

> "*12.18…Although it was wholly unnecessary to do so, Gajendragadkar, J. said:*
>
> > *…it may not be out of place incidentally to strike a note of caution and observe that in order that the practises in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practises which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practises within the meaning of Article 26. Similarly, even practises though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practises are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practises as are an essential and an integral part of it and no other.*
>
> *It is submitted that the above obiter runs directly* counter *to the judgment of Mukherjea, J. in the Shirur Mutt Case and substitutes the view of the court for the view of the denomination on what is essentially a matter of religion. The reference to superstitious practises is singularly unfortunate, for what is 'superstition' to one section of the public may be a matter of fundamental religious belief to another. Thus, for nearly 300 years bequests for masses for the soul of a testator were held void as being for superstitious uses, till that view was overruled by the House of Lords in Bourne* v. *Keane. It is submitted that in dealing with the practise of religion protected by provisions like those contained in s. 116, Commonwealth of Australia Act or in Article 26(b) of our Constitution, it is necessary to bear in mind the observations of Latham C.J. quoted earlier, namely, that those provisions must be regarded as operating in relation to all aspects of religion, irrespective of varying opinions in the community as to the truth of a particular religious doctrine or the goodness of conduct prescribed by a*

[31] 1954 SCR 1055 : AIR 1954 SC 388

particular religion or as to the propriety of any particular religious observance. The obiter of Gajendragadkar J. in the Durgah Committee case is also inconsistent with the observations of Mukherjea J. in Ratilal Gandhi Case, that the decision in Jamshedji v. *Soonabai afforded an indication of the measure of protection given by Article 26(b).*"[32]

(Emphasis supplied)

Mr. Seervai also criticised the observations of this Court in *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra) as follows:

"12.66 In Tilkayat Shri Govindlalji v. *Rajasthan Gajendragadkar J. again adverted to the rights under Arts. 25(1) and 26(b) and stated that if a matter was obviously secular and not religious, a Court would be justified in rejecting its claim to be a religious practise, as based on irrational considerations. It is submitted that the real question is whether the religious denomination looks upon it as an essential part of its religion, and however irrational it may appear to persons who do not share that religious belief, the view of the denomination must prevail, for, it is not open to a court to describe as irrational that which is a part of a denomination's religion. The actual decision in the case, that the right to manage the property was a secular matter, is correct, but that is because, as pointed out by Mukherjea J., Art. 26(b) when constrasted with Art. 26(c) and (d) shows that matters of religious belief and practises are distinct and separate from the management of property of a religious denomination. The distinction between religious belief and practises which cannot be controlled, and the management of the property of a religious denomination which can be controlled to a limited extent, is recognised by the Article itself and must be enforced. But this distinction is not relevant to the question whether a religious practise is itself irrational or secular."*[33]

(Emphasis supplied)

J. Duncan M. Derrett, a well-known Professor of Oriental Laws, highlights the problems in applying the "essential practises test" in his book titled '*Religion, Law and State in Modern India*' as follows:

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[32] H.M. Seervai, *Constitutional Law of India : A Critical Commentary,* Vol. II (4th Ed., Reprint 1999), paragraph 12.18 at p. 1267-1268

[33] *Id.* at paragraph 12.66 at p. 1283

> *"In other words the courts can determine what is an integral part of religion and what is not. The word essential is now in familiar use for this purpose. As we shall there is a context in which the religious community is allowed freedom to determine what is 'essential' to its belief and practise, but the individual has no freedom to determine what is essential to his religion, for if it were otherwise and if the law gave any protection to religion as determined on this basis the State's power to protect and direct would be at an end. Therefore, the courts can discard as non-essentials anything which is not proved to their satisfaction – and they are not religious leaders or in any relevant fashion qualified in such matters—to be essential, with the result that it would have no Constitutional protection. The Constitution does not say freely to profess, practise and propagate the essentials of religion, but this is how it is construed."*[34]
>
> (Emphasis supplied and internal quotations omitted)

10.3. The House of Lords in *Regina* v. *Secretary of State for Education and Employment & Ors.*[35], held that the court ought not to embark upon an enquiry into the validity or legitimacy of asserted beliefs on the basis of objective standards or rationality. The relevant extract from the decision of the House of Lords is reproduced hereinbelow:

> *"It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will enquire into and decide this issue as a question of fact. This is a limited inquiry. The Court is concerned to ensure an assertion of religious belief is made in good faith: neither fictitious, nor capricious, and that it is not an artifice, to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in Syndicat Northcrest* v. *Amselem (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the Court to embark on an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjected belief of an individual. As Iacobucci J also noted, at page 28, para 54,*

[34] J. Duncan M. Derett, *Religion, Law and the State in India* (1968), at p. 447
[35] [2005] UKHL 15

religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the State of the legitimacy of religious beliefs or of the manner in which these are expressed: Metropolitan Church of Bessarabia v Moldova (2002) 35 EHRR 306, 335, para 117. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held."

(Emphasis supplied and internal quotations omitted)

10.4. In *Eddie C. Thomas* v. *Review Board of the Indiana Employment Security Division*[36], the U.S. Supreme Court was dealing with a case where the Petitioner, who had terminated his job on account of his religious beliefs which forbade him from partaking in the production of armaments, was denied unemployment compensation benefits by the State. The Court noted that the determination of what constitutes a religious belief or practise is a very "*difficult and delicate task*", and noted as follows about the role of a Constitutional Court:

"*…The determination of what is a religious belief or practise is more often than not a difficult and delicate task…However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practise in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection…*

…The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was scripturally acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religious Clauses…Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the

[36] 450 U.S. 707 (1981)

commands of their common faith. Courts are not arbiters of scriptural interpretation."

(Emphasis supplied; internal quotations, and footnotes omitted)

This view was re-iterated by the U.S. Supreme Court in the following decisions:

- *United* States v. *Edwin D. Lee*[37], wherein it was held as follows:

> "…*It is not within the judicial function and judicial competence, however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; courts are not arbiters of scriptural interpretation…*"
>
> (Emphasis supplied; internal quotations omitted)

- *Robert L. Hernandez* v. *Commissioner of Internal Revenue*[38], wherein the Court noted:

> "…*It is not within the judicial ken to question the centrality of particular beliefs or practises to a faith or the validity of particular litigants interpretations of those creeds...*"
>
> (Emphasis supplied; internal quotations omitted)

- *Employment Division, Department of Human Resources of Oregon* v. *Alfred L. Smith*[39], wherein Scalia, J. noted as follows:

> "*…It is no more appropriate for judges to determine the centrality of religious beliefs before applying a compelling interest test in the free exercise field, than it would be for them to determine the importance of ideas before applying the compelling interest test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is central to his personal faith? Judging the centrality of different religious practises is akin to the unacceptable business of evaluating the relative merits of differing religious claims…As we reaffirmed only last Term, it is not within the judicial ken to question the centrality of*

[37] 455 U.S. 252 (1982)
[38] 490 U.S. 680 (1989)
[39] 494 U.S. 872 (1990)

particular beliefs or practises to a faith, or the validity of particular litigants interpretations of those creeds…Repeatedly and in many different contexts we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim…"

(Emphasis supplied; internal quotations omitted)

10.5. The observations of Chinnappa Reddy, J. in *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.* (supra) are instructive in understanding the nature of the protection afforded under Article 25, and the role of the Court in interpreting the same. The relevant extract from the opinion of Chinnappa Reddy, J. is extracted hereinbelow:

"18. Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to borne in mind in interpreting Article 25…"

10.6. A reference to the following extracts from the judgment of Khehar, C.J.I. in *Shayara Bano* v. *Union of India & Ors.*[40] is also instructive with respect to the role of Courts in matters concerning religious faiths and beliefs:

"*389. It is not difficult to comprehend what kind of challenges would be raised by rationalist assailing practises of different faiths on diverse grounds, based on all kinds of enlightened sensibilities. We have to be guarded lest we find our conscience traversing into every nook and corner of religious practises, and Personal Law. Can a court, based on a righteous endeavour, declare that a matter of faith be replaced, or be completely done away with?...This wisdom emerging from judgments rendered by this Court is unambiguous namely, that while examining the issues falling in the realm of religious practises or Personal Law, it is not for a court to make a choice of something which it considers as forward-looking or non-fundamentalist. It is not for a court to determine whether religious practises were prudent or progressive or regressive. Religion and Personal Law, must be perceived, as it is accepted by the followers of the faith…*"

[40] (2017) 9 SCC 1

(Emphasis supplied and internal quotations omitted)

10.7. The following extract from the concurring judgment of Chinnappa Reddy, J. in *S.P. Mittal* v. *Union of India & Ors.* (supra) is pertinent with respect to the approach to be adopted by Courts whilst dealing with matters concerning religion:

> "*2…What is religion to some is pure dogma to others and what is religion to others is pure superstition to some others…But my views about religion, my prejudices and my predilections, if they be such, are entirely irrelevant. So are the views of the credulous, the fanatic, the bigot and the zealot. So also the views of the faithful, the devout, the acharya, the moulvi, the padre and the bhikhshu each of whom may claim his as the only true or revealed religion. For our purpose, we are concerned with what the people of the Socialist, Secular, Democratic Republic of India, who have given each of its citizens freedom of conscience and the right to freely profess, practise and propagate religion and who have given every religious denomination the right to freely manage its religious affairs, mean by the expressions religion and religious denomination. We are concerned with what these expressions are designed to mean in Articles 25 and 26 of the Constitution. Any freedom or right involving the conscience must naturally receive a wide interpretation and the expression religion and religious denomination must therefore, be interpreted in no narrow, stifling sense but in a liberal, expansive way*."
>
> (Emphasis supplied and internal quotations omitted)

10.8. The Constitution lays emphasis on social justice and equality. It has specifically provided for social welfare and reform, and throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus through the process of legislation in Article 25(2)(b) of the Constitution. Article 25(2)(b) is an enabling provision which permits the State to redress social inequalities and injustices by framing legislation.

It is therefore difficult to accept the contention that Article 25(2)(b) is capable of application without reference to an actual

legislation. What is permitted by Article 25(2) is State made law on the grounds specified therein, and not judicial intervention.

10.9. In the present case, the 1965 Act is a legislation framed in pursuance of Article 25(2)(b) which provides for the throwing open of Hindu places of public worship. The *proviso* to Section 3 of the 1965 Act carves out an exception to the applicability of the general rule contained in Section 3, with respect to religious denominations, or sect(s) thereof, so as to protect their right to manage their religious affairs without outside interference.

Rule 3(b) gives effect to the *proviso* of Section 3 insofar as it makes a provision for restricting the entry of women at such times when they are not by custom or usage allowed to enter of place of public worship.

10.10. The Respondents claim the right to worship in the Sabarimala Temple under Article 25(1) in accordance with their beliefs and practises as per the tenets of their religion. These practises are considered to be essential or integral to that Temple. Any interference with the same would conflict with their right guaranteed by Article 25(1) to worship Lord Ayyappa in the form of a '*Naishtik Brahmachari*'.

10.11. In other jurisdictions also, where State made laws were challenged on grounds of public morality, the Courts have refrained from striking down the same on the ground that it is beyond the ken of the Courts.

10.12. For instance, the U.S. Supreme Court in *Church of Lukumi Babalu Aye* v. *City of Hialeah*,[41] an animal cruelty law made by the City Council was struck down as being violative of the Free Exercise clause. The Court held:

> "*The extent to which the Free Exercise clause requires Government to refrain from impeding religious exercise defines nothing less than the respective relationships in our Constitutional democracy of the individual to Government, and to God. ' Neutral, generally applicable ' laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and Government. Our cases now present competing answers to the question when Government, while pursuing secular ends may compel disobedience to what one believes religion commands.*"
>
> (Emphasis supplied)

10.13. Judicial review of religious practises ought not to be undertaken, as the Court cannot impose its morality or rationality with respect to the form of worship of a deity. Doing so would negate the freedom to practise one's religion according to one's faith and beliefs. It would amount to rationalising religion, faith and beliefs, which is outside the ken of Courts.

11. CONSTITUTIONAL MORALITY IN MATTERS OF RELIGION IN A SECULAR POLITY

11.1. The Petitioners have contended that the practise of restricting women of a particular age group runs counter to the underlying theme of equality and non-discrimination, which is contrary to Constitutional Morality. Rule 3(b) of the 1965 Rules has been challenged as being violative of Constitutional Morality.

[41] 508 U.S. 520 (1993)

11.2. India is a country comprising of diverse religions, creeds, sects each of which have their faiths, beliefs, and distinctive practises. Constitutional Morality in a secular polity would comprehend the freedom of every individual, group, sect, or denomination to practise their religion in accordance with their beliefs, and practises.

11.3. The Preamble to the Constitution secures to all citizens of this country liberty of thought, expression, belief, faith and worship. Article 25 in Part III of the Constitution make freedom of conscience a Fundamental Right guaranteed to all persons who are equally entitled to the right to freely profess, practise and propagate their respective religion. This freedom is subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

Article 26 guarantees the freedom to every religious denomination, or any sect thereof, the right to establish and maintain institutions for religious purposes, manage its own affairs in matters of religion, own and acquire movable and immovable property, and to administer such property in accordance with law. This right is subject to public order, morality and health. The right under Article 26 is not subject to Part III of the Constitution.

11.4. The framers of the Constitution were aware of the rich history and heritage of this country being a secular polity, with diverse religions and faiths, which were protected within the fold of Articles 25 and 26. State interference was not permissible, except as provided by Article 25(2)(b) of the Constitution, where the State may make law providing for social welfare and reform.

11.5. The concept of Constitutional Morality refers to the moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution, and achieve the objects contemplated therein.

11.6. Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is irrelevant whether the practise is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts.

11.7. The followers of this denomination, or sect, as the case may be, submit that the worshippers of this deity in Sabarimala Temple even individually have the right to practise and profess their religion under Article 25(1) in accordance with the tenets of their faith, which is protected as a Fundamental Right.

11.8. Equality and non-discrimination are certainly one facet of Constitutional Morality. However, the concept of equality and non-discrimination in matters of religion cannot be viewed in isolation. Under our Constitutional scheme, a balance is required to be struck between the principles of equality and non-discrimination on the one hand, and the protection of the cherished liberties of faith, belief, and worship guaranteed by Articles 25 and 26 to persons belonging to all religions in a secular polity, on the other hand. Constitutional morality requires the harmonisation or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined.

A Constitution Bench of five-Judges in *Sahara India Real Estate Corporation Limited & Ors.* v. *Securities and Exchange Board of India & Anr.*[42] had highlighted the role of this Court as an institution tasked with balancing the various Fundamental Rights, guaranteed under Part III. It was noted that:

> "*25. At the outset, it may be stated that Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control…under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values.*"

The Constitutional necessity of balancing various Fundamental Rights has also been emphasised in the decision of this Court in *Subramaniam Swamy* v. *Union of India, Ministry of Law & Ors.*[43].

In *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj & Ors.* v. *The State of Gujarat & Ors.*[44], a Constitution Bench, in the context of Article 26, noted that it is a duty of this Court to strike a balance, and ensure that Fundamental Rights of one person co-exist in harmony with the exercise of Fundamental Rights of others.

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[42] (2012) 10 SCC 603
[43] (2016) 7 SCC 221
[44] (1975) 1 SCC 11

It is the Constitutional duty of the Court to harmonise the rights of all persons, religious denominations or sects thereof, to practise their religion according to their beliefs and practises.

12. RELIGIOUS DENOMINATION

12.1. Article 26 of the Constitution guarantees the freedom to every religious denomination, or sect thereof, the right to establish and maintain institutions for religious or charitable purposes, and to manage their own affairs in matters of religion. The right conferred under Article 26 is subject to public order, morality and health, and not to any other provisions in Part III of the Constitution.

12.2. A religious denomination or organisation enjoys complete autonomy in matters of deciding what rites and ceremonies are essential according to the tenets of that religion. The only restriction imposed is on the exercise of the right being subject to public order, morality and health under Article 26.

The Respondents assert that the devotees of the Sabarimala Temple constitute a religious denomination, or a sect thereof, and are entitled to claim protection under Article 26 of the Constitution.

12.3. Article 26 refers not only to religious denominations, but also to sects thereof. Article 26 guarantees that every religious denomination, or sect thereof, shall have the right *inter alia* to manage its own affairs in matters of religion. This right is made subject to public order, morality, and health.

The Travancore Devaswom Board, and the other Respondents have asserted that the followers of the Sabarimala Temple constitute a religious denomination having a distinct faith, well- identified practises, being followed since time immemorial. The worshippers of this shrine observe the tenets of this faith, and are addressed as "*Ayyappans*." The Notifications issued by the Travancore Devaswom Board in 1955 and 1956 refer to the devotees of the Sabarimala Temple as "*Ayyappans*".

Given the identical phraseology, only the Notification dated November 27, 1956 is set out herein below for ready reference:

> " *NOTIFICATION*
>
> *In accordance with the fundamental principles underlying the Prathishta (installation) of the venerable holy and ancient temple of Sabarimala, Ayyappans who had not observed the usual vows as well as women who had attained maturity were not in the habit of entering the above mentioned temple for Darsan (worship) by stepping the Pathinettampadi. But of late, there seems to have been a deviation from this custom and practise. In order to maintain the sanctity and dignity of this great temple and keep up the past traditions, it is hereby notified that Ayyappans who do not observe the usual Vritham (vows) are prohibited from entering the temple by stepping the pathinettampadi and women between the ages of ten and fifty five are forbidden from entering the temple.*
>
> *Ambalapuzha*
> 27-11-'56 Assistant Devaswon Commissioner."
>
> (Emphasis supplied)

The worshippers of Lord Ayyappa at the Sabarimala Temple together constitute a religious denomination, or sect thereof, as the case maybe, follow a common faith, and have common beliefs and practises. These beliefs and practises are based on the belief that Lord Ayyappa has manifested himself in the form of a '*Naishtik*

Brahmachari'. The practises include the observance by the *Ayyappans* of the 41-day '*Vratham*', which includes observing abstinence and seclusion from the women-folk, including one's spouse, daughter, or other relatives. This pilgrimage includes bathing in the holy River Pampa, and ascending the 18 sacred steps leading to the sanctum sanctorum.

The restriction on women between the ages of 10 to 50 years from entering the Temple has to be understood in this context.

12.4. The expression "religious denomination" as interpreted in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra), was "*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*".[45] The Court held that each of the sects or sub-sects of the Hindu religion could be called a religious denomination, as such sects or sub-sects, had a distinctive name.

12.5. In *S.P. Mittal* v. *Union of India & Ors.* (supra), this Court, while relying upon the judgment in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Swamiar Thirtha Swamiar of Shirur Mutt* (supra), held that 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 satisfy three conditions:

[45] 1954 SCR 1005, at paragraph 15

> "*80. (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.*"

12.6. On a somewhat different note, Ayyangar, J. in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay* (supra) in his separate judgment, expressed this term to mean identity of its doctrines, creeds, and tenets, which are intended to ensure the unity of the faith which its adherents profess, and the identity of the religious views which bind them together as one community.

12.7. The meaning ascribed to religious denomination by this Court in *Commissioner, Hindu Religious Endowments* case (supra), and subsequent cases is not a strait-jacket formula, but a working formula. It provides guidance to ascertain whether a group would fall within a religious denomination or not.

12.8. If there are clear attributes that there exists a sect, which is identifiable as being distinct by its beliefs and practises, and having a collection of followers who follow the same faith, it would be identified as a 'religious denomination'.

In this context, reference may be made to the concurring judgment of Chinnappa Reddy, J. in the decision of this Court in *S.P. Mittal* v. *Union of India & Ors.* (supra) wherein he noted that the judicial definition of a religious denomination laid down by this Court is, unlike a statutory definition, a mere explanation. After observing that any freedom or right involving the conscience must be given a

wide interpretation, and the expressions 'religion' and 'religious denomination' must be interpreted in a "*liberal, expansive way*":

> "*21…the expression religious denomination may be defined with less difficulty. As we mentioned earlier Mukherjea, J., borrowed the meaning of the word denomination from the Oxford Dictionary and adopted it to define religious denomination as 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. The followers of Ramanuja, the followers of Madhwacharya, the followers of Vallabha, the Chistia Soofies have been found or assumed by the Court to be religious denominations. It will be noticed that these sects possess no distinctive names except that of their founder-teacher and had no special organisation except a vague, loose – un-knit one. The really distinctive feature about each one of these sects was a shared belief in the tenets taught by the teacher-founder. We take care to mention here that whatever the ordinary features of a religious denomination may be considered to be, all are not of equal importance and surely the common faith of the religious body is more important than the other features…Religious denomination has not to owe allegiance to any parent religion. The entire following of a religion may be no more than the religious denomination. This may be particularly be so in the case of small religious groups or developing religions, that is, religions in the formative stage.*"
>
> (Emphasis supplied and internal quotations omitted)

12.9. The Respondents have made out a strong and plausible case that the worshippers of the Sabarimala Temple have the attributes of a religious denomination, or sect thereof, for the reasons enumerated hereinbelow:

i. The worshippers of Lord Ayyappa at Sabarimala Temple constitute a religious denomination, or sect thereof, as the case maybe, following the '*Ayyappan Dharma*'. They are designated by a distinctive name wherein all male devotees are called '*Ayyappans*'; all female devotees below the age of 10 years and above the age of 50 years, are called '*Malikapurnams*'. A pilgrim

on their maiden trip to Sabarimala Temple is called a '*Kanni Ayyappan*'. The devotees are referred to as '*Ayyappaswamis*'. A devotee has to observe the '*Vratham*', and follow the code of conduct, before embarking upon the '*Pathinettu Padikal*' to enter the Temple at Sabarimala.

ii. The devotees follow an identifiable set of beliefs, customs and usages, and code of conduct which are being practised since time immemorial, and are founded in a common faith. The religious practises being followed in this Temple are founded on the belief that the Lord has manifested himself in the form of a '*Naishtika Brahmachari*'. It is because of this *nishtha*, that women between the ages of 10 to 50 years, are not permitted to enter the temple.

The practises followed by this religious denomination, or sect thereof, as the case maybe, constitute a code of conduct, which is a part of the essential spiritual discipline related to this pilgrimage. As per the customs and usages practised in the Sabarimala Temple, the 41-day '*Vratham*' is a condition precedent for undertaking the pilgrimage to the Sabarimala Temple.

The Respondents submit that the beliefs and practises being followed by them have been imparted by the deity himself to the King of *Pandalam* who constructed this Temple. The teachings of the Lord are scripted in the *Sthal Purana* of this Temple, known as the '*Bhuthanatha Geetha*'.

Reference to the custom and usage restricting the entry of women belonging to the age group of 10 to 50 years is

documented in the Memoir of the Survey of the Travancore and Cochin States[46] published in two parts in 1893 and 1901 written by Lieutenants Ward and Conner.

iii. This Temple owned vast landed properties from which the Temple was being maintained. These were taken over by the State, subject to the obligation to pay annuities to the Temple from the coffers of the State, as is evident from the Devaswom Proclamation[47] dated 12th April 1922 issued by the Maharaja of Travancore, on which reliance was placed by Mr. J. Sai Deepak, Advocate.

When the erstwhile State of Travancore merged with the Union of India, the obligation of paying annuities for the landed properties, was transferred to the Government of India.

iv. The Temple is managed by the Travancore Devaswom Board. It does not receive funds from the Consolidated Fund of India, which would give it the character of 'State' or 'other authorities' under Article 12 of the Constitution.

In any event, Article 290A does not in any manner take away the denominational character of the Sabarimala Temple, or the Fundamental Rights under Article 26.

12.10. The issue whether the Sabarimala Temple constitutes a 'religious denomination', or a sect thereof, is a mixed question of fact and law. It is trite in law that a question of fact should not be decided in writ

[46] *Supra* note 9

[47] Annexure I, Written Submissions by J. Sai Deepak, learned Advocate on Behalf of K.K. Sabu (Respondent No. 18), and People for Dharma (Intervenor).

proceedings. The proper forum to ascertain whether a certain sect constitutes a religious denomination or not, would be more appropriately determined by a civil court, where both parties are given the opportunity of leading evidence to establish their case.

In *Arya Vyasa Sabha & Ors.* v. *Commissioner of Hindu Charitable and Religious Institutions & Endowments, Hyderabad & Ors.*[48], this Court had noted that the High Court was correct in leaving the question open, of whether the petitioners constituted a religious denomination for determination by a competent civil court on the ground that it was a disputed question of fact which could not be appropriately determined in proceedings under Article 226.

12.11. This Court has identified the rights of a group of devotees as constituting a religious denomination in the context of a single temple, as illustrated hereinbelow:

In (supra), the Sri Venkataramana Temple at Moolky was considered to be a denominational temple, and the *Gowda Saraswath Brahmins* were held to constitute a religious denomination.

Similarly, in *Dr. Subramaniam Swamy* v. *State of Tamil Nadu* (supra) the *Podhu Dikshitars* were held to constitute a religious denomination in the context of the Sri Sabanayagar Temple at Chidambaram.

12.12. The contention of the Petitioners that since the visitors to the temple are not only from the Hindu religion, but also from other religions,

[48] (1976) 1 SCC 292

the worshippers of this Temple would not constitute a separate religious sect.

This argument does not hold water since it is not uncommon for persons from different religious faiths to visit shrines of other religions. This by itself would not take away the right of the worshippers of this Temple who may constitute a religious denomination, or sect thereof.

12.13. The Constitution ensures a place for diverse religions, creeds, denominations and sects thereof to co-exist in a secular society. It is necessary that the term 'religious denomination' should receive an interpretation which is in furtherance of the Constitutional object of a pluralistic society.

13. ESSENTIAL PRACTISES DOCTRINE

This Court has applied the 'essential practises' test to afford protection to religious practises.

13.1. The 'essential practises' test was formulated in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra).

Before articulating the test, this Court drew on the words "practise of religion" in Article 25(1) to hold that the Constitution protects not only the freedom of religious belief, but also acts done in pursuance of a religion. In doing so, it relied on an extract from the decision of Latham, C.J. of the High Court of Australia in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The*

Commonwealth.[49] The original extract relied upon has been reproduced hereinbelow:

> *"5. It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s. 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion."*
>
> (Emphasis supplied)

This Court then went on to formulate the 'essential practises test in the following words:

> *"20…what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion…all of them are religious practises and should be regarded as matters of religion within the meaning of Article 26(b)…*
> *…23. Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."*
>
> (Emphasis supplied)

13.2. The 'essential practises test' was reiterated in *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.*[50], where the narrow definition

[49] 67 CLR 116
[50] (1954) SCR 1055 : AIR 1954 SC 388

of "religion" given by the Bombay High Court was discarded. It was held that all religious practises or performances of acts in pursuance of religious beliefs were as much a part of religion, as faith or belief in particular doctrines. This Court re-iterated the 'essential practises test' in the following words:

> "*13…Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate…We may refer in this connection to the observation of Davar, J. in the case of Jamshed ji* v. *Soonabai and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad bag, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid and charitable gifts, the observations, we think, are quite appropriate for our present purpose. If this is the belief of the community thus observed the learned judge, and it is proved undoubtedly to be the belief of the Zoroastrian community, - a secular judge is bound to accept that belief – it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of the religion and the welfare of his community or mankind. These observations do in our opinion afford an indication of the measure of protection that is given by Article 26(b) of our Constitution.*"
>
> (Emphasis supplied and internal quotations omitted)

13.3. In *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), the 'essential practises test' was discussed by a Constitution Bench in the following words:

> "*33…Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practises in question should be treated as a part of religion they must be regarded by the said religion as its*

essential and integral part; otherwise even purely secular practises which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practises within the meaning of Article 26. Similarly, even practises though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practises are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practises as are an essential and an integral part of it and no other."

(Emphasis supplied)

This Court affirmed the 'essential practises test' as laid in the previous decisions in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (*supra), and *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.* (supra) insofar as it emphasised on the autonomy of religions to identify essential or integral practises.

13.4. In *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra), it was clarified that courts will intervene where conflicting evidence is produced in respect of rival contentions as to competing religious practises. It was held that:

"*57. In deciding the question as to whether a given religious practise is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practise in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practises the Court may not be able to resolve the dispute by a blind application of*

the formula that the community decides which practise in [sic] an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practise in question is religious in character, and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion…"

(Emphasis supplied)

13.5. In *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.* (supra), this Court emphasised that for a religious practise to receive protection under Article 25(1) it must be "genuinely", and "conscientiously" held by persons claiming such rights. This Court had noted that such religious beliefs and practises must be consistently and not "idly" held, and should not emanate out of "perversity". In doing so, it re-affirmed that the Constitutional fabric of our country permits religious beliefs and practises to exist, regardless of whether or not they appeal to the rational sensibilities of this Court, or others.

It would also be instructive to refer to the decision of the Supreme Court of Alaska in *Carlos Frank* v. *State of Alaska*[51] wherein the use of moose meat at a funeral potlatch, a religious ceremony, was held to be a practise deeply rooted in religion, based on the evidence adduced before the District Court. The Court had noted that the State of Alaska had failed to illustrate any compelling interest which would justify its curtailment, with the result that the case was remanded with instructions to dismiss the complaint against Frank

[51] 604 P.2d 1068 (1979)

for unlawful transportation of moose meat. The Court had underscored the importance of the sincerity of Frank's religious belief, and held that it would be sufficient that a practise be deeply rooted in religious belief for it to receive the protection of the free exercise clause under the U.S. Constitution.

13.6. Reference is required to be made to the doctrines and tenets of a religion, its historical background, and the scriptural texts to ascertain the 'essentiality' of religious practises.

The 'essential practises test' in its application would have to be determined by the tenets of the religion itself. The practises and beliefs which are considered to be integral by the religious community are to be regarded as "essential", and afforded protection under Article 25.

The only way to determine the essential practises test would be with reference to the practises followed since time immemorial, which may have been scripted in the religious texts of this temple. If any practise in a particular temple can be traced to antiquity, and is integral to the temple, it must be taken to be an essential religious practise of that temple.

13.7. The Temple Thanthri, the Travancore Devaswom Board, and believers of Lord Ayyappa have submitted that the limited restriction on access of women during the notified age of 10 to 50 years, is a religious practise which is central and integral to the tenets of this shrine, since the deity has manifested himself in the form of a '*Naishtik Brahmachari*'.

13.8. The practise of restricting the entry of women belonging to the age-group of 10 to 50 years, was challenged as being violative of Articles 15, 25, and 26 of the Constitution before a Division Bench of the Kerala High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvanathapuram & Ors.* (supra).

The Court held that the issue whether the practises were an integral part of the religion or not had to be decided on the basis of evidence. The High Court relied on the decision of this Court in *Tilkayat Shri Govindalji Maharaj* v. *State of Rajasthan* (supra) wherein it was held that the question whether the practise is religious in character, and whether it can be regarded as an integral or essential part of the religion, will depend upon the evidence adduced before a court, with respect to the tenets of the religion.

The High Court held that the restriction on the entry of women between the ages of 10 to 50 years was in accordance with the practise prevalent since time immemorial, and was not violative of Articles 15, 25, and 26 of the Constitution.

A religion can lay down a code of ethics, and also prescribe rituals, observances, ceremonies and modes of worship. These observances and rituals are also regarded as an integral part of religion. If the tenets of a religion lay down that certain ceremonies are to be performed at certain times in a particular manner, those ceremonies are matters of religion, and are to be protected as a religious belief.

The High Court took into consideration the testimony of three persons who had direct and personal knowledge about the practises of the temple. One of them was the then Thanthri of the Temple, who could authoritatively testify about the practises of the temple. His personal knowledge extended to a period of more than 40 years. The second Affidavit was affirmed by the Secretary of the Ayyappa Seva Sangham who had been a regular pilgrim of the shrine for a period of 60 years. A senior member of the Pandalam Palace also testified about the practise followed, and the views of the members of the Palace who have constructed the Temple. The testimony of these witnesses established that the practise of restriction on the entry of women during the notified age-group was being followed since the past several centuries.

The High Court recorded that a vital reason for imposing this restriction on young women as deposed by the Thanthri of the Temple, as well as other witnesses, was that the deity at the Sabarimala Temple was in the form of a '*Naishtik Brahmachari*' which means a student who has to live in the house of his preceptor, and studies the Vedas, living the life of utmost austerity and discipline. The deity is in the form of a '*Yogi*' or '*Naishtik Brahmachari*'. The High Court noted that this practise of restricting the entry of women is admitted to have been prevalent since the past several centuries.

The High Court concluded by holding:

> "*Our conclusions are as follows:*
>
> *(1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and*

offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.

(2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.

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

In view of the conclusions summarised above, the High Court directed the Travancore Devaswom Board not to permit women belonging to the age-group of 10 to 50 years "*... to trek the holy hills of Sabarimala in connection with the pilgrimage...*". The Judgment of the Kerala High Court was not challenged any further, and has attained finality.

The findings contained in the Judgment of the Kerala High Court deciding a Writ Petition under Article 226 were findings *in rem*, and the principle of *res judicata* would apply.[52]

In this context, it is pertinent to note that this Court, in *Daryao & Ors.* v. *State of U.P. & Ors.*[53], had held as follows:

> "*26. We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original*

[52] *Dr Subramaniam Swamy* v. *State of Tamil Nadu & Ors.*, (2014) 5 SCC 75.
[53] (1962) 1 SCR 574 : AIR 1961 SC 1457

petition made on the same facts and for obtaining the same or similar orders or writs."

Thus viewed, such findings of fact ought not to be re-opened in a Petition filed under Article 32.

13.9. The practise of celibacy and austerity is the unique characteristic of the deity in the Sabarimala Temple.

Hindu deities have both physical/temporal and philosophical form. The same deity is capable of having different physical and spiritual forms or manifestations. Worship of each of these forms is unique, and not all forms are worshipped by all persons.

The form of the deity in any temple is of paramount importance. For instance, Lord Krishna in the temple at Nathdwara is in the form of a child. In *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan* (supra), this Court noted that Lord Krishna was the deity who was worshipped in the *Shrinathji* Temple in Nathdwara. It was noted that:

> *"…believing in the paramount importance and efficacy of Bhakti, the followers of Vallabha attend the worship and services of the Nidhi Swaroops or idols from day-to-day in the belief that such devotional conduct would ultimately lead to their salvation.*"

In *Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra), this Court had observed that Gods have distinct forms ascribed to them, and their worship at home, and in temples, is ordained as certain means of salvation.

Worship has two elements – the worshipper, and the worshipped. The right to worship under Article 25 cannot be claimed in the

absence of the deity in the particular form in which he has manifested himself.

13.10. Religion is a matter of faith, and religious beliefs are held to be sacred by those who share the same faith. Thought, faith and belief are internal, while expression and worship are external manifestations thereof.

13.11. In the case of the Sabarimala Temple, the manifestation is in the form of a '*Naishtik Brahmachari*'. The belief in a deity, and the form in which he has manifested himself is a fundamental right protected by Article 25(1) of the Constitution.

The phrase "*equally entitled to*", as it occurs in Article 25(1), must mean that each devotee is equally entitled to profess, practise and propagate his religion, as per the tenets of that religion.

13.12. In the present case, the celibate nature of the deity at the Sabarimala Temple has been traced by the Respondents to the *Sthal Purana* of this Temple chronicled in the '*Bhuthanatha Geetha*'. Evidence of these practises are also documented in the Memoir of the Survey of the Travancore and Cochin States[54] written by Lieutenants Ward and Conner published in two parts in 1893 and 1901.

13.13. The religious practise of restricting the entry of women between the ages of 10 to 50 years, is in pursuance of an 'essential religious practise' followed by the Respondents. The said restriction has been consistently, followed at the Sabarimala Temple, as is borne out from the Memoir of the Survey of the Travancore and Cochin States

[54] *Supra* note 9

published in two parts in 1893 and 1901. The Kerala High Court in the case of *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors.* (supra) has recorded as follows:

> "*The testimony of three persons who have direct and personal knowledge about the usage in the temple is therefore available before this Court. Of them one is the Thanthri of the temple who can authoritatively speak about the usage followed in the temple. His knowledge extends to a period of more than 40 years. The Secretary of the Ayyappa Seva Sangham had been a regular pilgrim to Sabarimala shrine for a period of 60 years. A senior member of the Pandalam palace has also testified about the practise followed and the view of the members of the palace to which the temple at one time belonged. The testimony of these witnesses would therefore conclusively establish the usage followed in the temple of not permitting women of the age group 10 to 50 to worship in the temple. It necessarily flows that women of that age group were also not permitted either to enter the precincts of the temple or to trek Sabarimala for the purpose of pilgrimage.*"
>
> (Emphasis supplied)

13.14. In the present case, the character of the temple at Sabarimala is unique on the basis of centuries old religious practises followed to preserve the manifestation of the deity, and the worship associated with it. Any interference with the mode and manner of worship of this religious denomination, or sect, would impact the character of the Temple, and affect the beliefs and practises of the worshippers of this Temple.

13.15. Based on the material adduced before this Court, the Respondents have certainly made out a plausible case that the practise of restricting entry of women between the age group of 10 to 50 years is an essential religious practise of the devotees of Lord Ayyappa at the Sabarimala Temple being followed since time immemorial.

14. ARTICLE 17

14.1. The contention of the Petitioners that the restriction imposed on the entry of women during the notified age group, tantamounts to a form of 'Untouchability' under Article 17 of the Constitution, is liable to be rejected for the reasons stated hereinafter.

14.2. All forms of exclusion would not tantamount to untouchability. Article 17 pertains to untouchability based on caste prejudice. Literally or historically, untouchability was never understood to apply to women as a class. The right asserted by the Petitioners is different from the right asserted by *Dalits* in the temple entry movement. The restriction on women within a certain age-band, is based upon the historical origin and the beliefs and practises of the Sabarimala Temple.

14.3. In the present case, women of the notified age group are allowed entry into all other temples of Lord Ayyappa. The restriction on the entry of women during the notified age group in this Temple is based on the unique characteristic of the deity, and not founded on any social exclusion. The analogy sought to be drawn by comparing the rights of *Dalits* with reference to entry to temples and women is wholly misconceived and unsustainable.

The right asserted by *Dalits* was in pursuance of right against systematic social exclusion and for social acceptance *per se*.

In the case of temple entry, social reform preceded the statutory reform, and not the other way about. The social reform was spearheaded by great religious as well as national leaders like Swami

Vivekananda and Mahatma Gandhi. The reforms were based upon societal morality, much before Constitutional Morality came into place.

14.4. Article 11 of the Draft Constitution corresponds to Article 17 of our present Constitution.[55] A perusal of the Constituent Assembly debates on Article 11 of the Draft Constitution would reflect that "untouchability" refers to caste-based discrimination faced by *Harijans*, and not women as contended by the Petitioners.

During the debates, Mr. V.I. Muniswamy Pillai had stated:

> "*…Sir, under the device of caste distinction, a certain section of people have been brought under the rope of untouchability, who have been suffering for ages under tyranny of so-called caste Hindus, and all those people who style themselves as landlords and zamindars, and were thus not allowed the ordinary rudimentary facilities required for a human being… I am sure, Sir, by adoption of this clause, many a Hindu who is a Harijan, who is a scheduled class man will feel that he has been elevated in society and has now got a place in society…*"[56]

Dr. Monomohan Das, quotes Mahatma Gandhi while undeniably accepting the meaning of "Untouchability" as intended under the Constitution:

> "*…Gandhiji said I do not want to be reborn, but if I am reborn, I wish that I should be born as a Harijan, as an untouchable, so that I may lead a continuous struggle, a life-long struggle against the oppressions and indignities that have been heaped upon these classes of people.*

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[55] "*11.* "*Untouchability*" *is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of* "*Untouchability*" *shall be an offence punishable in accordance with law.*"
Draft Constitution of India, Drafting Committee of the Constituent Assembly of India (Manager Government of India Press, New Delhi, 1948) available at http://14.139.60.114:8080/jspui/bitstream/123456789/966/7/Fundamental%20Rights%20%285-12%29.pdf

[56] Statement of Shri V.I. Muniswamy Pillai, Constituent Assembly Debates (November 29, 1948)

> *… Not only Mahatma Gandhi, but also great men and philosophers of this ancient land, Swami Vivekananda, Raja Ram Mohan Roy, Rabindranath Tagore and others, who led a relentless struggle against this heinous custom, would also be very much pleased today to see that independent India, Free India, has at last finally done away with this malignant sore on the body of Indian Society.*"[57]

Mr. Seervai, in his seminal commentary, states that "Untouchability" must not be interpreted in its literal or grammatical sense, but refers to the practise as it developed historically in India amongst Hindus. He further states that Article 17 must be read with the Untouchability (Offences) Act, 1955, which punishes offences committed in relation to a member of a Scheduled Caste.[58]

Professor M.P. Jain also interprets Article 17 in a similar manner. He states:

> "*Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do no come within the purview of Art. 17. Art. 17 is concerned with those regarded untouchables in the course of historic developments.*"[59]

14.5. It is clear that Article 17 refers to the practise of Untouchability as committed in the Hindu community against *Harijans* or people from depressed classes, and not women, as contended by the Petitioners.

14.6. Explaining the background to Article 17, this Court in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra) observed:

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[57] Statement of Dr. Monomohan Das, Constituent Assembly Debates (November 29, 1948)
[58] H.M. Seervai, *Constitutional Law of India : A Critical Commentary,* Vol. I (4th Ed., Reprint 1999), paragraph 9.418 at p. 691
[59] M.P. Jain, *Indian Constitutional Law*, (6th Ed., Revised by Justice Ruma Pal and Samaraditya Pal; 2010), at p. 1067

> "*23. …. one of the problems which had been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchables. A custom which denied to large sections of Hindus the right to use public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic principle, and efforts were being made to secure its abolition by legislation. This culminated in the enactment of Article 17, which is as follows: "Untouchability" is abolished and its practise in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."*

14.7. Not a single precedent has been shown to interpret Article 17 in the manner contended by the Petitioners.

It is also relevant to mention that the Counsel for the State of Kerala did not support this submission.

15. RULE 3(B) OF THE 1965 RULES IS NOT *ULTRA VIRES* THE ACT

15.1. Section 3 of the 1965 Act reads as follows:

> "*3. Places of public worship to be open to all sections and classes of Hindus:- Nothwithstanding 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 affair in matters of religion"

(Emphasis supplied)

The relevant extract of Rule 3 of the 1965 Rules is also reproduced hereinbelow:

"*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-*
(a) …..
(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.
(c)…..
(d)….
(e)…..
(f)…..
(g)…."

(Emphasis supplied)

Section 3(b) of the 1965 Act provides 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, in any manner be prevented, obstructed or discouraged from entering such place of public worship or from worshipping or from offering prayers there or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may enter, worship, pray or perform.

The *proviso* to Section 3 of the 1965 Act carves out an exception in the case of public worship in a temple founded for the benefit of any religious denomination or section thereof. The provisions of the main section would be subject to the right of a religious

denomination or section to manage its own affairs in the matters of religion.

Section 2(c)[60] of the 1965 Act, defines "section or class" to include any division, sub-division, caste, sub caste, sect, or denomination whatsoever. Section 4(1)[61], empowers the making of regulations for the maintenance of orders and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein. The *proviso* to Section 3 of the 1965 Act provides that no such regulation shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular section or class.

15.2. The *proviso* carves out an exception to the Section 3 itself. The declaration that places of public worship shall be open to Hindus of all sections and classes is not absolute, but subject to the right of a religious denomination to "*manage its own affairs in matters of religion*". Section 3 must be viewed in the Constitutional context where the legislature has framed an enabling legislation under Article 25(2)(b) which has been made expressly subject to religious practises peculiar to a denomination under Article 26(b).

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[60] "*2. Definitions –*
…(c) "section or class" includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever."

[61] "*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 of 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…"

15.3. Rule 3(b) is a statutory recognition of a pre-existing custom and usage being followed by this Temple. Rule 3(b) is within the ambit of the *proviso* to Section 3 of the 1965 Act, as it recognises pre-existing customs and usages including past traditions which have been practised since time immemorial *qua* the Temple. The Travancore Devaswom Board submits that these practises are integral and essential to the Temple.

15.4. The *Petitioners* have not challenged the *proviso* to Section 3 as being unconstitutional on any ground. The *proviso* to Section 3 makes an exception in cases of religious denominations, or sects thereof to manage their affairs in matters of religion.

15.5. The Notification dated November 27, 1956 issued by the Travancore Devaswom Board restricts the entry of women between the ages of 10 to 55 years as a custom and practise integral to the sanctity of the Temple, and having the force of law under Article 13(3)(a) of the Constitution. The High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors.* (supra) noted that this practise of restricting the entry of women is admitted to have been prevalent since the past several centuries. These practises are protected by the *proviso* to Section 3 of the 1965 Act which is given effect to by Rule 3(b) of the 1965 Rules.

15.6. The contention of the Petitioners that Rule 3(b) is *ultra vires* Section 3 of the 1965 Act, fails to take into consideration the *proviso* to Section 3 of the 1965 Act. Section 3 applies to all places of public worship, whereas the *proviso* applies to temples founded for the

benefit of any religious denomination or sect thereof. Hence, the contentions of the Petitioners that Rule 3(b) is *ultra vires* Section 3 of the 1965 Act is rejected.

16. The summary of the aforesaid analysis is as follows:

(i) The Writ Petition does not deserve to be entertained for want of standing. The grievances raised are non-justiciable at the behest of the Petitioners and Intervenors involved herein.

(ii) The equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25 to every individual to freely profess, practise and propagate their faith, in accordance with the tenets of their religion.

(iii) Constitutional Morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practise is rational or logical.

(iv) The Respondents and the Intervenors have made out a plausible case that the *Ayyappans* or worshippers of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof, which is entitled to the protection provided by Article 26. This is a mixed question of fact and law which ought to be decided before a competent court of civil jurisdiction.

(v) The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution.

(vi) Rule 3(b) of the 1965 Rules is not *ultra vires* Section 3 of the 1965 Act, since the *proviso* carves out an exception in the case of public worship in a temple for the benefit of any religious denomination or sect thereof, to manage their affairs in matters of religion.

17. In light of the aforesaid discussion and analysis, the Writ Petition cannot be entertained on the grounds enumerated hereinabove.

It is ordered accordingly.

.....J.
(INDU MALHOTRA)

New Delhi;
September 28, 2018