

**CHIEF JUSTICE'S COURT**  
**HON'BLE THE CHIEF JUSTICE**  
**HON'BLE MRS. JUSTICE B.V. NAGARATHNA**  
**HON'BLE MR. JUSTICE M.M. SUNDRESH**  
**HON'BLE MR. JUSTICE AHSANUDDIN AMANULLAH**  
**HON'BLE MR. JUSTICE ARAVIND KUMAR**  
**HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH**  
**HON'BLE MR. JUSTICE PRASANNA B. VARALE**  
**HON'BLE MR. JUSTICE R. MAHADEVAN**  
**HON'BLE MR. JUSTICE JOYMALYA BAGCHI**

**COURT NO.1**  
**SUPREME COURT OF INDIA**  
**RECORD OF PROCEEDINGS**

**R.P. (C) No. 3358/2018 In W.P. (C) No. 373/2006**

**KANTARU RAJEEVARU**

**Petitioner(s)**

**VERSUS**

**INDIAN YOUNG LAWYERS ASSOCIATION THR, ITS GENERAL  
SECRETARY MS. BHAKTI PASRIJA AND ORS**

**Respondent(s)**

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TRANSCRIPT OF HEARING

07-April-2026  
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10:30 AM IST

1 **DAMA SESHADRI NAIDU:** SIR matter. Yesterday's SIR matter, there is a date correction.  
2 A candidate's appeal has to be disposed of before 9th, because there's a second phase last date.  
3 Instead it was... it's come as 13th.

4 **CJI SURYA KANT:** Just a minute. Yesterday's order?

5 **DAMA SESHADRI NAIDU:** Yes, My Lords, para 10. Yes, please. Para 10, My Lords.

6 **CJI SURYA KANT:** Para 10 of yesterday's order?

7 **DAMA SESHADRI NAIDU:** Yes, My Lords, the penultimate page, last but one. To take up  
8 that appeal...

9 **CJI SURYA KANT:** [INAUDIBLE] have already filed a [INAUDIBLE]. If that is the case, we  
10 request the [UNCLEAR] to make an endeavour to decide that appeal before 9th April 2026.

11 **DAMA SESHADRI NAIDU:** Yes, My Lords.

12 **CJI SURYA KANT:** Shri Dama Seshadri Naidu, Senior Counsel, [INAUDIBLE] on or before  
13 the scheduled date.

14 **RAVI PRASAD GUPTA:** My Lord, I'm on behalf of the original writ petitioner, My Lord,  
15 Indian Young Lawyers Association. Before my learned brother, My Lord, on behalf of the  
16 review petitioner argues, as per Your Lordship's order, first the review petitioner would argue.  
17 I've got no problem like that, but there is a small little history of this case because it is 20 years  
18 old case. It was filed in 2006.

19 **CJI SURYA KANT:** Whosoever will open...

20 **RAVI PRASAD GUPTA:** I'm giving history as well, My Lords.

21 **CJI SURYA KANT:** Whosoever will open the case, they will give the history also.

22 **TUSHAR MEHTA:** Yes, yes, I will present the case My Lord not taking sides, the correct  
23 questions of law referred...

24 **RAVI PRASAD GUPTA:** My Lord, this case... Although this... seven issues have been  
25 referred to this Honourable bench.

26 **CJI SURYA KANT:** Please take your seat. Now, first of all before you start anything, come  
27 to our order of 16th February, because that's the most important thing for us.

28 **TUSHAR MEHTA:** Yes My Lord, I can understand, My Lord.

1 **CJI SURYA KANT:** Now, if you kindly come to para 2 where we have simply reproduced the  
2 questions of law which were earlier formed, that's why there is no change in the questions of  
3 law.

4 **TUSHAR MEHTA:** Yes, My Lord.

5 **CJI SURYA KANT:** Now, can you please come to paragraph 8? First we would like to ensure,  
6 and just reconfirm from para 4 and 5, that Saswati filed, where is the Counsel? Has he done  
7 the compilation completely, or we can understand you are lost somewhere. Anyway, you have  
8 done your job. Very good, very good. And Mr. Krishan Kumar Singh? From your side also it  
9 has been done. Alright, now please come to Mr. Mehta, Mr. Vaidyanathan, Mr. [UNCLEAR] is  
10 here, Mr. Gopal is here. All two sides are...

11 **TUSHAR MEHTA:** We know where Your Lordships are taking us, My Lord.

12 **CJI SURYA KANT:** Mr. Mundra is here, R. P. sahab is there, everyone. Now, we have said  
13 the review petitioners of the Parties supporting them will be heard from 7th April 2026 to 09-  
14 04-2026, three clear working days we have given. The rejoinder submissions if any shall be  
15 heard on... no... and then the original review petitioners, and those supporting them will be  
16 heard from 14th to 16th again three days, and Rejoinder on 21st April. Now, what we find from  
17 the list of those who are representing now review petitioners or the party supporting them,  
18 that you are not adhering to this timeline and that creates problem for us.

19 **TUSHAR MEHTA:** May I?

20 **CJI SURYA KANT:** We are not going to grant more than that time. If you want... because  
21 please see, out of 33, 9 of us are sitting here. There are other matters, very urgent matters  
22 which are awaiting, and we have our own difficulties now.

23 **TUSHAR MEHTA:** Correct, My Lord.

24 **CJI SURYA KANT:** And please bear with us. So therefore, we can assure you whatever in  
25 written submissions is given, we are going to read each and every word very minutely. But  
26 respect this timeline, that is what we are strongly requesting and persuading you. And for this  
27 purpose I can just briefly indicate because I have got that list.

28 **TUSHAR MEHTA:** If Your Lordships can give us two minutes before that, My Lord? I think  
29 we may not have much problem. My Lord, what Your Lordships are deciding in these five... in  
30 these seven questions will govern the functioning of the nation, but for at least 30-40 years to  
31 come. My Lord, we are conscious of the fact that the court will have its own concerns and  
32 priorities in the matter, and we very respectfully, My Lord, accept that. My Lord, considering  
33 the consequences and the repercussions which it is likely to have on several issues, we will also

1 not like Your Lordships to be troubled beyond what is legitimately required to be placed. We  
2 have also discussed. Whatever is argued the next learned counsel will not...

3 **CJI SURYA KANT:** Repetition should be avoided, repetition should be avoided.

4 **V. GIRI:** We will avoid it, My Lord. We will avoid it.

5 **CJI SURYA KANT:** Arguments can be very concise.

6 **V. GIRI:** We will consciously deliberately avoid it.

7 **CJI SURYA KANT:** Like Mr. Dhavan argued the Article 370 matter. So the... this side all of  
8 them were very precise to the point and...

9 **TUSHAR MEHTA:** Exactly, My Lord. So, therefore, My Lord, we would also maintain that  
10 discipline whether we will be able to adhere to that intention or not.

11 **CJI SURYA KANT:** Our intention is not to curtail the arguments, our intention is not to  
12 curtail the argument. Our intention is only please, there should not be any repetition and to  
13 the extent you can directly come to the point and explain.

14 **V. GIRI:** My Lord, we will modulate in such a way that we don't repeat it because...

15 **TUSHAR MEHTA:** I have requested for a longer time, for the reason that the first person  
16 may have to read all relevant judgments from *Shirur Mutt* till *Adi Saiva*. That will have to  
17 be present.

18 **CJI SURYA KANT:** Yes. If the first one read out those judgments then others need not.  
19 Others can only simply refer to it.

20 **V. GIRI:** The others will only refer to the paragraphs, relevant paragraphs. We will not repeat  
21 it. But My Lord, to make our submissions we may have to refer to them. We... for example, My  
22 Lord, see just a moment, sir.

23 **CJI SURYA KANT:** You can keep the relevant lines on your piece of paper and...

24 **V. GIRI:** We have that. We are having that.

25 **CJI SURYA KANT:** And you need not to force us to open the paper book and...

26 **V. GIRI:** No, no, no.

27 **CJI SURYA KANT:** No. This create problem. There is some kind of... Please come to page  
28 number 1407 and thousand...

29 **TUSHAR MEHTA:** Leave the papers.

1 **CJI SURYA KANT:** That creates problem.

2 **V. GIRI:** No. We will not do that, we will not...

3 **CJI SURYA KANT:** We can assure you we will read those pages...

4 **V. GIRI:** We will not do that.

5 **CJI SURYA KANT:** If you have not read that already. Otherwise, you just keep on referring  
6 to your note, we'll note down and read.

7 **V. GIRI:** That's correct, My Lord, that's all...

8 **C.S. VAIDYANATHAN:** In our Written Submission, we have extracted.

9 **TUSHAR MEHTA:** My Lord, what I have done is... only a minute. My Lord, what I have done  
10 is my Written Submissions might be 90 pages because the relevant paragraphs I have  
11 extracted, so that Your Lordships may not have to Volume 7 and Volume 8.3, etc.

12 **CJI SURYA KANT:** We have seen that. We have seen that part, some of the paragraphs are  
13 reproduced. That's why we are saying please don't force us to go to volume number so and so,  
14 SCC so and so, page number so and so.

15 **V. GIRI:** No, we will not. We have extracted.

16 **CJI SURYA KANT:** That will create problem.

17 **V. GIRI:** Your Lordships...

18 **RAJEEV DHAVAN:** May I just say something?

19 **CJI SURYA KANT:** Yes, yes, Mr. Dhavan.

20 **RAJEEV DHAVAN:** What Your Lordship says about precision, is certainly something all  
21 advocates should do at all times. When I have practiced My Lord abroad, we get up and say we  
22 have five points to make, I will argue these three, somebody else will argue two.

23 **CJI SURYA KANT:** Exactly.

24 **RAJEEV DHAVAN:** That is the way we do it. As far as referring to things are concerned, we  
25 have put the relevant paragraphs in our submissions themselves.

26 **CJI SURYA KANT:** Precisely.

27 **INDIRA JAISING:** My Lord, surely be entitled to...

28 **RAJEEV DHAVAN:** To what the learned solicitor has said. My Lord, Your Lordships will be  
29 rewriting or rather re-examining Article 25 and Article 26. Now, I have no doubt Your

1 Lordships will read every word, but if Your Lordship is satisfied that Your Lordship wants to  
2 hear more, then kindly bear that in mind.

3 **CJI SURYA KANT:** Certainly, certainly.

4 **RAJEEV DHAVAN:** That's all I want to say, because this subject is one of immense  
5 importance.

6 **CJI SURYA KANT:** Dr. Rajeev, then you are absolutely right. If we get up from here and we  
7 are not sure about that, what we have really understood from both the entire perspective, then  
8 probably we will be also lacking in forming an opinion.

9 **RAJEEV DHAVAN:** I have argued before several benches...

10 **TUSHAR MEHTA:** My Lord, one fact...

11 **RAJEEV DHAVAN:** It was argued in February that it would end in March; it actually ended  
12 in September because of the issues involved.

13 **TUSHAR MEHTA:** One factor is very relevant.

14 **V. GIRI:** It will not be as bad as that.

15 **TUSHAR MEHTA:** That should be a very discouraging point.

16 **INDIRA JAISING:** My Lord, may I make a single comment?

17 **TUSHAR MEHTA:** That is the factor may be kept in mind, which would curtail the time also.  
18 Your Lordships have been very clear in the reference and Your Lordship's order, which My  
19 Lords just now were pleased to read, that Your Lordships would be answering questions  
20 referred. So individual facts, etc. are not to be gone into. Some of us, My Lord, have also gone  
21 into issues like personal law, this *Appa Mali, Narasu Appa Mali*, etc., which is not even  
22 remotely concerned. Some of us have gone into right of educational institutions minority. We  
23 are concerned with 25, 26, and what should be the scope of judicial review in interpreting  
24 religion.

25 **CJI SURYA KANT:** Maybe beyond 25, 26, there are some other provisions also referred to  
26 like Justice Chandrachud has relied.

27 **V. GIRI:** Para 14...

28 **TUSHAR MEHTA:** 15. Yes, yes.

29 **CJI SURYA KANT:** Reference to Article 13 also.

1 **V. GIRI:** Some judgments have referred to Article 17. My Lord, either to say that affirming  
2 something or to say that it is irrelevant, we may have to refer to something.

3 **CJI SURYA KANT:** Just I need only half a minute from you. I'll try to that broadly categorise  
4 because that might help you and it will help us also. One will be the... one category of the  
5 lawyers will be arguing will be broad discretion given to the court to enter into any domain of  
6 fundamental right that has been encapsulated into the Constitution of India; that is one broad  
7 category of lawyers. Second, court has no such discretion in religious matters even if it pertains  
8 to constitutional morality; that will be a one group of lawyers who will be arguing. The third  
9 will be the discretion, according to the court, to interfere into religious practices is narrow, but  
10 some minorities may be insulated. That is also... we could see that argument coming forth.

11 **TUSHAR MEHTA:** Which is not the subject... the question framed.

12 **CJI SURYA KANT:** And one group appears to be arguing that the court may interfere, but  
13 only on a case-to-case basis, that is where the facts are being referred to, relied upon. Now, if  
14 this is the kind of broad category, then one set of lawyers who want to argue 7.1, they can argue  
15 one after the other, because that will give a better understanding. That is the only request that  
16 is for among you that you...

17 **V. GIRI:** No, but that... then there will be... there's one problem with regard to that, My Lord;  
18 there could be overlapping, there could be overlapping, My Lord. Therefore, we would humbly  
19 request that Your Lordships may hear, hear us one after the other, and therefore, My Lords...

20 **C.S. VAIDYANATHAN:** Complete shift compartmentalisation there'll be.

21 **V. GIRI:** Issue, issue...

22 **RAJEEV DHAVAN:** I have one thing, My Lord. There is a point in Article 26 that needs  
23 elaboration, the concept of a denomination.

24 **TUSHAR MEHTA:** We are not on merits. Let me start on merits.

25 **RAJEEV DHAVAN:** One second, Solicitor. Now, the point here is that it is strictly speaking  
26 not in the points of reference.

27 **CJI SURYA KANT:** Yes, yes.

28 **TUSHAR MEHTA:** It is there, very much it is there.

29 **RAJEEV DHAVAN:** It is there before Your Lordships, because, My Lord, in *Sabarimala*,  
30 that's precisely what happened. If denomination is very narrowly defined, a large number of  
31 institutions will just go out of Your Lordships' purview.

32 **CJI SURYA KANT:** Dr. Dhavan, Question No. 3 will take care of that.

- 1 **C.S. VAIDYANATHAN:** Question No. 3 is there.
- 2 **TUSHAR MEHTA:** It is there and complete.
- 3 **C.S. VAIDYANATHAN:** Question No. 3 is very much there.
- 4 **RAJEEV DHAVAN:** This is to highlight in the beginning, because this is something that  
5 Your Lordships' for sure might take under consideration.
- 6 **CJI SURYA KANT:** Question No. 2 and 3 probably they'll take care.
- 7 **RAJEEV DHAVAN:** My Lord.
- 8 **C.S. VAIDYANATHAN:** Yes, they cover that.
- 9 **TUSHAR MEHTA:** It does cover it.
- 10 **CJI SURYA KANT:** So, we can start that.
- 11 **V. GIRI:** Yes.
- 12 **C.S. VAIDYANATHAN:** Yes.
- 13 **K. RADHAKRISHNAN:** Before anybody starts, My Lords, just... [INAUDIBLE] We're  
14 supporting [INAUDIBLE], but my name is [INAUDIBLE].
- 15 **CJI SURYA KANT:** Dr. Radhakrishnan, you have a very loud voice, what happened today?  
16 We can't hear you; you need a...
- 17 **INDIRA JAISING:** My Lord, if Your Lordship could just give one clarity, I'm in respectful  
18 agreement...
- 19 **JUSTICE M.M. SUNDRESH:** Let him finish.
- 20 **INDIRA JAISING:** ...with everything that's been said by this court.
- 21 **JUSTICE M.M. SUNDRESH:** Let him finish, please.
- 22 **K. RADHAKRISHNAN:** My Lords, this is with respect to the list prepared by the nodal  
23 Counsel...
- 24 **TUSHAR MEHTA:** He's reading the wrong list, he's on this side, that's what.
- 25 **K. RADHAKRISHNAN:** Yeah, that's what, and I may be allotted appropriate time and...
- 26 **CJI SURYA KANT:** No, no, this doesn't matter, don't go by that, that's a ministerial exercise.  
27 So, let's not... don't go by that.
- 28 **K. RADHAKRISHNAN:** Yes, I want to point out that as well.

1 **CJI SURYA KANT:** While arguing this side, you can support them. While arguing from this  
2 side you can support them, for us it's the same thing.

3 **SANJAY HEGDE:** Now, My Lord, I'm the first...

4 **TUSHAR MEHTA:** I may have to give Rejoinder.

5 **JUSTICE M.M. SUNDRESH:** Just a second.

6 **SANJAY HEGDE:** My Lord, I moved the Review Petition. My Lords, I was the first person  
7 to move the Review Petition. My Lords, I moved... I was the first person to move the Review  
8 Petition, My Lords, at least give me some time at the end of the... at the end of the hearing at  
9 least.

10 **CJI SURYA KANT:** Yes, yes.

11 **INDIRA JAISING:** My Lord, may I just...

12 **SANJAY HEGDE:** So, My Lord, now, My Lord, all juniors have become seniors, where my  
13 name is not included. Give me at least 10 minutes at the end of the Board.

14 **CJI SURYA KANT:** We will hear you.

15 **SANJAY HEGDE:** If it is given at the beginning, I'll be greatly obliged.

16 **INDIRA JAISING:** My Lord, may I just seek a clarification?

17 **SANJAY HEGDE:** Thank you, My Lords.

18 **INDIRA JAISING:** I do respectfully agree with everything this Court has said, and we'll  
19 abide by that discipline. There is only one clarification we would like. My Lord, the Review  
20 Petitions will not be heard that is my understanding, because if we have to address you on the  
21 Review Petitions, my first submission will be review doesn't lie, but my understanding is Your  
22 Lordship will not get into those issues and only decides the questions of law. Therefore, the  
23 Review Petitions will be decided later.

24 **CJI SURYA KANT:** Absolutely right.

25 **V. GIRI:** Your Lordships are not accepting...

26 **INDIRA JAISING:** There will be no... there will be no mandamus on the earlier judgment of  
27 this Court, which is in full force and effect; that judgment has not been stayed. So, we are  
28 happy to address you on questions of law, My Lord, which have been framed, without  
29 interfering with any judgment of this Court already delivered. Is my understanding correct,  
30 My Lord? Your Lordship will send the Review Petitions for hearing to another Bench.

1 **CJI SURYA KANT:** The fate of Review Petitions on merits will depend upon how this nine-  
2 Judge Bench decides...

3 **V. GIRI:** That's correct, My Lord, that's what Your Lordships have...

4 **SANJAY HEGDE:** A judgment is not rendered *per incuriam, sub silentio*, void, without  
5 hearing the people of this country - *res inter alios acta alteri nocere non debet*.

6 **INDIRA JAISING:** Because, My Lords, each...

7 **SANJAY HEGDE:** *Res inter alios acta alteri nocere non debet* . This judgment was  
8 rendered behind the back of these people, and this has resulted in this waste of so much of  
9 Court's time. Honorary Petitions are dismissed in 93 seconds.

10 **ABHISHEK SINGHVI:** I don't wish to stop him, My Lords, but anyway. Your Lordship, my  
11 suggestion is only this, there are some principal parties, like the Travancore Devaswom Board  
12 like me.

13 **V. GIRI:** The Tantri.

14 **ABHISHEK SINGHVI:** The Tantri here. And of course central government comes first  
15 that's Mr. Mehta. Your Lordship on each of the nine questions may hear them first because  
16 those are the principally affected parties, here the intervenors later, the various were the other  
17 people who are coming later. I had the privilege of opening the original *Sabarimala* and the  
18 review before Justice Gogoi's bench, but let the central government open first, then we'll sort  
19 out between the...

20 **CJI SURYA KANT:** Yes, yes. Absolutely.

21 **V. GIRI:** We are trying to sort it out in such a way... yes, I think Your Lordships...

22 **SANJAY HEGDE:** One... one suggestion, My Lords. May I suggest please, it is not the  
23 *Sabarimala* review as Your Lordship has just now clarified. If Your Lordships state, that this  
24 is a reference in writ Articles 25, 26, that would solve a lot of [INAUDIBLE], we can predict in  
25 the future, it should be seen as one institution, one institution lost, we are not looking at that,  
26 we are looking at it purely as a question of law, and it will also help My Lords later when there  
27 is reporting.

28 **CJI SURYA KANT:** I think all of us have this broad understanding...

29 **SANJAY HEGDE:** Yes My Lords, if it's formally renamed, if it's formally renamed, you can  
30 read Articles 25, 26, that would help.

31 **CJI SURYA KANT:** We'll consider that aspect also.

- 1 **COUNSEL:** My Lord, I have a... I have a...
- 2 **ARYAMA SUNDARAM:** If that will arise, please keep this in mind.
- 3 **CJI SURYA KANT:** If that will arise, we will hear you.
- 4 **TUSHAR MEHTA:** When that arises, you argue that.
- 5 **ARYAMA SUNDARAM:** When... when deciding Articles 25, 26, per force the ***Sabarimala***
- 6 judgment will be looked at.
- 7 **INDIRA JAISING:** My Lord [UNCLEAR] on that.
- 8 **ARYAMA SUNDARAM:** ***Sabarimala*** judgment will be looked at.
- 9 **C.S. VAIDYANATHAN:** All the judgments...
- 10 **ARYAMA SUNDARAM:** Saying that it could be dehors completely may not be correct.
- 11 **INDIRA JAISING:** My Lord, that will take you to the review.
- 12 **V. GIRI:** Not on... not on the merits of the review. Your Lordships will have to look into the
- 13 judgment.
- 14 **RAVI PRASAD GUPTA:** My Lord, may I submit one thing My Lord?
- 15 **C.S. VAIDYANATHAN:** On the questions of law it will be looked at, not on the review.
- 16 **COUNSEL:** The whole exercise is of enormous waste of public time, judicial time. So much
- 17 of cases could have been heard by this...
- 18 **COUNSEL:** My Lord all the...
- 19 **COUNSEL:** [UNCLEAR] mention apart from all this... this is a different matter.
- 20 **TUSHAR MEHTA:** Our understanding I think I agree with Ms. Jaising.
- 21 **COUNSEL:** [UNCLEAR].
- 22 **JUSTICE M.M. SUNDRESH:** Normally you are being criticized for what you are saying.
- 23 **COUNSEL:** I said My Lord, I would be happy the PIL business is coming to an end. People
- 24 come without a... see PIL means you come... My Lord, none of my rights are infringed.
- 25 **CJI SURYA KANT:** That is why your answer can be My Lord, wait for some time I will keep
- 26 my original colour.
- 27 **COUNSEL:** No, I am waiting for the end of the board. If Your Lordship will hear me for 10
- 28 minutes then the bench can be discharged in one hour.

- 1 **C.S. VAIDYANATHAN:** The entry itself has taken longer than 10 minutes.
- 2 **COUNSEL:** They are all against me. They are all against me. The whole designated lot are  
3 against me. 99% of the ordinary lawyers support me.
- 4 **TUSHAR MEHTA:** Let me start, My Lord, let me start.
- 5 **N. HARIHARAN:** My Lord, before my friend can start My Lord, there is a...
- 6 **COUNSEL:** Time be set apart for interveners especially those representing multiple different  
7 religions and...
- 8 **CJI SURYA KANT:** What will happen, you have given the timelines from your side. I have  
9 also done with consultation with my sister and brother some homework on that, let us see that  
10 how it proceed, then accordingly we will keep on requesting you.
- 11 **N. HARIHARAN:** My Lord, I have an urgent mentioning which has got nothing to do with  
12 all this. If Your Lordship... This is a matter which requires serious concern. There is a rape and  
13 murder of a four-year-old child in PS Ghaziabad. Interestingly, though, the post-mortem  
14 shows aggravated assault, sexual assault, there is no investigation which is directed towards  
15 rape, only an FIR in relation to 302, that too after great persuasion, has been registered. This  
16 requires consideration, My Lord.
- 17 **CJI SURYA KANT:** Who is the petitioner?
- 18 **N. HARIHARAN:** The petitioner happens to be the father, the father.
- 19 **CJI SURYA KANT:** Who is the...?
- 20 **N. HARIHARAN:** Father of the child, the father of the child is the petitioner. This way things  
21 go on, My Lord, no child is safe.
- 22 **CJI SURYA KANT:** Do you want to be listed tomorrow? You want to be listed on Friday?
- 23 **N. HARIHARAN:** Yes, My Lord, tomorrow. Tomorrow, day after, whenever Your Lordship  
24 thinks it's appropriate, but it needs urgent hearing.
- 25 **CJI SURYA KANT:** We will give you a choice, you want tomorrow or on Friday?
- 26 **N. HARIHARAN:** Friday.
- 27 **TUSHAR MEHTA:** What is the prayer? What is the prayer? Listen to me. What is the prayer?
- 28 **N. HARIHARAN:** I am seeking transfer of investigations, My Lord. There is no investigation  
29 which has happened.
- 30 **CJI SURYA KANT:** That we will consider on merits once you finish the matter.

1 **N. HARIHARAN:** Yes. Your Lordship will have to hear me on merits. I will show to you how  
2 things are going on.

3 **CJI SURYA KANT:** We will have to hear you and then only pass an order.

4 **N. HARIHARAN:** Yes, yes. Friday, My Lord.

5 **CJI SURYA KANT:** Right.

6 **N. HARIHARAN:** Very well.

7 **CJI SURYA KANT:** Mr. Hariharan, tell your junior to make sure that if defects if any that is  
8 cured. Only if there is we are listing it...

9 **N. HARIHARAN:** Very well. I'm sorry to hold you all up.

10 **TUSHAR MEHTA:** My Lord, please have a look at my volume. This is thicker because  
11 extractions are there. Your Lordships need not have to go through the judgments.

12 **V. GIRI:** They are using electronic copies.

13 **TUSHAR MEHTA:** My Lord, please come to page 1. There is something important, My Lord,  
14 which makes our job a little more responsible. Your Lordships have page 1? My Lord, why this  
15 is important and why our job is more responsible? It's not, My Lord, the one particular aspect-  
16 centric matter. My Lord, please, when the court was, My Lord, the court has referred the  
17 matter to nine Honourable Judges the... It was incidentally authored by Justice Gogoi. Justice  
18 Gogoi is the author in *Adi Saiva* judgment. I'll come to that matter, that need not be written.  
19 But *Adi Saiva* judgment takes note of law from *Shirur Mutt* till that date and thereafter,  
20 when this order is passed, the judgment in *Sabarimala* was also there. Now keeping that in  
21 mind, please have a look My Lord, why we are before Your Lordships, My Lord and what is the  
22 scope of this reference. Para 4: "It is time that this court should evolve a judicial policy." It's  
23 not, My Lord, one judgment being right or one judgment being wrong or one practice, etc.  
24 "Judicial policy befitting to its plenary powers to do substantial and complete justice and for  
25 an authoritative enunciation of the constitutional principles by a larger bench of not less than  
26 seven Judges." My Lord why seven Honourable Judges? *Shirur Mutt* is seven judge. "The  
27 decision of a larger bench would be put... would put at rest recurring issues touching upon the  
28 rights flowing from Article 25 and 26 of the Constitution of India. It is essential to adhere to  
29 judicial discipline and propriety when more than one..." I'm not going into it. Only purpose,  
30 My Lord, is...

31 Now, My Lord, Your Lordships will have to adjudicate and interpret broadly three terms so far  
32 as religion is concerned, Article 25(1) I'll come to that the text uses the word 'religion'. Second  
33 term which is used is Article 25(2), which uses the term 'religious practices'. And Article 26(b)

1 uses the word 'to manage affairs relating to religion'. My Lord, what has happened is there are  
2 three things which in my submission has happened and central government is not taking My  
3 Lord one extreme view or the other. I'm assisting Your Lordships what can be the possible way  
4 of answering questions and what can be the contours of Your Lordships' judicial review, which  
5 is one of the questions framed. My Lord, neither in **Shirur Mutt** till **Sabarimala** judgment,  
6 that's the journey of Article 25 and 26. My Lord three things are not noticed. (a) The  
7 Constituent Assembly debates which brought 25 and 26 into existence, (b) My Lord, the  
8 enormity and width of religions in this country. My Lord we are not dealing with, My Lord,  
9 one religion; the country is having a very proud plurality of religions - Hindus, Muslims,  
10 Christians and other, Judaism, etc. But the beautiful part is, there is internal plurality in the  
11 religions also. Hindu has several sub-denominations. Philosophically Hinduism is a way of  
12 life, but for constitutional purposes, it is a religion. It is also a denomination, but it is also  
13 divided in several denominations and each denomination has their own independent  
14 denomination which are ultimately referable to the broader concept of Hinduism, My Lord,  
15 that is possibly not presented so far.

16 Same is about Islam. Whatever I have studied about Islam, the only difference is that it has  
17 one particular holy book where you take guidance from, and one particular originator i.e.  
18 honourable Prophet Muhammad, which is the distinguishing feature. But even in Islam, there  
19 is an internal plurality. It's not all Muslims which are as a one-class, one-denomination; there  
20 are several denominations. When we, Your Lordships will have to examine and answer what  
21 is denomination. And the same... So, we have Shias, we have... One young lawyer I requested,  
22 but he declined, but anyway, anyway, you need not.

23 **COUNSEL:** Your Lordship, always the AGs are respected; AGs are having any problem. I am  
24 in the second lines...

25 **TUSHAR MEHTA:** I said some seniors are standing.

26 **COUNSEL:** I am always left my seat, sir and...

27 **TUSHAR MEHTA:** Alright *chaal* only but my answer would be a dignified silence, My Lord.  
28 I requested when Mr...

29 **CJI SURYA KANT:** Not only to you or to everyone?

30 **TUSHAR MEHTA:** Mr. Sundresh was standing, I requested him, that please give a chair, a  
31 senior, very senior member. Anyway, My Lord, leave it at that. Anyway My Lord, the only  
32 answer sometimes is the dignified silence. Now, similarly My Lord Shia Muslims, Sunni  
33 Muslims, sub-denominations, etc., and this broadly Your Lordships are not examining  
34 theological part of the religion, but must remain in Your Lordship's mind that Hindu religion

1 is not just Hindus, Islam is not just Islam. Islam has denominations. Christianity has  
 2 denominations. And this is the beauty of not only pluralistic society in India, but internal  
 3 plurality which co-exist within the religion also. My Lord, just taking five minutes of Your  
 4 Lordships, this is what My Lord, Your Lordships may bear in mind My Lord, while deciding  
 5 the word "religion", "religious affairs" and "matters pertaining to religion". My Lord, there is  
 6 a reason why a "religious affairs" words are used. Earlier My Lord, it was only religion. But I'll  
 7 come to that, there is a purpose. For example, during the Constituent Assembly debates, it was  
 8 only matter pertaining to religion, but one of the honourable members said that some matters  
 9 are not pertaining to religion, but they are religious practices and he gave an example of  
 10 Ganpati Visarjan, that it is a part of Hinduism, broader doctrine. But Ganapatya Sampradaya  
 11 is a separate denomination. It is not... it may not be a part of Ganapatya Sampradaya, but it is  
 12 a practice followed since at least 300-400 years.

13 My Lord, kindly have a look at this chart. I will not take more than 5-7 minutes on this point  
 14 and I will switch over to the main points. My Lord, this is the width of the term religion, which  
 15 would My Lord be a guiding factor for Your Lordships to decide to what extent whether a  
 16 Hindu denomination is before Your Lordships or a Muslim denomination is before Your  
 17 Lordships or a Christian or any other religion, to what extent Your Lordships would have the  
 18 expertise on the subject, and to what, My Lord level we will be able to assist Your Lordships.  
 19 That is an inherent limitation which is subject specific limitation. Please have a look, My Lord,  
 20 this is... I have given My Lord for Hindu religion, I have also given My Lord for other on  
 21 religious... religions.

22 My Lord, as we call Sanatana. Sanatana, that is Hinduism, we have four Vedas. Your Lordships  
 23 are aware Rigveda, Samaveda, Yajurveda and Atharvaveda.

24 It prescribes several things. Then we have four Upavedas i.e. Dhanurveda, Gandharvaveda,  
 25 Ayurveda and Arthashastra. Arthashastra may deal with only economic aspects, perhaps. Then  
 26 we have six Vedangas. My Lord, this is to preserve and follow the Vedas which are Shiksha,  
 27 Vyakaran, Chandas, Niruktas, Jyotisha and Kalpa. Now, we have four Upangas. My Lord, one  
 28 is Dharmashastra, Yagnavalkya and Parasurama immediately came to my mind, but Patanjali  
 29 also can be added in this category, as per my limited understanding. Then we have Puranas,  
 30 we have 18 Mahapuranas, 18 Uppuranas, Ramayana and Mahabharata. Then we have  
 31 Mimamsa and Nyaya Shastras.

32 Now please turn the page over, it goes further. Mimamsa and Nyaya Shastra, My Lord, which  
 33 ultimately finds its roots in Vedas, My Lord, has six components and these are recognized  
 34 components. My Lord, Nyaya, Vaishalika, Samkhya, Yoga, Purva Mimamsa, and Uttara  
 35 Mimamsa. Correct, My Lord? Kindly mark what I have said, this is Aastik darshan, because

1 there is one beauty in this religion. You can be nastik, you can be a non-believer, you can be  
 2 an atheist, you can be an agnostic and still be a Hindu. I'll come to that, My Lord, for two  
 3 minutes only.

4 Now My Lord, we have Uttara Mimamsa *mai* Upanishads, Bhagavad Sutra and Bhagavad Gita.  
 5 Now Agamas. My Lord, Agamas are the only things which are referred to by Justice Mukherjee  
 6 and My Lord Justice Venkataswami in ***Devaru***. Right, My Lord? Beyond... Above that nothing  
 7 is discussed. Therefore, My Lord, I am pointing this out. Six Agamas, we have Shakt, Shakti  
 8 Sampradayam for those who believe in Shakti. We have Shaivites, we have Vaishnavites. Then  
 9 Ganapatya Sampradaya. Lord Ganesh Vighnaharta is the deity, is the Eshta Dev. Then  
 10 Kumara, that is Karthik Swamy or Lord Murugan or Suriya that is Swamy... My Lord, it should  
 11 not be Swaminarayan it's a typo, it should be Surya Narayan, it's sun God. It's a autocorrect  
 12 mistake. Kindly correct it, My Lord, it is Surya Narayan.

13 **JUSTICE B.V. NAGARATHNA:** That's between the two...

14 **TUSHAR MEHTA:** Yeah, yes, Your Ladyship is absolutely right. And last and according to  
 15 me, my personal belief, one of the most beautiful part of this is Nastik Darshans. Nastik means  
 16 non-believer. They don't believe in God, they don't believe in existence of any superpower. And  
 17 I'm really... when I was studying this long back, not for this matter, I was really surprised and  
 18 I felt proud that Charvaka Darshan is dating a few thousand years where the world did not  
 19 have the concept of religion. And Charvaka Darshan in those days is the first atheist of the  
 20 world. He did not believe in God, he did not believe in any superpower. He said there is no  
 21 destiny, there is no person or a body or a power or anything which controls your destiny. The  
 22 moment... the way a tree exists, a human exists. The tree is destroyed, the human is dead.  
 23 Nothing happens, no karma, no afterlife, nothing. And there was his following, Charvaka had  
 24 his own following, Charvaka Sangeetha is still followed by several.

25 Then second is Jain Darshan. Jain Darshan and Buddha Darshan also they do not believe in  
 26 God. Both Jainism and Buddhism, they do not believe in God. They do not believe in afterlife.  
 27 I'm not giving a theological background, but this would be necessary. Now My Lord, please  
 28 have a look at...

29 **JUSTICE AHSANUDDIN AMANULLAH:** Just, Mr. Tushar, if you say the Jains and the  
 30 Buddhists don't believe in afterlife then where the Teerthankars one after the other  
 31 reincarnation, there is a belief.

32 **TUSHAR MEHTA:** No, nastiks don't believe one after the other.

- 1 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, Jain and Buddhism you said. You said  
2 they don't believe, but it ends with the death that is Saranam. But there are Teerthankars in  
3 Jain, it said that they are reincarnation.
- 4 **TUSHAR MEHTA:** My Lord, that is exactly the difficulty, because neither I am competent  
5 nor Your Lordships would be able to know. In Buddhism what they believe is salvation,  
6 moksha, that you are dead, you are liberated, there is no afterlife that's what I say. There is no  
7 afterlife, they don't believe in idol worship.
- 8 **JUSTICE B.V. NAGARATHNA:** Idol worship is different, not...
- 9 **JUSTICE AHSANUDDIN AMANULLAH:** How many Charvaka theory, my brother is  
10 giving that example, *ghritam pibet*, but we will reshare that.
- 11 **JUSTICE JOYMALYA BAGCHI:** We identify Pursuit of Happiness to John Locke, but it  
12 actually relates to Charvaka, where Charvaka says, *yavat jeevet sukham jeevet, runam kritva*  
13 *ghritam pibet*
- 14 **TUSHAR MEHTA:** Yes, the very popular.
- 15 **JUSTICE JOYMALYA BAGCHI:** As long as I live, I live with material happiness even I will  
16 be in debt...
- 17 **TUSHAR MEHTA:** I'll consume ghee.
- 18 **JUSTICE JOYMALYA BAGCHI:** The material happiness. So Pursuit of Happiness in the  
19 American Constitution in fact relates to Charvaka, much...
- 20 **TUSHAR MEHTA:** He says, whatever is there is, is in this world. These are all material  
21 things you enjoy. Your Lordships are right. Even if you have to incur debt, you incur debt but  
22 consume ghee. Ghee means consume all which is...
- 23 **JUSTICE JOYMALYA BAGCHI:** Material pleasure.
- 24 **TUSHAR MEHTA:** Material pleasure.
- 25 **JUSTICE JOYMALYA BAGCHI:** So I will go into debt, which spiritually is impure. To  
26 achieve the material pleasures of existence.
- 27 **TUSHAR MEHTA:** Material life, yes.
- 28 **JUSTICE JOYMALYA BAGCHI:** So it's an existential theology and we do not require John  
29 Locke to remind us.
- 30 **TUSHAR MEHTA:** To remind us, yes.

1 **JUSTICE JOYMALYA BAGCHI:** This is Charvaka.

2 **TUSHAR MEHTA:** It is the Charvaka some few thousand years back. Answering My Lord's  
3 question, they do not believe in afterlife, means some denominations of Hindu believe that  
4 this is only a body, what is the soul is eternal and it only changes the body from one body it  
5 goes to another body. In Buddhism there is a concept of Nirvana. Nirvana or Mahanirvana  
6 means once you're dead you achieve salvation, you literally achieve liberation. You don't  
7 reborn, you are not reborn, you don't get a rebirth. That is the concept I'm saying, but that is  
8 a non-idol worship, My Lord. I will just My Lord hurriedly conclude this.

9 Thereafter, My Lord comes one of the most visionary saint who walked on this earth i.e. Adi  
10 Shankara; Shankaracharya. Taking into consideration all this My Lord, denominations and  
11 non-denominations, he codified Hinduism or Sanatana, as we call, in 10 different sections  
12 which is called Dashanaam. "Dash" means ten "Naam" means names. And My Lord, what is  
13 Dashanaam. One is for example, I'll just give you one example. Tirth. My Lord, Tirth is one  
14 section of that Dashanaam, they would have a separate name. If I become a Dikshit in  
15 Dashanaam Sampradaya with Tirth, then my name would be so and so Tirth. You can find out  
16 from the name of the Saint that he belongs to Giri Sampradaya, Tirth Sampradaya, Bharati  
17 Sampradaya etc., etc. Everyone would have a different tilak. So, you identify that he belongs  
18 to Dashanaam and this particular category. Everyone would have a different salutation for  
19 each other. The moment he says "Alakh Niranjana", you find out which one of the categories he  
20 belongs to. But these are nine categories. Tenth category is in what our legal parlance we say  
21 residuary entry. Those who do not fall or do not wish to fall in 1 to 9, would be Hindus under  
22 the tenth category. It includes non-believers, it includes those who believe in books. For  
23 example Sikhism, those who do not believe in idol worship and those who do not believe in  
24 anything. So, I can be a non-believer, non-idol worshipper and I believe in Charvaka theory,  
25 but I can still be a Hindu. My Lord, this is the broadness of any religion that Your Lordships  
26 will have to keep in mind.

27 Immediately My Lord for... I'm not getting into beyond a point, but please have a look at My  
28 Lord. This is the same thing with, My Lord, Islam that is and the main five elements are say,  
29 zakat, etc. My Lords would be aware. The Holy book is Quran and Prophet Muhammad is the  
30 last prophet, My Lord. And My Lord, but based upon the doctrinal differences, page 155, I have  
31 given, as per my understanding, these are the denominations which are within one  
32 denomination called Islam, but they are all Islam denominations.

33 **CJI SURYA KANT:** Page 155 of?

1 **TUSHAR MEHTA:** 155, PDF 158 if Your Lordships are having, PDF 158. I'm not taking Your  
2 Lordships through this in detail, but Islam, the holy book Quran, then Sunni, Shia and  
3 Khawarij. Khawarij is now not My Lord, much...

4 **CJI SURYA KANT:** You are referring to this table?

5 **TUSHAR MEHTA:** Yes, yes, yes. But Your Lordships need not go in detail into this. My  
6 purpose of showing is that let us not take Hinduism, Islam, or Christianity as one particular  
7 broad denomination and then take decisions whether it would be a religious practice, whether  
8 it is a religion, whether these are affairs pertaining to religion. And therefore, My Lords, in  
9 Section 26(b), the framers of the Constitution...

10 **K. RADHAKRISHNAN:** Article.

11 **TUSHAR MEHTA:** I'm sorry, Article. My apologies. I'm not a Constitutional Lawyer. Article  
12 26(b), they have specifically added "not only religious denomination, religious affairs, any  
13 section thereof." So, I need... I'll give you the broadly the, why the section thereof. Kindly have  
14 a look at the Constitution and there is a purpose and a vision of the visionary constitutional  
15 framers. Why has the word "section thereof" is used? My Lord, 26, the first part. "Subject to  
16 public order..."

17 **JUSTICE M.M. SUNDRESH:** Where are you referring?

18 **TUSHAR MEHTA:** Sir, I'm reading Article 26, and I'll give you the reason why our  
19 constitutional framers were visionaries and why this expression was specifically added  
20 subsequently: "Freedom to manage religious affairs. Subject to public order, morality and  
21 health, every religious denomination or any section thereof..." What is the purpose? I'll come  
22 to that in a detail little later. What is the purpose? My Lord, suppose, take for example, My  
23 Lord, Shirdi. Hindus go, Muslims go, all denominations of Hindus go, Shaivites go, Shakti  
24 Sampradaya goes, everyone goes. So, it is not confined to one particular denomination; it is a  
25 section of a denomination. My Lord, for example, Tirupati Balaji. It's... One can say it is a  
26 Vaishnavite shrine; one can say it is not a Vaishnavite shrine, it is a Hindu shrine. My Lords  
27 as **Sabarimala** says that all are Hindus, all who go are Hindus, so we cannot recognise any  
28 denomination. My Lord, I'm not arguing that, but **Sabarimala** does not even consider or  
29 refer to the word "section thereof". That's a matter of argument at the time of the review. So,  
30 My Lord, "section thereof"... For example, Khwaja Moinuddin Chishti Dargah, Hindus go, all  
31 communities go. Which denomination we will put it, My Lord, if there is some question arises?  
32 It would be a denomination because it is a part of "section of one larger denomination".  
33 Khwaja Nizamuddin Auliya; everyone goes. So, there are reasons and reasons, My Lord, why  
34 we cannot blindly and reverentially adopt American doctrines or foreign doctrines, because

1 our religious structure is differently plural, and internal plurality, which gives beauty to it, My  
2 Lord, has a totally different dimension. And therefore, we did not lift the religious freedom  
3 either from the First Amendment of the American Constitution or any other Constitution. Our  
4 framers, though they have adopted some provision in some other Articles, 25 and 26 are  
5 designed to suit Indian conditions.

6 **JUSTICE JOYMALYA BAGCHI:** But Mr. Solicitor, 25, 26 is an import from the  
7 Constitution of Ire.

8 **TUSHAR MEHTA:** Ireland, yes.

9 **JUSTICE JOYMALYA BAGCHI:** Article 44.

10 **TUSHAR MEHTA:** Yes, but My Lord, it is made or tailored in peculiar Indian situations. It's  
11 not word-by-word same. That's what Dr. Ambedkar also says that it is an... it is derived from  
12 in Constitution of Ire, which is Ireland, but Ireland was a theology.

13 **JUSTICE JOYMALYA BAGCHI:** That history of being uniquely Catholic in a Protestant  
14 monarch.

15 **TUSHAR MEHTA:** Yes.

16 **JUSTICE JOYMALYA BAGCHI:** Or an Anglican monarch.

17 **TUSHAR MEHTA:** An Anglican, which they used to oppose and there were rebellions and  
18 revolts and etc., etc. So, My Lord... And similar, My Lord, Christianity, I'm not going into it  
19 because this is not what Your Lordships would be seeing. My Lord, Buddhism also. My Lord,  
20 please come to page 150... 160 which is My Lord PDF page 163. I just want Your Lordships to  
21 see the chart that Buddhism is not one denomination. That's the... possibly our assist... lack of  
22 assistance that in all earlier judgments, we never pointed out that this is the internal plurality  
23 within one religion. So, Your Lordship's view also will have to be suitably examined. My Lord,  
24 Buddha's teachings that starts My Lord, then Oral traditions. 18 schools were developed. First  
25 notion of Mahayana, Mahayana Buddhism My Lord, etc. etc. Chinese Buddhism is different,  
26 then Mahayana... Vajrayana Buddhism which travelled from India which is now being  
27 practiced. Essentially, Mahayana and Vajrayana in Bhutan, Ladakh, Sikkim etc. My Lord,  
28 that's not the purest form of Buddhism as Lord Buddha preached, it has some element of that...  
29 Maa tara...

30 **JUSTICE JOYMALYA BAGCHI:** Tantrism, it's a hybrid between the tantric...

31 **TUSHAR MEHTA:** Tantric, it is My Lord Shaiva Tantrism, the Muni Padmasambhava in  
32 eighth century made a fusion of Buddhism and Shaiva Tantrism, and that is the form of  
33 Buddhism which is in vogue in Tibet, Bhutan, Sikkim and other areas. So, there is an internal

1 plurality, that's all I'm trying to My Lord... Then Vajrayana also My Lord which has My Lord  
2 next page. My Lord, I have given several branches and My Lord, Christianity with whatever  
3 limited understanding I could gather My Lord because these are general things My Lord and  
4 I have done my own research only to show it is not one thing to say I'm dealing with  
5 Christianity as a religion. Your Lordships will have to decide several things and the question  
6 would be would the court have the necessary expertise to go into those questions? Your  
7 Lordships may bear in mind, in most of the cases which we cite, we cite for the findings  
8 recorded or the ratio, but all those cases came from civil suits, whether... most of them,  
9 whether religious practices, it is a long religion practice, etc. etc.

10 So My Lord, this is early Christian Church, Eastern Orthodoxy, Roman Catholicism,  
11 Protestantism and there are some sub-denominations within one larger denomination. So,  
12 kindly bear this in mind, My Lord in India also My Lord at page 170 which is My Lord at 173,  
13 I have given My Lord Indian Christianity also My Lord, year-wise, how My Lord they have  
14 separate denomination. The doctrinal beliefs are same, and one holy book i.e. Bible that is  
15 common, the founder is common, but doctrinal differences, principled differences etc.,  
16 interpretative differences. Differences also may be worldly world, My Lord. It's not difference  
17 but another way of looking at the same thing. And that is how My Lord this plural... internally  
18 plural religious practices developed.

19 Now My Lord, coming back to the main matter now, please have a look at My Lord, something  
20 which in my respectful submission, subject to being corrected, is missed. When we interpret  
21 Article 25 and 26 which can never be interpreted without looking at the Preamble. Your  
22 Lordships have always interpreted fundamental rights in light of the Preamble. My Lord, at  
23 least the judgments which I could see and I would place some paragraphs, My Lord, this part  
24 is not specifically noted. Please have a look at page 5 which would be PDF 8. I'm just... Your  
25 Lordships have read and re-read Preamble several times, but in this context only one right  
26 what we have given to ourselves. My Lord, I have highlighted in red colour. Your Lordships  
27 have in red colour, My Lord? Liberty of thought; we are not concerned possibly. Expression;  
28 it can be 19(1)(a) expression or expressing religious belief also because if we go by *ejusdem*  
29 *generis*, expression, belief, faith and worship. My Lord, this is what is ensured in the Preamble.

30 Your Lordships may consider, My Lord, requiring Article 25 and 26 be interpreted keeping in  
31 mind the faith and belief also, because there can be several things which are capable of belief  
32 system. It may not be emanating as a... this is necessary because of the unnecessary doctrine  
33 of essential religious practice being introduced. How do you decide? It's a matter of faith, it's  
34 a matter of belief. Whether this is essential or this is not essential, you will have to first examine  
35 and make a judicial review of religious scriptures. You will have to understand the religious  
36 scripture the way it is meant to be understood, which is impossible, My Lord, unless we achieve

1 that level of spiritual supremacy, we will also not be in a position to assist what exactly Prophet  
2 Muhammad said or for that matter My Lord, Jesus, Lord Jesus said, or My Lord the Veda says  
3 or Upanishad says, other things will say. And based on that there can be a faith and belief  
4 system which has developed, which is not otherwise contrary to public order, morality, health  
5 and Part 3. Then how would Your Lordships examine the essentiality of that? That's the  
6 purpose.

7 Now, coming to how the 25 and 26 was framed, and I will... I will be citing this My Lord, so  
8 that it's... I'll have to show the route because this was not shown earlier to earlier Benches, or  
9 maybe it has missed or whatever; I'll not. My Lord, the first part is what happened prior to the  
10 Constituent Assembly set to debate the draft constitution placed before it. My Lord, before  
11 that also, there were proceedings, there were committees; committees on minorities,  
12 committees on religious freedoms, etc. etc. These are My Lord also... this is the pre-  
13 Constituent Assembly debates deliberations on 25 and 26. I have confined it to 25 and 26. For  
14 completeness, I have placed everything, but I have marked My Lord what is not to be read  
15 because it is irrelevant for the questions to be answered. Now, kindly see at page 10, PDF 13.  
16 This is how the first draft was placed by Kanaiyalal Munshi. My Lord, please see, religious and  
17 cultural freedom. They are discussing 25 to 30. We are not concerned with anything other than  
18 25 and 26. "All citizens are equally entitled to freedom of conscience and to the right freely to  
19 profess and practice religion in a manner compatible with public order..."

20 **CJI SURYA KANT:** What page?

21 **TUSHAR MEHTA:** I'm sorry, page 10 and para... page 13 if it is PDF. Printed page 10.

22 **CJI SURYA KANT:** That's it.

23 **TUSHAR MEHTA:** Yes. "All citizens are equally entitled to freedom of conscience and the  
24 right freely to profess and practice religion in a manner compatible with public order, morality  
25 or health, provided that economic, financial or political activities associated with religious  
26 worship." Please mind, write, underline this "religious worship" was the word initially... "shall  
27 not be deemed to be included in the right to profess or practice religion." Your Lordships would  
28 might the word "propagate" is not there. Something turns on that, therefore, I am pointing out  
29 at this stage.

30 Then (ii) Your Lordships can skip. "Citizens belonging to national minorities in a state,  
31 whether based on religion or language, have equal rights with other citizens in forming,  
32 controlling, administering at their own expense, charitable, religious..." please mark. This goes  
33 ultimately in 29 and 30. There cannot be any educational institution of either a linguistic  
34 minority or a religious minority, which is educational religious institution. Nothing turns on

1 that for these questions, but I'm just pointing out because one of us My Lord, is going to raise  
2 possibly the question that 25, 26 applies to educational institutions also, and social  
3 institutions, schools and other educational institutions, with the free use of their language and  
4 practice of their religion. Then, no person may be compelled to pay taxes." This becomes  
5 Article 27; we are not concerned. "Religious instruction shall not be compulsory." This  
6 becomes Article 28 in a different format, but we are not concerned. Then, "no person under  
7 the age of 18 shall be free to change his religious persuasion without the permission of his  
8 parent or guardian; conversion from one religion to another brought about by coercion, undue  
9 influence, or offering of material inducement is prohibited and is punishable by the law of the  
10 Union."

11 Please turn the page over, My Lord. Then, My Lord, Article 2. My Lord, there is some... Dr.  
12 B.R. Ambedkar independently circulated a memorandum... I have said that. There were three  
13 drafts, but period, I have said. I'm not as conversant as you, but I have said it subsequently.  
14 Yes, yes, *na* continuously I am overhearing you. "Dr. B.R. Ambedkar independently circulated  
15 a memorandum and draft article." My Lord, his draft article was like this: "The State shall  
16 guarantee to every Indian citizen liberty of conscience and the free exercise of his religion,  
17 including the right to profess, to preach, and to convert within limits of compatibility... within  
18 the limits compatible with public order and morality." My Lord, this was the draft suggested  
19 by Dr. Ambedkar.

20 My Lord, now please see, My Lord, Rajkumari Amrit Kaur and Dr. Hansa Mehta, two eminent  
21 lady members. India has always not only treated ladies equally, they have always been treated  
22 at a higher pedestal. My Lord, there are several judgments of the recent past where there is a  
23 concept of patriarchal society or there is some gender stereotypes, etc. They were never there.  
24 We are the only generation... arguably, we are the only, My Lord, Indian society. We worship  
25 ladies. The President of India to the Prime Minister of India to the judges of the Supreme  
26 Court. We bow down before our lady deities. So let us not introduce those concepts of  
27 patriarchy and gender stereotypes, etc. There has never been. So, these two eminent ladies,  
28 Rajkumari Amrit Kaur, who became the first Health Minister in Pandit Nehru's cabinet, My  
29 Lord, they raised...

30 **JUSTICE B.V. NAGARATHNA:** They called them "the founding mothers."

31 **TUSHAR MEHTA:** Founding mothers.

32 **JUSTICE B.V. NAGARATHNA:** We always say "founding fathers."

33 **TUSHAR MEHTA:** Yes.

1 **JUSTICE B.V. NAGARATHNA:** ...of the Constitution. So, let us call these 15 women  
2 "founding mothers".

3 **TUSHAR MEHTA:** Yes, My Lord, "founding mothers of the Constitution."

4 **JUSTICE B.V. NAGARATHNA:** Yes.

5 **TUSHAR MEHTA:** Correct, correct, correct, My Lords. Now, they have a... they had pointed  
6 out a correct problem.

7 **JUSTICE B.V. NAGARATHNA:** Yes, These 15 women.

8 **TUSHAR MEHTA:** Yes, yes, yes, they... it's biographical narration.

9 **JUSTICE B.V. NAGARATHNA:** No. Participation in the Committees.

10 **TUSHAR MEHTA:** Committee also.

11 **JUSTICE B.V. NAGARATHNA:** In the Assemblies, their contribution and how some of the  
12 Articles, especially Article 15(3).

13 **TUSHAR MEHTA:** And even 25, 23. My Lord, their objection was; Your Ladyships, very  
14 right and pertinent observation. Their objection was that if you say right of religion, some  
15 religion forbids what otherwise our social reformers have prohibited. For example, somebody  
16 may say Sati Pratha is a part of the religion; somebody may say child marriage is a part of  
17 religion. So, he said that you will be nullifying all reformist actions which have been successful  
18 by way of laws, preventing all this. That was a very pertinent objection raised by Rajkumari  
19 Amrit Kaur, and she says "Article so-and-so of Mr. Munshi's draft was..."

20 My Lord, kindly now turn to page 13. PDF page would be 16. My Lord, I'm just making a  
21 reference nothing turns on that for the questions, but Sardar Harnam Singh said that you  
22 specifically clarify that right to carry a kirpan is a part of our religion, which was accepted, but  
23 that's what I have said. Then 27th of March '47, the subcommittee accepted Munshi's  
24 formulation of Anti-conversion Clause which was Clause 7. Same thing which I read was  
25 accepted. Then 31st of March '47, as I pointed out, Rajkumari Amrit Kaur on behalf of herself  
26 and Mrs. Hansa Mehta wrote to B.N. Rao, who prepared the first draft, it was Sir B.N. Rao,  
27 that Your Lordships aware, emphasizing that many oppressive practices i.e. child marriage,  
28 polygamy, untouchability are justified in the name of religion. They proposed narrowing the  
29 right of freedom of religious worship rather than broader practice of religion. Therefore, My  
30 Lord, she suggested that we should have... not have religion but some other word may be used  
31 so that earlier wrong practices may not come back. Your Lordships can skip that.

1 My Lord, please come to page 14, next page My Lord. "First Conjoint Draft Report of the Sub-  
2 Committee on Fundamental Rights was published. It contained Clause 16 and 23 on religious  
3 freedoms including right to profess and practice religion subject to order, morality and  
4 health." Kindly mark "propagate" was not there, it was only "practice and profess". "Rights of  
5 religious denomination to manage affairs and own property, prohibition on compulsory  
6 religious taxes, Anti-Conversion Clauses" that is 22 and so and so. Then see My Lord 16 is what  
7 is 25 today. That's the only thing which needs to be seen on this page.

8 **KANU AGRAWAL:** All persons are equally entitled.

9 **TUSHAR MEHTA:** "All persons are equally entitled...", please see My Lord. These words are  
10 introduced for the first time. Kindly pause here for a moment. Why am I insisting or  
11 emphasizing on this? My Lord, *Sabarimala* judgment reads that equally entitled includes  
12 gender equality. My submission is going to be on interpretation, gender equality is already  
13 taken care of in Article 14 and 15. They are equally entitled. For them, it need not be repeated.  
14 Why they are saying equally entitled? The framers were aware that we are dealing with a  
15 pluralistic society. And there is a discussion that one religion may not claim better rights than  
16 the other, merely based upon the numerical strength. And Your Lordships would also bear in  
17 mind, the date is 3rd of April, 1947, where My Lord the partition process had started,  
18 communal riots were taking place, and the framers of the Constitution were aware about the  
19 concern that one religion may, based upon their numerical strength, might try to get  
20 something more than the other religions. And therefore, they added the word "equally  
21 entitled". It has nothing to do with gender, it has something to do only and only with religious  
22 plurality of the country, accepting the situation prevailing on that day. Now, My Lord further.

23 **JUSTICE B.V. NAGARATHNA:** You're equally entitled to freedom of conscience?

24 **TUSHAR MEHTA:** Yes, so everything... man and women both are equally entitled to all  
25 fundamental rights, which is taken care of in 14 and 15. You need not repeat it, and therefore  
26 it is not a repetition on gender basis. It is introduced as a religious freedom so that one religion  
27 may not take or may not understand it to have been given more rights than another religion.

28 **JUSTICE B.V. NAGARATHNA:** Therefore, no religion is superior than the other.

29 **TUSHAR MEHTA:** Than the other, no religion is subservient, all are equal. It is My Lord  
30 manifestation of secularism. It has nothing to do with gender. "All persons are equally entitled  
31 to freedom of conscience and the right freely to profess and practice religion subject to public  
32 order, morality or health, and to other provisions of this chapter". My Lord, this also comes  
33 for the first time, but propagate word has so far not come. Now see the explanation (ii). (i) is  
34 regarding kirpan, we are not concerned. (ii), "No person..." I'm sorry. "The right to profess and

1 practice religion shall not include any economic, financial, political or other secular activities  
2 that may be associated with religious worship." So "worship" word continues. Earlier, My  
3 Lord, what was used was religion... I'm sorry, religious worship, which was objected to by  
4 Rajkumari Amrit Kaur and Hansa Mehta, but it continued which is subsequently changed, I'll  
5 come to know.

6 **JUSTICE B.V. NAGARATHNA:** The word "worship" is there in the Preamble also.

7 **TUSHAR MEHTA:** Yes, yes, it is there. It is there, but in the Fundamental Rights the  
8 objection was this that if you say religious worship, some of the reforms, which we have made  
9 might get nullified, because Constitution was being framed as that stage where there were  
10 statutory laws prohibiting Sati. Sharda Act was against child marriage restraint, etc., My Lord.  
11 So they would refer to Sharda Act also. Sharda Act is the name of the Act based upon the  
12 proponent of that act, but it was child marriage restraint act and their concern was genuine,  
13 but which is taken care of, subsequently.

14 My Lord, now please see page 17, the PDF 20, 10-04-1947. Earlier, Your Lordships have  
15 noticed states power to make a law for social reform was not there. It was only subject to public  
16 order, morality and health and other provisions of this part. So, it was kind of an unqualified  
17 right given. My Lord... Yes, My Lord 08-04-1947, constitutional advice that Your Lordships  
18 can skip. 14-04-1947, kindly come to the next page. "Alladi Krishnaswamy Iyer wrote another  
19 letter specifically suggesting a clause empowering the State to enact Social Welfare Legislation  
20 as suggested by Rajkumari Amrit Kaur and Mrs. Hansa Mehta. The relevant extract is  
21 reproduced here under." Incidentally, Mrs. Hansa Mehta was the wife of First Chief Minister  
22 of Independent Gujarat when Gujarat was separated, but she was a leader and an intellectual  
23 in her own right. She was there in the Constituent Assembly not because she was wife of Jivraj  
24 Mehta. Then My Lord kindly see the bold part.

25 **JUSTICE B.V. NAGARATHNA:** She has spoken extensively on...

26 **TUSHAR MEHTA:** Extensively.

27 **JUSTICE B.V. NAGARATHNA:** On how a Governor should perform under the  
28 Constitution.

29 **TUSHAR MEHTA:** Yes, My Lord, that is where My Lord the word constitutional morality  
30 came. Constitutional morality is a... I'll come to that, it's a separate chapter, it's a political  
31 doctrine as to how Government, constitutional functionaries they should behave, function,  
32 work. When there is constitutional silence, then there are certain constitutional conventions,  
33 and that convention is known as constitutional morality. My Lord, subsequently in the recent  
34 years, constitutional morality left that meaning and became a standard of judicial review,

1 which I will come to that, which was never conceived. Constitutional morality means this. It's  
2 how the constitutionally functionaries should function. And there is a material available that  
3 this is how they understood. Dr. Ambedkar also understood it in that context only, the famous  
4 speech which is being cited for constitutional morality. "To meet the point..." and then the  
5 suggestion is this. "To meet the point and explanation or proviso to the following effect may  
6 be added." Now, the suggestion of honourable two ladies, "the right to profess and practice  
7 religion shall not preclude the Legislature from enacting laws of social betterment and of the  
8 people." The wordings change, the spirit continued thereafter. Now it is something else that  
9 becomes Article 25(2)(b), particularly.

10 Then Your Lordships may come to next page, 16-04-1947. I'm skipping everything which is  
11 not relevant for Your Lordship's consideration, and therefore I'm trying to meet with the...  
12 "Report issued with revised clauses on Religious Freedoms, Clause 16 now guaranteed  
13 freedom of conscience, freedom of religious worship, and freedom to profess religion which  
14 are significant narrow... with a significant narrowing from the earlier practice. Clause 17 to 22  
15 addressed denominational rights, religious taxes..." etc. etc. Now My Lord, it becomes  
16 religious worship, correct, My Lords? I'm not reading it, it's only a transient provision which  
17 ultimately went into... went into some changes. Please come to page 19, PDF page 22. This is  
18 only, My Lord, to complete this. There were discussions that conversion should be permitted  
19 as a fundamental right, and therefore the word "propagate" should be added. This is what it  
20 says: "Sub-Committee of Minorities was formed, with Dr. S.P. Mukherjee as the Chairman.  
21 Mr. Ruthnaswamy pointed out..." I'm sorry "...pointed out that Christianity and Islam are  
22 essentially proselytizing religions, and the clauses should permit them to propagate them." My  
23 Lord, proselytizing means having the idea of converting people. That was one individual view,  
24 My Lord, before the Committee. "Dr. S.P. Mukherjee noted that the right to build places... "  
25 we are not concerned, My Lord. And then Your Lordships can kindly come to next page, 18-  
26 04-47. Now, My Lord, there is a change, the word "propagate" is introduced in the draft: "All  
27 persons are equally entitled to freedom of conscience and the right freely to profess, practice,  
28 and propagate religion, subject to public order, morality or health, and to other provisions of  
29 this Chapter, and that explanation to the words religious worship, religious practice should be  
30 substituted." Then, My Lord, rest may not be relevant, My Lord. On the bottom is, My Lord,  
31 recommendation for anti-conversion, etc.

32 Now come to the next page, 21, My Lord PDF page 23. "The clauses went for discussion and  
33 debate before a larger Advisory Committee. The discussion accepted the change to explanation  
34 (ii) from religious worship to religious practice." My Lord, therefore, the suggestions were  
35 again accepted. "Chairman Sardar Patel requested C. Rajagopalachari and Shri S.P. Mukherjee  
36 to draft a comprehensive clause allowing the legislature to intervene to reform and regulate

1 secular affairs... " only secular affairs, My Lord. "Their proposal was appending a new  
2 explanation stating that nothing in this right to practice religion shall debar the State from  
3 enabling laws for the purpose of social welfare and reform, and it was swiftly approved that  
4 any religion, the State can make a law for the purpose of reform or social welfare." This was  
5 approved, My Lord.

6 "The word "propagate" was taken up at the instance of Ruthnaswamy. Munshi and Iyer noted  
7 it was already covered by free speech guarantee, but G.B. Pant intervened and said, "at worst  
8 it is redundant, and it may not harm anyone to adopt it." The word was thus included."

9 Then Clause 17: "Several members, including Sardar Patel, Ambedkar, Munshi, and  
10 Rajagopalachari debated whether legislature ought to be allowed to prohibit religious bodies  
11 from holding property. Rajagopalachari offered a middle path, retaining the Clause but  
12 qualifying it with subject to general law." My Lord, this becomes 26(d) in a different format,  
13 but the same thing, the right to own and administer property, but not an unqualified right, as  
14 per the law. So the State can make the law. "The debate of Anti-conversion Clause 21 and 22  
15 between Shri S.P. Mukherjee, Bakshi Tek Chand, Frank Anthony, and Ruthnaswamy was  
16 settled by Sardar Patel's observation that forced and fraudulent conversion was already an  
17 offence under existing statutory law, and the matter was better left to the legislature."

18 My Lord, then please see next page. K.M. Munshi, rest may not assist Your Lordships on these  
19 questions. "There was discussion on this in the Minorities Committee; many things may not  
20 be exactly worship, but may be in the sense practice of that religion. You may have, for  
21 instance, the immersion procession of Ganpati.

22 It is not worship but practice of religion. If you go to the temple, it is worship, further than  
23 that it will be practice of religion. C. Rajagopalachari the second difference is the right of  
24 propagate... propagation comes under freedom of expression. There is a sharp difference of  
25 opinion on this whether worship alone, whether it may be, should be allowed, or whether  
26 practice should be included in our fundamental rights." My Lords, it was with a view to  
27 whether to widen it or not to widen it. Eventually, it was widened. Kindly My Lord turn to the  
28 next page 24. I'm not troubling Your Lordships... Your Lordships have it?

29 **CJI SURYA KANT:** Yes.

30 **TUSHAR MEHTA:** Did I miss the query?

31 **CJI SURYA KANT:** No.

32 **TUSHAR MEHTA:** I'm sorry. Please come to page 24. I'm just shuffling this through,  
33 because it may not have direct relevance, we'll read 25 textually and this is how it is interpreted  
34 in the judicial pronouncements. Now, please come to 27 instead of this. The rest may not have

1 any... This is regarding, of course, conversion. My Lord the Chairman ultimately puts it to vote  
2 and ultimately his decision. Somewhere in the 10th or 15th line from the bottom highlighted  
3 part, Chairman.

4 **CJI SURYA KANT:** "Consider these are matters."

5 **TUSHAR MEHTA:** "These are matters to be left to legislation with the concurrence of the  
6 House, Clause 21 was deleted which provided in a fundamental right chapter that conversion  
7 should be prohibited". Sardar Patel says this is a matter of legislature, it is already a penal  
8 offense. Let us leave it to a legislature. "We may take up Clause 22, this Clause 2 is unnecessary  
9 and may be deleted".

10 Now, My Lord please see next page Chairman's final verdict, that was forcible conversion.  
11 "Forcible conversion is no conversion. We won't recognize it." But ultimately he says that there  
12 are laws and there can be a law. There cannot... need not be a fundamental right either way.  
13 Then kindly come to 29.

14 **JUSTICE B.V. NAGARATHNA:** There is a difference between propagating religion and  
15 forcible conversion.

16 **TUSHAR MEHTA:** Converting.

17 **JUSTICE B.V. NAGARATHNA:** Here what is protected is propagation of religion.

18 **TUSHAR MEHTA:** Yes, not by force or inducement or by coercion, etc. That's exactly what,  
19 I didn't read it, but these were the words used by everyone that if you are converting someone  
20 because of force, inducement, threat, coercion, then it's no conversion at all. You can  
21 propagate, you can convince someone, you can say this is the better things of my religion etc.,  
22 My Lord. Now My Lord some questions, Your Lordships have framed one question, why was  
23 it opened only for Hindus? Article 25(2)(b) says that all Hindu religious places shall be open,  
24 all public religious places of Hindu religion shall be open for all sections. Your Lordships  
25 should get something in this.

26 1st May, 1947. "The Constituent Assembly meeting in New Delhi took up Sardar Patel's Interim  
27 Report on fundamental rights. Debate was relatively limited. K.M. Munshi moved to add a  
28 specific provision that religious freedom will not prevent laws for throwing open Hindu  
29 religious institutions of a public character..." I'm reading page 29, PDF 31... 32.

30 **JUSTICE M.M. SUNDRESH:** The top.

31 **TUSHAR MEHTA:** I'll read again. "The Constituent Assembly meeting in New Delhi took  
32 up Sardar Patel's Interim Report on fundamental rights. Debate was relatively limited. K.M.  
33 Munshi moved to add a specific provision that religious freedom will not prevent laws for

1 throwing open Hindu religious institutions of a public character to all classes and sections of  
2 Hindus directly targeting exclusion of Dalits and lower caste from the people." This was the  
3 idea, because we unfortunately were living in a society where one particular part of Hindu was  
4 not permitted to be a part of the broader Hindu denomination by denying them the right to  
5 worship. Again, this had nothing to do with gender. In the last decade or so there is a  
6 jurisprudence which is developed where every constitutional provision will have to be seen  
7 from the lens of gender; all provisions are not. There is no discrimination. 14 - All genders are  
8 equal. 15 - Irrespective of sex, all fundamental rights are equal. This was My Lord that era-  
9 specific provision, that if it is a public temple or a public religious institution, it should be open  
10 for all. We must deal... My Lord, do away with this untouchability etc., etc. Section within the  
11 section, etc., which was very rightly accepted. I'm highlighting because not one judgment has  
12 said that this is to ensure that even women can enter. Women were entering all temples, I'll  
13 come to that, My Lords.

14 Then next page, last part. Why "section thereof" word was used? In the... so far Your Lordships  
15 have seen Article 25 did not have the word "section thereof", it was only "religion". Now it  
16 comes because K.M. Munshi all were visionaries, Alladi Krishnaswamy Iyer, K.M. Munshi.  
17 There were many, if I name I would be doing injustice to some other people, but K.M. Munshi.  
18 "Sir, I move an amendment that in Clause 14, the word or a "section thereof" be added between  
19 the word "denomination" and the word "shall". It was felt that the use of the term religious  
20 denomination may prevent a section of a denomination from being protected."

21 My Lord, no judgment has noticed this part. **Sabarimala** does not notice even the expression  
22 "section thereof". It says that Sabarimala or Ayyappa Swamy is not a denomination at all, that  
23 temple is not a denomination because it is a larger part of Hinduism, so no protection under  
24 25, 26. Therefore, I gave an example of Ajmer Dargah where everyone goes. It's a section  
25 thereof. In Shirdi everyone goes, it's a section thereof. In Tirupati Balaji all Hindus go;  
26 Shaivites, Shakteties, Vaishnavites, everyone goes, but it is a denomination because it takes  
27 care of faith and belief of a section of the Hindus. So, "denomination" and a "section thereof",  
28 that was suggested and no judgment takes My Lord, at least Sabarimala does not even notice  
29 while holding that Sabarimala is not a denomination because it is a... Hindus also go and  
30 Muslims also go and I can give 50 examples of shrines, places, dargah where all community  
31 people go or places where... for example Shrinathji, it is essentially a Vaishnavite  
32 denomination but Shaivites also go, Shaktya Sampradaya also go, every sampradaya goes. So  
33 you cannot say that it is ultimately Vaishnava denomination and therefore it would not get the  
34 protection of 25 and 26, therefore the word "section thereof".

35 Page 32 in this court. My Lord, I'm sorry if I'm going a little... In case of Dargah Committee,  
36 that is Ajmer, the five judge Honourable... five judges Bench of this Honourable Court did hold

1 that it is a denomination, and it is rightly held. One of the reasons why it was referred to was  
2 this anomaly, that, why how can you.. it's a section thereof, why are you not doing it? The only  
3 problem with Dargah Committee was, for the first time it introduces essential religious  
4 practise doctrine and it goes to the extent of saying that not only essential religious practice,  
5 your superstition is not protected by 25 and 26. Nobody says superstition should be protected,  
6 but who will decide whether it is a religious practise or a superstition? Courts certainly cannot  
7 decide. If it is a superstition, I'll give Your Lordships, I've compiled laws which prohibits  
8 superstitious acts under Article 25(2) (b), Social Reform. There are acts against black magic,  
9 against several... I'll give the list of laws. So superstition can never be a test for deciding  
10 whether it's an essential religious practise. My Lord, kindly see, practically if some particular  
11 practise comes before Your Lordships, My Lords will have to first decide whether it is a  
12 religious practise or not. How can that be decided? You'll have to interpret the concerned  
13 religious text. Concerned religious text would be interpreted by several scholars, by what we  
14 call in Hinduism, Bhasiya. Bhasiya is a commentary, several commentaries. If Holy Quran has  
15 Hadiths, have several other documents. You will have to examine all in juxta position and try  
16 to understand what is meant when it was written, which is now the sacred text, which is  
17 impossible. We also will not be able to assist...

18 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Mehta, are you suggesting that at a certain  
19 point of time at a certain stage the Court may not enter the domain of deciding the essentiality,  
20 which probably would be a little bit more than what the Court, could be asked upon to  
21 interpret?

22 **TUSHAR MEHTA:** My Lord, I am on a judicial review that this is a domain which may  
23 perhaps not fall within the judicial review domain, irrespective of the religion.

24 **JUSTICE JOYMALYA BAGCHI:** Mr. Mehta, there is a difference in the nature of the  
25 proceeding in which the question of a religion, religious practice or not an essential religious  
26 practice may lie, don't only see it from the narrow compass of Article 32 or 226, it may be in  
27 the form of a Civil Suit also.

28 **TUSHAR MEHTA:** That is one of my submissions. As I go further, Your Lordships would  
29 find I have not pitched my submission at a higher threshold, and...

30 **JUSTICE JOYMALYA BAGCHI:** If your proposition is taken to a logical conclusion, then  
31 Courts are not essentially experts in matters of science, but the Evidence Act empowers the  
32 Court to examine the opinion of experts and become an expert of experts.

33 **TUSHAR MEHTA:** Correct. And take assistance, that's why one of the...

1 **JUSTICE JOYMALYA BAGCHI:** 33... or 32 customs, usages, practices. There is a provision  
2 in which the law permits the Court to use objective parameters to come to correct subjective  
3 decisions in the facts of each case, as to whether it is a longstanding practice, usage or not.

4 **JUSTICE M.M. SUNDRESH:** Probably... probably the different... the difference is here,  
5 science is based upon logic and reasoning primarily, whereas religion is based upon belief.

6 **TUSHAR MEHTA:** Faith and belief. My Lord, there are two answers and I'll come to that.

7 **JUSTICE M.M. SUNDRESH:** And in the opposite, they can go into the aspect touching  
8 upon belief.

9 **TUSHAR MEHTA:** Yes.

10 **JUSTICE M.M. SUNDRESH:** It is our little understanding, as you rightly said, without  
11 the...

12 **TUSHAR MEHTA:** I am going to address little in detail on essential practice. Why I  
13 highlighted is, first Your Lordship will have to decide what is religion. Then second, it would  
14 be whether it is essential part of the religion, which would be very, very difficult and if I am  
15 permitted to say difficult to decide. And third, Your Lordship will have to say whether this  
16 needs examination or not I have devoted one... two page chapter on this that even if it is  
17 necessary... Kindly give me a minute.

18 **JUSTICE JOYMALYA BAGCHI:** My question is not a *koi* opinion in any way, I would just  
19 want some...

20 **TUSHAR MEHTA:** Understood. My Lord, it's just that...

21 **JUSTICE JOYMALYA BAGCHI:** It's alluding to say... you enlighten.

22 **TUSHAR MEHTA:** Elucidate?

23 **JUSTICE JOYMALYA BAGCHI:** Yes.

24 **TUSHAR MEHTA:** My Lord, what has happened is there is...

25 **JUSTICE JOYMALYA BAGCHI:** Because, there is a difference between an opinion as to  
26 faith and the faith perceived. One can have a particular faith, but whether that faith... opinion  
27 exists in that denomination or not, can be separate from the testing of what is the faith itself.

28 **TUSHAR MEHTA:** My Lord, I would answer My Lord, when I come to that, but my  
29 immediate response is this that...

30 **JUSTICE JOYMALYA BAGCHI:** Because a religious head says this is my faith and the  
31 followers abide by that. The fact that this is my faith stated by the religious head is something

1 which is within the domain of the Court to apply the appropriate forensic criteria or tools to  
2 decide. But whether that faith actually exists or not is for the religious head to decide.

3 **TUSHAR MEHTA:** Rationality or scientific nature of it cannot be gone into, I bow. That's  
4 correct, that's a correct approach. My Lord, what I have suggested as I go further that there  
5 are two things, that Your Lordships can decide...

6 **JUSTICE JOYMALYA BAGCHI:** We are fully conscious that when we see Article 25,  
7 Article 26, it is an unique capsule which must be seen in contradistinction to fundamental  
8 duties of scientific temper.

9 **TUSHAR MEHTA:** Correct.

10 **JUSTICE JOYMALYA BAGCHI:** Because there may be a faith in the existence of an all-  
11 encompassing omnipotent power which is scientific temper or scientific experiments may not  
12 divulge or ravel-unravel as of now. That may not be a question which Courts will ever enter  
13 into. But whether such a faith existed amongst the members of a particular denomination or  
14 a part of denomination, can be an issue framed in a suit between two groups or even  
15 intergroups as such.

16 **TUSHAR MEHTA:** I am fully in respectful agreement, but not the question whether it is  
17 essential part or not. And second and I don't want to jump the gun, there is a separate chapter.  
18 If it is found to be by a legally trained mind, either unscientific or illogical, the... only a minute,  
19 only a minute.

20 **JUSTICE JOYMALYA BAGCHI:** Merely relevant at all when we come to faith.

21 **TUSHAR MEHTA:** Only a minute, My Lords. Your Lordship finds that this is something  
22 unscientific, not palatable or something, the remedy is for the legislature under the social  
23 reform.

24 **JUSTICE JOYMALYA BAGCHI:** Social reform. Right.

25 **TUSHAR MEHTA:** Second, I have also devoted one chapter that in case if it is required to  
26 be gone into whether this is a religious practice at all, the remedy would be a civil suit where  
27 the parties can lead evidence, examine Expert Witnesses, Experts on the subject, which will  
28 have the... the court will have the assistance of those Expert Witnesses, and based upon the  
29 totality of the facts, the court would examine whether this is religion or not. It cannot be that  
30 on... there is nothing in Affidavit which satisfies us that this is an essential religious practice.  
31 That is done. This is a part of judicial review, therefore My Lord, I'm not for a second saying  
32 that 32 or 226 would never apply, I'm only on the extent of judicial review.

1 **JUSTICE JOYMALYA BAGCHI:** So, we understand your submission is not on justiciability  
2 but the forum at which the...

3 **TUSHAR MEHTA:** No, justiciability also. And I will My Lord make my submission.

4 **CJI SURYA KANT:** You will make.

5 **TUSHAR MEHTA:** Yes. Justiciability also My Lord, that's, I must make it clear, it may meet  
6 with Your Lordship's acceptance or not, but justiciability, and in most of the cases, the forum  
7 also. Suppose, for example, in some religion some person claims that rite of human sacrifice  
8 has been a practice in our religion, and it is an essential religious practice. He comes before  
9 Your Lordships under 32. No evidence is needed. If some example comes before Your  
10 Lordships which directly hits either public health... public order, health or morality, Your  
11 Lordships would not be required to go into whether it is religious or not, whether it is an  
12 essential part or not, and Your Lordships can say, no, this is contrary to morality. I can have  
13 for example... any, I don't want to give examples which are immoral examples.

14 **JUSTICE M.M. SUNDRESH:** So we take it. So let us take this *Sabarimala* case. Rules  
15 are also challenged. There is... there is a forum by which rule can be challenged. So, 226, you  
16 can always do it, but according to you, if you can reframe what you are saying, the power of  
17 judicial review over the Constitution or that rule is rather limited accordingly.

18 **TUSHAR MEHTA:** Yes.

19 **JUSTICE M.M. SUNDRESH:** To that extent we can put it, notwithstanding whether the  
20 suit is available, suit also can be filed, challenging that.

21 **TUSHAR MEHTA:** And it can...

22 **JUSTICE M.M. SUNDRESH:** With all due respect it also can be filed.

23 **TUSHAR MEHTA:** It can be checked...

24 **JUSTICE M.M. SUNDRESH:** But you can say that, court repeats [UNCLEAR]. Certain  
25 areas you can venture into like competency and other things...

26 **TUSHAR MEHTA:** Yes. Legislative competence, Arbitrariness...

27 **JUSTICE M.M. SUNDRESH:** But court cannot substitute itself, with the... with availability  
28 of material and then how it can be done.

29 **TUSHAR MEHTA:** And based on Affidavits that it is a religion, no religion, it's not a part of  
30 religion. Whether it is essential or not that is something a second guess which may be done in  
31 given circumstance. Suppose cannibalism, somebody says that cannibalism is a part of my  
32 religious practice, it's immoral. Your Lordship doesn't need to undertake any theological

1 exercise. My Lord, in Pakistan, and some other countries there are the courts, what is called  
2 My Lord are ecclesiastical courts, which are especially... constitutionally created courts  
3 where...

4 **JUSTICE M.M. SUNDRESH:** Rather we can go into the decision-making process, but not  
5 on the... on the decision...

6 **TUSHAR MEHTA:** Merit review is not permitted. That's what my submission is, in a  
7 different format I'll make it good but in these courts which are constitutional federal courts,  
8 the judges are having legal expertise as well as Ulemas. They sit together and decide whether  
9 it is a part of religious practice and whether, if at all, if required it's an essential part of religious  
10 practice.

11 **JUSTICE B.V. NAGARATHNA:** See, in other words, if there is a social ill which is being  
12 branded as a religious practice, the court can certainly distinguish between the two. A social  
13 ill or an evil and an essential practice of religion.

14 **TUSHAR MEHTA:** My Lord, essential practice is a separate issue. But if it is a social evil,  
15 the answer can be yes...

16 **JUSTICE B.V. NAGARATHNA:** Because, many social evils are given a religious colour, but  
17 the court can always distinguish it.

18 **TUSHAR MEHTA:** Certainly, but I'm... but the real answer in law. The constitutional answer  
19 would be the remedy even in case of an evil, would be 25(2)(b).

20 **JUSTICE B.V. NAGARATHNA:** Yes.

21 **TUSHAR MEHTA:** Which says for social welfare and reform the Legislature can legislate.

22 **JUSTICE B.V. NAGARATHNA:** Correct.

23 **TUSHAR MEHTA:** And there are legislations, which I will show, that they are... the  
24 Legislatures are not passing such laws. I'll just finish this and...

25 **JUSTICE B.V. NAGARATHNA:** Article 25 is a balance between what was existing and what  
26 has to be done in future. What has to be done in future is left to the Legislature, but the  
27 Constitution also tries to preserve what is already existing in Article 25.

28 **TUSHAR MEHTA:** I'll go a step further.

29 **JUSTICE B.V. NAGARATHNA:** One, overarching i.e. it is subject to public order, morality  
30 and health when it comes to freedom of conscience...

31 **TUSHAR MEHTA:** And Part 3.

1 **JUSTICE B.V. NAGARATHNA:** And propagating.

2 **TUSHAR MEHTA:** And Part 3.

3 **JUSTICE B.V. NAGARATHNA:** Yes.

4 **TUSHAR MEHTA:** In 25... Part 3.

5 **JUSTICE B.V. NAGARATHNA:** All the conditions of Part 3?

6 **TUSHAR MEHTA:** Correct. Even if there is a practice which is in vogue at the time the  
7 Constitution came into force, even that can be subject matter of 25(2)(b), reform law or for  
8 social welfare. Something which may be not good for the society or may be bad for the society  
9 and continued can still be reversed by the Legislature by preventing it, regulating it,  
10 prohibiting it whichever way the legislative wisdom goes. Now, My Lord, kindly come to page  
11 34. I'm just going to quickly run through and come to *Shirur Mutt*. This is conversion, I'm  
12 not reading it, kindly treat it as read. Ultimately they say, "that send back to the Advisory  
13 Committee," and Advisory Committee comes back and it says that it is an evil, but let... it is  
14 already penalized and it can be penalized, that's all.

15 Now please come to page 38, the PDF would be 41. Now any class or sections of Hindus. My  
16 Lords, please bear this in mind, right now, when I read 25 and 26. Your Lordships may have  
17 the background on why these were added, that's the purpose. This is the note which I've said...  
18 This is the note of Sir B.N. Rao, not our note in the... in our Written Submission. Sir, note part  
19 of the debate... of the record. "The expression any class of sections of Hindu or class section of  
20 Hindus used in subsection (b) of Clause 2 of Article 19 will not prevent the making of any law  
21 for throwing open Hindu religious institutions of a public character to all classes and sections  
22 of Hindus. There is, however, no objection to the amendment. Discrimination on the ground  
23 of caste, etc. is forbidden by Article 9, which is 17 now." My Lord, *Sabarimala* says that all  
24 sections of Hindus were introduced so that it is gender specific. It is not gender specific. As a  
25 matter of fact, I'm sorry, but one opinion in *Sabarimala* says that Article 17 applies to  
26 women. You are treating women as untouchables; that's the opinion, one opinion, My Lord.  
27 That's something I have a very, very strong exception to it. Therefore, I am insisting, all  
28 sections of Hindus had the background of all castes, not gender. My Lord, India is not that  
29 patriarchal or a gender stereotype society as the West understands. Sometimes that's the  
30 problem. It's not...

31 **JUSTICE B.V. NAGARATHNA:** The question of untouchability has its own history in India  
32 and therefore to get over that Article 17 was made a Fundamental Right. Untouchability in the  
33 context of the *Sabarimala*, I don't know how it will be argued.

- 1 **TUSHAR MEHTA:** It can never be justified on untouchability. It can... I'm putting that  
2 straight.
- 3 **JUSTICE B.V. NAGARATHNA:** Speaking as a woman I can say there can't be three day  
4 untouchability every month and on the fourth day there is no untouchability.
- 5 **TUSHAR MEHTA:** I understand. I'm not on menstrual things.
- 6 **JUSTICE B.V. NAGARATHNA:** Let us go by the hard realities.
- 7 **TUSHAR MEHTA:** But entry of women.
- 8 **JUSTICE B.V. NAGARATHNA:** The other aspect is the main question.
- 9 **TUSHAR MEHTA:** We fully agree with this.
- 10 **JUSTICE B.V. NAGARATHNA:** Speaking as a woman, Article 17 cannot apply for three  
11 days, and on the fourth day there is no untouchability.
- 12 **TUSHAR MEHTA:** I have no issue or dispute with that. **Sabarimala** I will defend in my  
13 own different way without **Sabarimala** does not mean four days, **Sabarimala** means a  
14 particular age group and let us be very clear if there is any confusion in anyone's mind. Lord  
15 Ayyappan temples throughout the world are open for all sections of ladies, except one  
16 particular section... My Lord, temple. My Lord, which is a *sui generis* case, which is a *sui*  
17 *generis* case. There are three temple, Lord Ayyappan temples in to my knowledge in New Delhi  
18 all, right from child till old women everyone goes and worships, it is only one temple. My Lord  
19 there can be a denomination and denominational practices which we have to respect. My Lord,  
20 everything is not relatable to human dignity or individual body freedom. My Lord, if I go to a  
21 Mazhaar or if I go to a Gurudwara, if I have to cover my head, I cannot say that where is my  
22 dignity? You are taking away my right of choice. This is what **Sabarimala** says. Your right of  
23 choice is taken away, your autonomy is taken away. It's not taking away of the autonomy, it is  
24 respecting the tenets, the faith, the belief of that religion. When we go to Ajmer Sharif, we do  
25 wear... we do cover our heads, when we go to a Gurudwara, we do cover our heads, and nobody  
26 says that this is bodily integrity, which is... But this is My Lord has snipped in. There is a new  
27 My Lord jurisprudence which is developed. I'll bring Your Lordships attention to that. But it's  
28 saying this My Lord, all sections of Hindus is meant to mean no caste based discrimination.
- 29 **JUSTICE JOYMALYA BAGCHI:** That is the first question, Mr. Solicitor, that is the first  
30 question that 26 reserving the right of religious practice or managing religion by a  
31 denomination...
- 32 **TUSHAR MEHTA:** Religion affairs, My Lords.

- 1 **JUSTICE JOYMALYA BAGCHI:** Prevails over 25 that is the right of every individual to  
2 conscience and to practice, so there is a stratification of 25 and 26, with 26 supervening 25  
3 rights.
- 4 **TUSHAR MEHTA:** My Lord, there is divergence of view.
- 5 **JUSTICE JOYMALYA BAGCHI:** No, that is what you are trying to; I'm just trying to  
6 formulate what if you are trying to respond to the first question.
- 7 **TUSHAR MEHTA:** I will come to that, but immediate answer is this.
- 8 **JUSTICE JOYMALYA BAGCHI:** That it is supervening 25.
- 9 **TUSHAR MEHTA:** No, no, that's not my... My Lord, therefore I said, I am not raising any of  
10 my arguments at a plain which becomes...
- 11 **CJI SURYA KANT:** So far you have not raised any argument, you are only...
- 12 **TUSHAR MEHTA:** Yes, this is historical background, but my answer immediate answer and  
13 I will finish this. 26(b) is not a standalone island, it will have to be read with 25 and other parts  
14 of the Constitution also. Now, today, My Lord, after *Coelho*, after My Lord *T.M.A. Pai* and  
15 after *R.C. Cooper*, we cannot say that any fundamental rights is an island and it cannot take  
16 colour from any other fundamental right. Article 25 and 26 also will be governed by 14 and 15,  
17 that is; no gender-based discrimination. I'm not pitching it high. *Sabarimala* is a *sui generis*  
18 case on facts I'll decide.
- 19 **JUSTICE JOYMALYA BAGCHI:** That is the difference. 25 makes it expressly subject to  
20 other...
- 21 **TUSHAR MEHTA:** I'll come to that.
- 22 **JUSTICE JOYMALYA BAGCHI:** 26 is unshackled.
- 23 **TUSHAR MEHTA:** Unshackled.
- 24 **JUSTICE JOYMALYA BAGCHI:** 26 unshackled.
- 25 **TUSHAR MEHTA:** Yes, that is a possible view, My Lord that. But there is a view on this side  
26 that it should be a separate island, 26 is unfettered by any provisions.
- 27 **JUSTICE JOYMALYA BAGCHI:** You are not putting it that high?
- 28 **TUSHAR MEHTA:** I am not putting it My Lords, it would be unfair to putting it that high,  
29 that one article of any fundamental right chapter can be an island and we can do anything we  
30 want. That's My Lord, my...

1 **JUSTICE JOYMALYA BAGCHI:** Not anything, it's object to [INAUDIBLE] and health.

2 **TUSHAR MEHTA:** Of course, of course and not Part 3, not Part 3.

3 **JUSTICE JOYMALYA BAGCHI:** Definitely not cannibalism as you say.

4 **TUSHAR MEHTA:** There are some arguments on our side, there are some arguments on  
5 our side which says that 26(b) cannot be read even with 25(2)(b). Even there cannot be any  
6 law for social reform or My Lord, which takes away 26(b), right? Which according to me is too  
7 high interpretation to be given. Now My Lord, I'm through with this I'm not ultimately it comes  
8 to what 25...

9 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Mehta, probably you will have to also  
10 address because we should not stretch the consideration to a point where we consider all Lord  
11 Ayyappa temples in one frame, this has to be specifically with only one as you said that all  
12 others this is not the restriction, it is only in one special temple.

13 **TUSHAR MEHTA:** That's not my submission. My submission is that 25 and 26, as My Lords  
14 have used the word is a "capsule". It will have to be read together. And 26 also may take colour  
15 from other fundamental rights. I am saying...

16 **JUSTICE AHSANUDDIN AMANULLAH:** I'm not with what brother...

17 **TUSHAR MEHTA:** I'm only saying *Sabarimala* is a *sui generis* specific case. There may  
18 be other temples having their temple specific peculiarities and...

19 **JUSTICE AHSANUDDIN AMANULLAH:** This has to be specific to that.

20 **TUSHAR MEHTA:** I'm saying *Sabarimala* I'm not right now touching, it's a gender... it's  
21 a *sui generis* case, I'm not saying. There may be other temples also where there are some... for  
22 example, this is attribute of a deity. In Ayyappan Swami case, it's an attribute of a deity. How  
23 would we judicially examine? Can an attribute of a deity be ever subject matter of a judicial?  
24 I'll come, I'll come to that. Please come to...

25 **JUSTICE M.M. SUNDRESH:** The mere practice it is indeed, it is connected to the belief.

26 **TUSHAR MEHTA:** Faith and belief both.

27 **JUSTICE M.M. SUNDRESH:** For it will be a little bit more.

28 **TUSHAR MEHTA:** Yes, My Lord. My Lord, therefore kindly now come to 25 and 26, and  
29 then I'll directly come to *Shirur Mutt*. 25: First see the title of the chapter - "Right to  
30 Freedom of Religion". My Lord, the title of... subtitle of Part 3 is "Right to Freedom of  
31 Religion", correct My Lords? Now 25: "Freedom of Conscience and Free Profession practice  
32 and propagation of religion subject to public order, morality and health and to other provisions

1 of this part". My Lord, it is specifically made subject to Part 3. "All persons are equally  
2 entitled...", "equally" is a manifestation of secularism, I would say, "to freedom of conscience  
3 and right freely to profess, practice and propagate religion." So, first word which is used is  
4 "religion". Then (ii). "Nothing in this Article shall affect the operation of any existing law or  
5 prevent..." with Your Ladyship, My Lords?

6 **CJI SURYA KANT:** "Prevent this state from..."

7 **TUSHAR MEHTA:** Yes, My Lord, "Nothing in this Article shall affect the operation of any  
8 existing law or prevent the state from making any law (a) Regulating or restricting any  
9 economical, financial, political or other secular activity which may be associated with religious  
10 practice". Now please see, this is practice of religion. First is religion, second is while you  
11 practice the religion, there may be something which is either economical, financial, political  
12 or secular, and that can be regulated or restricted by the state. Now (b). "Providing for...", this  
13 again is a right or negatively couched provision that state is not prevented from doing what,  
14 "Providing for social welfare and reform". My Lord, this is the power specifically conferred,  
15 and this in my submission is not confined to any religion. Now second part, "or", which is  
16 disjunctive, "throwing open of Hindu religious institutions of a public character to all classes  
17 and sections of Hindus". I have already pointed out that is a caste specific intention being  
18 reflected. So, for all religions there can be a law either providing for social welfare or providing  
19 for reform, and all religious places nobody can say that one particular caste will not be able to  
20 enter temple of another caste. Forget 17, I'm taking a little broader version... vision. There can  
21 be a possibility unless we read it this wise, that one temple of one particular denomination,  
22 say X caste of Hindus, may prevent another section of another class of Hindus who are not  
23 protected by 17. We will be dividing the society if we read it that way. Therefore, I am not  
24 reading.

25 **JUSTICE AHSANUDDIN AMANULLAH:** I didn't get that. It's not very clear, your  
26 submission.

27 **TUSHAR MEHTA:** Yes, I'll again point out, I'll make myself clear. My Lord, I'm explaining  
28 why there is a mandate that you can make a law for social welfare and reform for all religions,  
29 no dispute, there cannot be any dispute. Why the word used is "throwing open of Hindu  
30 religious institutions of public character to all classes and sections of Hindus". It has a noble  
31 idea and the interpretation which I am trying to give is that forget those who are covered by  
32 17, schedule caste persons who were traditionally earlier not permitted to enter the temple. It  
33 is not mentioned in this provision that it is only confined to permitting Clause... Article 17  
34 people. Why? Unless we take that view. My Lord, both of us are Hindus. I belong to a particular  
35 denomination, he belongs to another denomination, there is a temple of my denomination, he

1 is not covered by 17, he is not a Dalit, but let me put it straight, he is not a scheduled caste  
2 person and because... But for this, I can prevent him also. There would be division amongst  
3 Hindus. There can be a division *inter se* Muslims. That is why... but Muslims would not come  
4 because this is only for Hindu religious institutions. Unless we give this interpretation, there  
5 would be a serious, serious danger and apprehension of society being again divided on caste  
6 basis, not based on Dalits versus non-Dalits and power is with the Legislature.

7 **JUSTICE AHSANUDDIN AMANULLAH:** So there are two words used, class and section,  
8 there are two words there.

9 **TUSHAR MEHTA:** Class and sections, two words to make it very clear that suppose there  
10 are, there can be more than one category of the Dalits. So class is Dalit, but there can be other  
11 sections that Dalits will permit but a category of Dalit we will not permit. It can be different...

12 **JUSTICE B.V. NAGARATHNA:** Backward clause under Article 15(4) socially and  
13 educationally backward...

14 **TUSHAR MEHTA:** No, My Lord, no. Let's suppose we say it may be suppose occupation, for  
15 example, that Dalits are permitted, but those who are doing that are activity of manual  
16 scavenging will not be permitted, or those who are dealing with leather of the dead animals  
17 will not be permitted. Therefore, to be on the safer side, they say that all classes and sections  
18 of...

19 **JUSTICE AHSANUDDIN AMANULLAH:** Pointedly your argument is that caste and  
20 section cannot mean and include gender.

21 **TUSHAR MEHTA:** Gender, yes, yes, it's overarching...

22 **JUSTICE AHSANUDDIN AMANULLAH:** It excludes gender.

23 **TUSHAR MEHTA:** And it's... I am not saying that that means gender can be prohibited, that  
24 is but...

25 **JUSTICE AHSANUDDIN AMANULLAH:** But this would not...

26 **TUSHAR MEHTA:** Would not... it's not intended for that, it is intended for the caste  
27 situation existing in 1947 when the Constitution was framed. The gender equality is already  
28 there under 14 and 15, that you cannot discriminate based on sex.

29 **JUSTICE M.M. SUNDRESH:** There should be a public character. Institutions must be of a  
30 public character.

31 **TUSHAR MEHTA:** Public character, yes, yes. There are some private temples. There are  
32 private temples in this country. Therefore the framers of the Constitution have risen from the

1 rank, they have played on Indian streets, they knew the hard realities of life that what is  
2 happening in the society and they were giving a Constitution which deals with all these issues,  
3 that there are private temples, public temples, one particular caste is not permitted in some  
4 particular temples etc., etc., and therefore this was a reformist move specifically by the  
5 constitutional makers, leaving rest of the reforms for other communities including Hindus,  
6 other religions, including Hindus to the state.

7 **JUSTICE B.V. NAGARATHNA:** The form of assimilation of Hindu societies.

8 **TUSHAR MEHTA:** Yes, and no...

9 **JUSTICE B.V. NAGARATHNA:** You see, divisions within Hindu society...

10 **TUSHAR MEHTA:** And preventing discrimination, these were... My Ladyship is right. These  
11 were the two things. Then My Lord explanation (i) we are not concerned Kirpans. Then (ii)  
12 also we are not concerned. It says Hindus include Sikhs, Buddhists, Jains, etc. it's not a  
13 question of dispute. Now see 26. "Freedom to manage religious affairs subject to public order,  
14 morality and health." Your Lordships are right. It specifically absent. There is a conspicuous  
15 absence of textual words, other provisions of this part. So, it is capable of reading in two ways  
16 that it is a standalone island provision. It is not shackled or inhibited by anything in either  
17 Article 25 or any other fundamental right. Second, interpretation which I personally subscribe  
18 to and I assist Your Lordships with is that 26 in the present day, the way jurisprudence has  
19 developed, jurisprudence says that no article in Part 3 is an island. It is always to be understood  
20 with some other Articles of the Constitution, other fundamental rights. That's how what they  
21 call harmonious construction. That's what *Devaru* judgment does. Yes. Thank you. That's  
22 what the other side agrees with me. I immediately on my alert there is something seriously  
23 wrong in my argument but yes.

24 **JUSTICE JOYMALYA BAGCHI:** No, there should be harmony also between both sides,  
25 yes.

26 **TUSHAR MEHTA:** But here we are...

27 **JUSTICE JOYMALYA BAGCHI:** No one is island.

28 **TUSHAR MEHTA:** No, otherwise. This was on a lighter side, because no one here should be  
29 arguing for succeeding or losing. We are assisting Your Lordships to answer questions, and  
30 those answers, which have large-scale ramifications for decades to come, therefore, it has to  
31 be the assistance rather than any adversarial thing.

32 Now please see: "Subject to public order, morality and health, every religious denomination  
33 or any section thereof shall have the right - (a) to establish and maintain institutions for

1 religious and charitable purposes; only these two." Earlier, My Lord, the term "religious,"  
2 which was used in the then 30, is deleted now. "(b), to manage its own affairs in matters of  
3 religion." This is My Lord what is falling for Your Lordships 'consideration. But (c) and (d)  
4 Your Lordships may read, because **Shirur Mutt** was dealing with (d): "to own and acquire  
5 movable and immovable property - no dispute, to administer such property in accordance with  
6 law." So, this is, My Lord, shackled by one condition: that if there is a law prescribing your  
7 administering the property, your right to administer the property would be in accordance with  
8 law, if made. Correct, My Lords?

9 This is the textual meaning. Now let us My Lords start with **Shirur Mutt**, how this is My Lord  
10 considered in **Shirur Mutt**. The relevant parts I have quoted for Your Lordships.

11 **JUSTICE B.V. NAGARATHNA:** Solicitor General, in the context of the **Sabarimala**  
12 controversy, how Article 26 is relevant?

13 **TUSHAR MEHTA:** My Lord, their argument was... I'll just answer. The argument was that  
14 it is a denomination. 26, as Your Ladyship has noticed, is a denominational right.

15 **JUSTICE B.V. NAGARATHNA:** We agree that it is a denomination, but it applies that the  
16 temple is open to all Hindus and not related to a particular sect or something like that.

17 **TUSHAR MEHTA:** Argument was that it is a denominational temple and therefore 26 would  
18 apply. The court held that it is not a denomination without noting "section thereof", saying  
19 that it's a Hindu temple ultimately "section thereof" is not. (b) was placed into service to say  
20 that it is the right of this denomination to manage my affairs, and managing the affairs means  
21 that there is a faith and belief that particular gender of particular age group would not be  
22 permitted. So, the court said that first it is not a denomination and it says that 26(b) is given  
23 an expansive meaning. My Lord, I'll come to that.

24 **JUSTICE B.V. NAGARATHNA:** 26 does not apply, if they say, if they held; majority held.

25 **TUSHAR MEHTA:** It was not necessary to go into the second question, I agree.

26 **JUSTICE B.V. NAGARATHNA:** There is no need of Article 26 being applied...

27 **TUSHAR MEHTA:** My Lord, they have also...

28 **JUSTICE B.V. NAGARATHNA:** ...for so to say.

29 **TUSHAR MEHTA:** My Lords, I'm sorry but there are 20-30 pages written on Article 17.  
30 What is the meaning of Article 17? I'll come to that, I have a serious views on some of the  
31 paragraphs and I'll...

32 **JUSTICE M.M. SUNDRESH:** We need not go to **Sabarimala**.

1 **TUSHAR MEHTA:** No, we are not going to... not *Sabarimala*, not *Sabarimala*.

2 **JUSTICE M.M. SUNDRESH:** We are trying to understand. 25 deals with the... with the  
3 temples Hindu temples of public character, 26 deals with the denomination [UNCLEAR]. Only  
4 commonality is that both of them will make clear that is they are subject to public order,  
5 morality and health.

6 **TUSHAR MEHTA:** Correct, My Lords.

7 **JUSTICE M.M. SUNDRESH:** You that travel on that they are on different channels.

8 **TUSHAR MEHTA:** I'm not... I'm not on... I'll not argue review on *Sabarimala* but the  
9 journey of judicial evolution from *Shirur Mutt* ends at *Sabarimala*. So in that process I'll  
10 read *Sabarimala* that's all, not for review, this is how there is a shift.

11 **CJI SURYA KANT:** Mr. Solicitor, request from the nine judge bench, to seven questions are  
12 there, at least Question No. 2 and 3 they directly pertain to Article 26 also. Therefore,  
13 essentially arguments will have to come from both sides on 26 also, and probably we will have  
14 to respond to that.

15 **TUSHAR MEHTA:** Correct, correct.

16 **CJI SURYA KANT:** So, ultimately, it may or may not have any direct or indirect impact while  
17 deciding a particular case. But what is the true meaning and scope and import of that Article,  
18 probably that is required to be pointed out.

19 **TUSHAR MEHTA:** May I only add one part with Your Lordship's permission? When Your  
20 Lordships says that judicial policy will have to be evolved, how to deal with such issues? So I'll  
21 have to show without going into how *Sabarimala* is right or wrong that it started with  
22 *Shirur Mutt*, and this is how the judicial exercise is undertaken for 25, 26 in *Sabarimala*,  
23 without giving anything that whether it is right or wrong, but I can always read it as a part of  
24 the judgment, because the journey starts from *Shirur Mutt* and ends at *Sabarimala*. Now  
25 it would finally end by what Your Lordship decides. Now My Lord kindly see...

26 **JUSTICE B.V. NAGARATHNA:** Hopefully.

27 **TUSHAR MEHTA:** Yes, My Lords.

28 **JUSTICE M.M. SUNDRESH:** Your new journey begins.

29 **TUSHAR MEHTA:** Yeah. But yes, that also because broadly there are three eras of this  
30 evolution. First is Justice B.K. Mukherjee era, and Justice B.K. Mukherjee was, apart from  
31 being a scholarly judge, was also an Expert in Hindu law. That was first era. Then comes the  
32 second era, that Justice Gajendragadkar era. I'm not... not in any other sense, just to define.

1 Then third comes Veeraswami era... Justice Ramaswami era. Some three judgments which I  
2 will show, but some...

3 **CJI SURYA KANT:** Justice Gajendragadkar was probably 4 or 5 judges.

4 **TUSHAR MEHTA:** With... All are five judges, Justice Ramaswami is in 3 or 2 judge  
5 combination. And fourth is this last decade the new jurisprudence which is involved.

6 **JUSTICE JOYMALYA BAGCHI:** Arbitrariness and constitutional morality.

7 **TUSHAR MEHTA:** Constitutional morality...

8 **JUSTICE JOYMALYA BAGCHI:** Do we use constitutional morality in interpreting the  
9 encapsulation of freedom of religion rights, between 25 to 26?

10 **TUSHAR MEHTA:** It can never be a test, it can never be a test for judicial review. It is  
11 something else.

12 **JUSTICE JOYMALYA BAGCHI:** It's faith versus constitutional morality.

13 **TUSHAR MEHTA:** Faith, belief, worship. Constitutional morality is some... I'll show  
14 constitutional morality, even this court has not understood as a part of judicial review. It says  
15 how Governors, Prime Ministers, President, Constitutional functionaries under the  
16 Constitution have to act. It's a political doctrine. It's not a doctrine for judicial review, and that  
17 is how in *Kesavananda Bharati* it is understood.

18 **JUSTICE JOYMALYA BAGCHI:** This is why Mr. Solicitor, I was putting the question, what  
19 would be the import of the absence of subject to other...

20 **TUSHAR MEHTA:** I'm... I'll be addressing, let me...

21 **JUSTICE JOYMALYA BAGCHI:** Provisions of the Article 26, and making 25 subject to  
22 other provisions of the that, because 17 definitely you have addressed but there is also 15.

23 **TUSHAR MEHTA:** I'm addressing that also.

24 **JUSTICE JOYMALYA BAGCHI:** And therefore when it is subject to other positions in 25,  
25 subject to 15, equality cannot be taken away on the ground of sex articulated further to the  
26 Jain.

27 **TUSHAR MEHTA:** Even 14.

28 **JUSTICE JOYMALYA BAGCHI:** 14... But if you see 26, it's not subject to it. We are fully  
29 conscious of it being compatible with others, but not subject to 15. There is uniqueness in a  
30 particular denomination to say this is how our worship is done, or this is how the religion we  
31 understand as salvation to our deity.

- 1 **TUSHAR MEHTA:** I...
- 2 **JUSTICE JOYMALYA BAGCHI:** Can that be tested against the paradigm of equality under  
3 14 to 16?
- 4 **TUSHAR MEHTA:** My Lord, I have given the answer to that. The answer is that neither 26  
5 is supreme or superior or 25 is subordinate or dependent, nor others, My Lord, and that's how  
6 *Devaru* answers this precise question, that the interpretation will have to be purposive  
7 reading 25 and 26 together. That's My Lord, according to me is a correct position on law for  
8 that purpose. Can I...?
- 9 **JUSTICE B.V. NAGARATHNA:** So essentially, Article 25 with regard to, from the  
10 Preamble or right freedom of thought, belief...
- 11 **TUSHAR MEHTA:** Faith, belief and worship.
- 12 **JUSTICE B.V. NAGARATHNA:** Thought, faith, belief.
- 13 **TUSHAR MEHTA:** And worship.
- 14 **JUSTICE B.V. NAGARATHNA:** Worship is a manifestation of that belief and thought. It  
15 is a manifestation. And Article 25 is related to conscience, which is also part of that. But Article  
16 26 is not related to conscience as such, it is only a freedom to manage religious affairs.
- 17 **TUSHAR MEHTA:** The reason is...
- 18 **JUSTICE B.V. NAGARATHNA:** It's a totally different area.
- 19 **TUSHAR MEHTA:** Your Ladyship is right. The reason is 26 is a denominational right and  
20 denomination cannot have a conscience, only individuals have conscience.
- 21 **JUSTICE B.V. NAGARATHNA:** Yes.
- 22 **TUSHAR MEHTA:** 25 is for individual or group of individuals and therefore the word  
23 "conscience" is used. 26 is denomination specific. Now, I'm in three parts.
- 24 **JUSTICE B.V. NAGARATHNA:** In any section thereof?
- 25 **TUSHAR MEHTA:** Yes, in any section thereof.
- 26 **CJI SURYA KANT:** I've got some food for thought, so better you answer it after lunch.
- 27 **TUSHAR MEHTA:** After lunch. I'm obliged, Your Lordship.
- 28 **TUSHAR MEHTA:** That happens My Lord, I know. That doesn't affect Your Lordship. I'll  
29 only read...

- 1 **CJI SURYA KANT:** It appears the case, where...
- 2 **TUSHAR MEHTA:** No My Lord, she needs sympathy and if she wants to be helped, a help.  
3 But possibly it seems, she doesn't want to be helped.
- 4 **CJI SURYA KANT:** Seems to be, whatever may be the circumstances, but...
- 5 **TUSHAR MEHTA:** Absolutely.
- 6 **CJI SURYA KANT:** It's not maintaining balance.
- 7 **TUSHAR MEHTA:** Balance also. I'll read only two judgments from the judgment  
8 compilation. Rest, just for Your Lordship's easy reference and, so that I don't bore the Court  
9 by reading unnecessary things. I have highlighted some parts, so that Your Lordships jour...the  
10 evolution of law on this point is complete. Then My Lord, I would not...I'll immediately take  
11 my submissions on the merits of the case. Your Lordships may first take *Shirur Mutt* case.
- 12 **CJI SURYA KANT:** Is it the compilation by the Nodal Counsel or by...?
- 13 **TUSHAR MEHTA:** Yes, it is volume V-1 by...Volume V-1, titled "Precedents."
- 14 **CJI SURYA KANT:** Starts with BCCI? It starts with BCCI?
- 15 **TUSHAR MEHTA:** No, no, no My Lord. It starts with Kantare... Dinshaw Maneckjee Petit.
- 16 **CJI SURYA KANT:** Which volume of Precedents?
- 17 **TUSHAR MEHTA:** It is V.1. 160.
- 18 **JUSTICE M.M. SUNDRESH:** Volume V is it?
- 19 **TUSHAR MEHTA:** Yes, Volume V.1.
- 20 **JUSTICE M.M. SUNDRESH:** Yes, and serial number of judgment is?
- 21 **TUSHAR MEHTA:** My Lord, five. 160 to 201 *Commissioner Hindu religious*  
22 *endowments versus Sri Lakshmi...*
- 23 **CJI SURYA KANT:** No, I don't have the benefit of the...
- 24 **TUSHAR MEHTA:** Pardon My Lord?
- 25 **CJI SURYA KANT:** I will not have the benefit to read. I'll just talk from memory. This is the  
26 way they used to behave, not even bothered to put it on the record.
- 27 **JUSTICE B.V. NAGARATHNA:** Separately it's not put...
- 28 **CJI SURYA KANT:** No, no, no... it was not put...

1 **TUSHAR MEHTA:** As I understand the Nodal Counsels uploaded on the websites. So it is  
2 with everyone My Lords.

3 **CJI SURYA KANT:** Unfortunately it is not with me, the annexure.

4 **TUSHAR MEHTA:** No, it is already there. My Lord, it is shown in the...

5 **CJI SURYA KANT:** They must have done it but the SCR has not done it.

6 **TUSHAR MEHTA:** V.1. Do we have another copy, do we have a laptop or something? Can  
7 we share our laptop for Your Lordship's immediate reference?

8 **CJI SURYA KANT:** Where do I mark?

9 **TUSHAR MEHTA:** Sorry?

10 **CJI SURYA KANT:** Where do I mark?

11 **COUNSEL:** Can we give a hard copy?

12 **TUSHAR MEHTA:** That's the rule. That's SC-8. It has to be SC-8. As per the circular, the  
13 judgment will have to be SCR judgement. Therefore, we have therefore, I think, Nodal  
14 Counsels have placed SCR judgments. It's more convenient to read SCC, but there is a SOP  
15 issued by Your Lordships, by the, this Honourable court on the administrative side. Your  
16 Lordship gets, page 160, My Lord, the Chief Justice. Please see the... Yes, yes My Lord.  
17 **Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra**  
18 **Thirtha Swamiar.** My Lord, Your Lordships knows Madhavacharya Ji started this  
19 tradition. There are eight mutts, these are under the Udupi Mutt.

20 **CJI SURYA KANT:** What is the reference?

21 **TUSHAR MEHTA:** It is **1954/SCR/1005**, Udupi Sri Krishna Mutt is one of the main Mutt.  
22 There are eight mutts under Udupi Sri Krishna Mutt. This is one of the mutts. I would like to  
23 show one more thing, something relevant. Please see the composition of the bench because  
24 thereafter the next judgement except two, all judges are same, and the judgment is after two  
25 days, difference of two days. Chief Justice MC Mahajan, Justice B.K. Mukherjea, Justice SR  
26 Das, Justice Vivian Bose, Ghulam Hassan, Justice Bhagwati and Venkatarama Iyer. Correct,  
27 My Lords? Please turn the page 162. The date of the judgement is 16th of March 1954. The  
28 purpose why I am showing the composition and the date is that the next judgment which is  
29 **Ratilal Gandhi**, five judge Honourable bench judgment, My Lord where same, five out of  
30 the same seven and the date of the judgement is 18th March '54. So after two days. So if there  
31 is any confusion about the interpretation of **Shirur Mutt** it should be clear from the second  
32 judgment which according to me there is none but if **Shirur Mutt** is read the way, My Lord,

1 sometimes it is read subsequent to this judgment, then it is a wrong judgment, otherwise it is  
2 a perfect judgment. This was a case where I'm not reading the...

3 **JUSTICE B.V. NAGARATHNA:** Both the judgments is Justice...

4 **TUSHAR MEHTA:** Justice B. K Mukherjea. Yes, yes, Your Ladyship is right. Justice  
5 Mukherjea, My Lord. Here was a case in **Shirur Mutt**, there was a direction issued for the  
6 purpose of creating a scheme, scheme under the Hindu Endowments Act. That was under  
7 challenge. The Act was also under challenge. There were two proceedings filed; one was a suit  
8 and another was writ petition. The competence of the legislature was not under challenge.  
9 Competence of the State Legislature was not under challenge.

10 Now My Lord, in this context, please come to page 173, 172 bottom... 171 bottom, 1016. 1(6)  
11 Sub-para. There is only one problem with this judgement according to my reading of the  
12 judgment, subject to how Your Lordships read, but I'll come to that problem later. "The  
13 learned judges of the High Court have taken the view, that Respondent as..." Your Lordship  
14 gets... all Your Lordships are having? "The Respondent as Mathadhipati has certain well  
15 defined rights in the institution..."

16 **CJI SURYA KANT:** Page 173?

17 **TUSHAR MEHTA:** 171, bottom para My Lords.

18 **CJI SURYA KANT:** "The learned judges of the High Court..."

19 **TUSHAR MEHTA:** Yes, "the learned judges of the High Court have taken the view that the  
20 Respondent has Mathadhipati has certain well-defined rights in this institution and its  
21 endowment, which could be regarded as right to property within the meaning of Article  
22 19(1)(F)", as it was a Fundamental right then. "The provisions of the Act to the extent that they  
23 take away or unduly restrict the power to exercise these rights are reasonable restrictions  
24 within the meaning of 1905 and must consequently be held invalid. The High Court has held  
25 in the second place, that Respondent as the Head of representative of the religious institution  
26 has a right guaranteed to him under Article 25 of the Constitution to practise and propagate  
27 freely, the religion of which he and his followers profess to be adherence. This right, in the  
28 opinion of the High Court, has been affected by some of the provisions of the Act. The High  
29 Court has held further that the Mutt in question is really an institution belonging to Shivalli  
30 Brahmins who are section of followers of Madhavacharya and hence constitute a religious  
31 denomination within the meaning of Article 26 of the Constitution. This religious  
32 denomination has a fundamental right under Article 26 to manage its own affairs in the  
33 matters of religion through the Mathadhipati who is the spiritual head and superior, and those  
34 provisions of the Act which substantially take away the rights of Mathadhipati in this respect,

1 amount to violation of the fundamental rights guaranteed under Part 26." Then Your  
2 Lordships can consider skipping and come to last two lines on this page. "So far as Article 25  
3 of the Constitution is concerned..." rest is 19(1)(F), we are not concerned. I'm sorry, My Lord.  
4 My Lord, Justice Arvind Kumar... "So far as Article..." last two lines, My Lord at page 172. "So  
5 far as Article 25 of the Constitution is concerned, the point raised is whether this Article which  
6 it is said is intended to protect religious freedom only so far as individuals are concerned, can  
7 be invoked in favour of an institution or organization. With regard to Article 26, the contention  
8 is that a Mutt does not come within the description of a religious denomination as provided  
9 for in the Article, and even if it does, what cannot be interfered with is the right to manage its  
10 own affairs in the matters of religion only and nothing else. It is said that the word 'religion' as  
11 used in this Article should be taken in its strict etymological sense as distinguished from any  
12 kind of secular activity which may be connected in some way with religion but does not form  
13 an essential part of it." Please mark here. Please pause here. It does not say essential part of  
14 the religion. The doctrine which wrongly, according to me, is developed subsequently. It says  
15 religion but does not form an essential part of that religion. This is something different which  
16 immediately Your Lordship would get. But in any case, this is the argument, not the finding of  
17 the court.

18 "Reference is made in this connection to Clause 2(A) of Article 25, and Clause D of Article 26."  
19 We'll take up these points for consideration one after the other. Please note one thing- there  
20 were two issues: 26(B) and 26(D). Right to manage the property, and Right to manage its own  
21 affairs. Now kindly, My Lord, come to page 176.

22 **CJI SURYA KANT:** 170?

23 **TUSHAR MEHTA:** 176.

24 **CJI SURYA KANT:** Yes.

25 **TUSHAR MEHTA:** My Lord, second unnumbered paragraph, My Lord. SCR doesn't have  
26 unfortunately have para numbers. "We now come..." Your Lordship gets it? "We now come to  
27 Article 25, which as its language indicates, secure to every person, subject to public order,  
28 health and morality of freedom, not only to entertain such religious belief as may be approved  
29 by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks  
30 proper and to propagate or disseminate his ideas for the edifice of edification of others. A  
31 question is raised as to whether the word 'persons' here means individuals only or includes  
32 corporate body as well." My Lord, that Your Lordships can skip and come to the last para. "As  
33 regards Article 26, the first question is, what is the precise meaning or connotation of the  
34 expression 'religious denomination' and whether a Mutt could come within this expression.  
35 The word 'denomination' has been defined in Oxford Dictionary to mean a collection of

1 individuals classed together under the same name." This definition is not accepted. So as per  
2 Oxford, it should be having the same name. "A religious sect or body having a common faith  
3 and organization and designed by a distinctive name..." sorry,"... designated by a distinctive  
4 name... a distinctive name. It is well known that the practice of setting up Mutts as centres of  
5 theological teachings was started by Sri Shankaracharya and was followed by various teachers  
6 since then. After Shankara, came a galaxy of religious teachers and philosophers who founded  
7 different sects and subsects of the Hindu religion that we find in India. As the present day,  
8 each one of such sects or subsects can certainly be called a 'religious denomination' as it is  
9 designated by the distinctive name. In many cases, it is the name of the founder, and has a  
10 common faith and common spiritual organization."

11 My Lord, please pause here for a moment. My Lord, common name, may perhaps not be  
12 required in my respectful submission. For example, under the fold of Hinduism, there can be  
13 Shaivites. There is no common designated name of Shaivites, but they are a denomination,  
14 and there can be a denominational, religious place for Shaivites, subject to of course entry etc.,  
15 My Lord. "The followers of Ramanuja, who are known by the name of Sri Vaishnavas,  
16 undoubtedly constitute a religious denomination, and so do the followers of Madhavacharya  
17 and other religious teachers. It is a fact well established by tradition, that the 8 Udupi Mutts  
18 were founded by Madhavacharya himself, and the trustees and the beneficiaries of the mutts  
19 profess to be followers of that teacher. The High Court has found that mutt in question is in  
20 charge of Shivalli Brahmins, who constitute a section of followers of Madhavacharya. As  
21 Article 26 contemplates not merely a religious denomination but also a section thereof, the  
22 mutt or spiritual fraternity represented by it can legitimately come within the purview of this  
23 Article. The other thing that remains to be considered in regard to Article 26 is, what is the  
24 scope of Clause B of the article which speaks of management of its own affairs in the matter of  
25 religion. The language undoubtedly suggests that there could be other affairs of a religious  
26 denomination or a section thereof, which are not matters of religion, and to which the  
27 guarantee given by this clause would not apply.

28 The question is, where is the line to be drawn between what are matters of religion and what  
29 are not? It will be seen that besides the right to manage its own affairs in matters of religion  
30 which is given by Clause B, the next two clauses of Article 26 guarantee to a religious  
31 denomination, the right to acquire and own property and to administer such property in  
32 accordance with law. The administration of its property by a religious denomination has thus  
33 been placed on a different footing from the right to manage its own affairs in the matter of  
34 religion. The latter is a fundamental right which no legislature can take away..." Latter means  
35 B, 26B. "Whereas the former can be regulated by laws which the legislature can validly impose.  
36 It is clear, therefore, that the questions merely relating to administration of property...

1 administration of properties belonging to a religious group or institution are not matters of  
2 religion to which Clause B of the article applies." Pausing here for a minute. The first part  
3 makes 26(B) absolute, that there can be no law, and that is one way of looking at it. That, it is  
4 a standalone island provision and therefore it may not be curtailed either by My Lord, Part III,  
5 except possibly 25(2)(B), for social reform, that is also one of the arguments the other side  
6 would be making, and that is a view which Your Lordship will have to take. But otherwise,  
7 26(B) as per *Shirur Mutt* is a standalone provision, cannot be interfered with by operation  
8 of law, except that it is secular, etc. if it is not religious activities.

9 What then, are the matters of religion? "The word 'religion' has not been defined in the  
10 Constitution, and it is a term which is hardly susceptible to any rigid definition. In an American  
11 case it has been said that the term 'religion' has reference to one's views of his relation with his  
12 creator and to obligations they impose of reverence for his being, and character, and the  
13 obedience of his will. It is often confounded with cults of form or worship of a particular sect,  
14 but is distinguishable from latter. We do not think that the above definition can be regarded  
15 as either precise or adequate." Someone who understands India and the plurality of India  
16 could have written this, only could have written this.

17 "Articles 25 and 26 of the Constitution are based for the most part upon Article 44(2) of the  
18 Constitution of Ire and we have great doubt whether definition of religion as given above could  
19 have been in minds of our Constitution makers when they framed the Constitution. Religion  
20 is certainly a matter of faith with individuals or communities, and it is not necessarily theistic."  
21 Theistic people believe at least in one God but in Indian context you need not believe in God,  
22 you might believe in *Advaita* also. Yes. There are well-known religion in India....

23 **JUSTICE B.V. NAGARATHNA:** I am sorry. Dvaita and Advaita are different.

24 **JUSTICE ARAVIND KUMAR:** There you are not correct.

25 **JUSTICE B.V. NAGARATHNA:** Correct all your Philosophies.

26 **TUSHAR MEHTA:** I'm sorry, I'm sorry.

27 **JUSTICE ARAVIND KUMAR:** The word you want is Nastik.

28 **JUSTICE B.V. NAGARATHNA:** Nastik.

29 **TUSHAR MEHTA:** Nastik or agnostic.

30 **JUSTICE ARAVIND KUMAR:** There is a difference between Nastik and Advaita.

31 **TUSHAR MEHTA:** Yes.

32 **JUSTICE B.V. NAGARATHNA:** Advaita is founded by...

- 1 **TUSHAR MEHTA:** Advaita means to separate. Advaita means I am him and he is me.
- 2 **JUSTICE B.V. NAGARATHNA:** *Aham Brahmasmi.*
- 3 **TUSHAR MEHTA:** *Aham Brahmasmi.*
- 4 **JUSTICE B.V. NAGARATHNA:** That is Adi Shankaracharya that the God is within me  
5 therefore a man must be reached to the...
- 6 **TUSHAR MEHTA:** Spiritual level
- 7 **JUSTICE B.V. NAGARATHNA:** Status of...That is what all the philosophers...
- 8 **JUSTICE ARAVIND KUMAR:** There is always a debate between Dvaita and Advaita.
- 9 **TUSHAR MEHTA:** *Shivoaham* or *Aham Brahmasmi.* It is the same thing.
- 10 **JUSTICE B.V. NAGARATHNA:** *Bhakti*, it means the man is lower, God is higher and  
11 where there is bhakti between the man and the God that is the relationship. But each one  
12 religion means having a common philosophy which pertains to the relationship of man to God.  
13 It can be Shaivism, it can be Advaitism...
- 14 **TUSHAR MEHTA:** Existence of God is to be accepted.
- 15 **JUSTICE B.V. NAGARATHNA:** Can be Jainism, it can be Buddhism, it can be Christianity  
16 or even Islam.
- 17 **TUSHAR MEHTA:** That's what next line says but interestingly nothing to do with this  
18 matter, My Lord there was a philosopher and a spiritual leader in Islam called Al-hallaj  
19 Mansur. He said, *Ana 'l-Ḥaqq*, which is loosely translated to *Aham Brahmasmi.* But since that  
20 was about a different religion, religious text was different.
- 21 **JUSTICE R. MAHADEVAN:** That was more elaborately described in *Riyad us-Saliheen*,  
22 which is the collection of *Ahadith* written by Abu Zakaria Nawawi which speaks about inner  
23 self. Realization of self. That is the principle being adopted in South Indian continent like you  
24 know in Tamil Nadu more particularly.
- 25 **JUSTICE B.V. NAGARATHNA:** Shaivism.
- 26 **JUSTICE R. MAHADEVAN:** Shaivism that's the concept of self-realization,
- 27 **TUSHAR MEHTA:** Yes, that there is no duality that that's how Adi Shankara also said, there  
28 is no duality. You are the Brahma, Brahma is inside you. That is the next sentence. "There are  
29 well known religions in India like Buddhism and Jainism which do not believe in God or in  
30 any intelligent first cause. A religion undoubtedly has its basis in a system of beliefs or  
31 doctrines which are regarded by those who profess that religion as conducive to their spiritual

1 well-being, but it would not be correct to say that religion is nothing else but a doctrine of or  
 2 belief. A religion may not only lay down a code of ethical rules for its followers to accept, it  
 3 might prescribe rituals and observances, ceremonies and modes of worship which are  
 4 regarded as integral part of religion." Please mark, "not essential part of religion." This is  
 5 where My Lord, the ***Durgah Committee judgment*** goes wrong, and I will show. I'm  
 6 convinced that what ***Shirur Mutt*** means. Integral part of the religion, not essential part of  
 7 religion. And these...

8 **JUSTICE B.V. NAGARATHNA:** It is called the *Anushthanas* with regard to that particular  
 9 form of philosophy that cannot be a subject matter of a court's decision. That is what...

10 **TUSHAR MEHTA:** I'm grateful, My Lord the learned judges also...

11 **JUSTICE B.V. NAGARATHNA:** Let us say, even this particular mutt which is propagating  
 12 a particular philosophy Shaivism or Advaitism, the *Anushthanas* which are followed there,  
 13 that cannot be a subject matter of a court decision. See, you cannot say why you are following  
 14 a particular thing.

15 **TUSHAR MEHTA:** Whether it is essential in your religion or not can never be the test.

16 **JUSTICE B.V. NAGARATHNA:** That is the essence of this judgment.

17 **TUSHAR MEHTA:** Yes, they say, My Lord, what Your Ladyship described as *Anushthanas*,  
 18 they say *karma kanda*. Now please further, further.

19 **JUSTICE B.V. NAGARATHNA:** *Karma kanda*, we have another meaning for that.

20 **TUSHAR MEHTA:** Yes, sir. No, My Lord this is...

21 **JUSTICE B.V. NAGARATHNA:** This is... will know what it is in Kannada.

22 **TUSHAR MEHTA:** No, it is it...

23 **JUSTICE B.V. NAGARATHNA:** *Karma kanda*, you say like this, *karma kanda*.

24 **TUSHAR MEHTA:** *Anushthana*, I read from the judgement. It's not my word, but *karma*  
 25 *kanda* is loosely according to me is *Anushthana*. The modes of worship, ceremonies, rituals.  
 26 Rituals is something nearer to that. Modes of which are regarded as integral parts of religion  
 27 and these forms and observances might extend even to matters of food and dress. The  
 28 guarantee under our Constitution not only protects the freedom of religious opinion, but it  
 29 protects also acts done in pursuance of a religion, and this is made clear by the use of the  
 30 expression 'practice of religion' in Article 25. Latham, Chief Justice of the High Court of  
 31 Australia, while dealing with the provision of Section 116 of the Australian Constitution which  
 32 *inter alia* forbids the Commonwealth to prohibit the free exercise of religion, made the

1 following weighty observation." My Lord, see the irony. Chief Justice Latham was a known  
2 non-believer. Latham. Latham. He was also Chairman of Rationalist Association of Australia,  
3 but his view of... My Lord, it's... appears to be a comprehensive view. "It is sometimes  
4 suggested in discussions on the subject of freedom of..." Now My Lord, Chief Justice Latham  
5 is quoted, is being quoted. "It is sometimes suggested in discussions on the subject of freedom  
6 of religion that though the civil government should not interfere with religious opinions, it  
7 nevertheless may deal as it pleases with any acts which are done in pursuance of religious  
8 beliefs without infringing the principle of freedom of religion. It appears to me..." My Lord,  
9 this is suggestion recorded, now the court's finding. "It appears to me to be difficult to  
10 maintain this distinction as relevant to the interpretation of Section 116. The section refers in  
11 express terms to the exercise of religion, and therefore, it is intended to protect from the  
12 operation of any Commonwealth laws, acts which are done in exercise of religion. Thus, the  
13 section goes far beyond protecting liberty of opinion; it protects also acts done in pursuance  
14 of religious belief as a part of...", My Lord, "rituals" or "anushtana" as Her Ladyship says. "  
15 And these observations apply fully to the protection of religion as guaranteed by the Indian  
16 Constitution. restrictions by the State upon free exercise of religion are permitted both under  
17 Article 25 and 26 on grounds of public order, morality and health. Clause 2(A) of Article 25  
18 reserves the right of State to regulate or restrict an economic, financial, political and other  
19 secular activities which may be associated with religious practice and there is further right  
20 given to the state by subclause (b) under which the State can legislate for social welfare and  
21 reform, even though by so doing, it might interfere with religious practices." So, there can be  
22 a law providing for social reform even if it interferes with the religious belief, etc., etc.

23 Now My Lord, is the crucial part. And please bear in mind, the court was considering Article  
24 26(b) and Article 26(d), the right to administer property. And now the court records the  
25 learned Attorney General, the then Attorney General's submission. "The learned Attorney  
26 General lays stress upon Clause 2A of the Article, and his contention is that all secular activities  
27 which may be associated with religion but do not really constitute an essential part of it, are  
28 amenable to State regulation." This is the contention, that essentiality has to be considered,  
29 and if it is not essential, it can be regulated. Now kindly see how the court deals with it. "The  
30 contention formulated in such broad terms cannot, we think, be supported. In the first place,  
31 what constitute the essential part of religion is primarily to be ascertained with reference to  
32 the doctrines of that religion itself. If the tenets of any religious sect of Hindu prescribe that  
33 offering of food should be given to the idol at particular hours of the day, that periodical  
34 ceremony should be performed in a certain way, at certain periods of the year, or that there  
35 should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded  
36 as part of religion, and that mere fact that they involve expenditure of money or employment  
37 of priests and servants or use of marketable commodities would not make them secular

1 activities, partaking of a commercial or economic character. All of them are religious practices  
2 and should be regarded as matters of religion within the meaning of Article 26(b). What Article  
3 25(2)(a) contemplates is not regulation by the state of religious practices as such..." My Lord,  
4 this is the important word, "...not a religious practices as such, the freedom of which is  
5 guaranteed by the Constitution except when they run counter to public order, health and  
6 morality, but regulation of activities which are economic, commercial or political in their  
7 character, though they are associated with religious practices. We may refer in this connection  
8 to a few American and Australian cases, all of which arose out of activities of persons  
9 connected with the religious association known as Jehovah's Witnesses. This association of  
10 persons loosely organised through Australia, USA and other countries regard the literal  
11 interpretation...", the originalist approach, My Lord, "...the literal interpretation of the Bible  
12 as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible  
13 colours many of their political ideas." This is My Lord, the issue arose because of the political  
14 ideas which were coloured by the religious doctrines. "They refused to take oath of allegiance  
15 to the king or other constituted human authority, and even to show respect to the national  
16 flag. And they decry all wars between nations and all kinds of war activities. In 1941, a company  
17 of Jehovah's Witnesses incorporated in Australia commenced proclaiming and teaching  
18 matters which were prejudicial to war activities and the defence of Commonwealth and steps  
19 were taken against them under the National Security Regulations of the State. The legality of  
20 the action of the Government was questioned by means of a writ petition before the High  
21 Court, and the High Court held, that the action of the Government was justified and Section  
22 116, which guaranteed freedom of religion under the Australian Constitution was not in any  
23 way infringed by National Security Regulations. These were undoubtedly political activities  
24 though arising so and so, so and so."

25 Now My Lords may kindly directly come to 183. Now, American and Australian cases are  
26 referred to and distinguished. Your Lordships are aware, the Bill of Rights in America, our  
27 equivalent to Fundamental Rights, the First Amendment, Second Amendment, etc., they are  
28 in absolute terms. We have our own tailored fundamental rights with sometimes limitations,  
29 sometimes with some restrictions, permissible, etc. 183, second para. "It is to be noted, that  
30 both in American as well as in Australian Constitutions, the Right to Freedom of Religion has  
31 been declared in unrestricted terms without any limitation whatsoever. Limitations therefore,  
32 have been introduced by the courts of law in these countries on the ground of morality, order,  
33 and social protection, and adjustment of the competing demands of the interest of government  
34 and the constitutional liberties is always a delicate and difficult task, and that is why we find  
35 difference of judicial opinion to such an extent in cases decided by the American courts, where  
36 question of religious freedoms were involved. Our Constitution makers, however, have  
37 embodied the limitations which have been evolved by judicial pronouncements in America or

1 Australia in the Constitution itself. And language of Article 25 and 26 is sufficiently clear to  
2 enable us to determine, without the aid of foreign authorities as to what matters come within  
3 the purview of religion and what do not." My Lord, there was no reverence to foreign  
4 authorities in those days.

5 "As we have already indicated, freedom of religion in our Constitution is not confined to  
6 religious beliefs only. It extends to religious practices as well, subject to the restrictions which  
7 the Constitution itself has laid down. Under Article 26(b), therefore, a religious denomination  
8 or organisation enjoys complete autonomy in the matters of deciding as to what rites and  
9 ceremonies are essential according to the tenets of the religion they hold and no outside  
10 authority has any jurisdiction to interfere with their decision in such matter." What is essential  
11 is for the denomination to decide. Kindly see this is seven judge bench which is deviated from  
12 in ***Durgah Committee***. I'll show. "Of course, the scale of expenses to be incurred in  
13 connection with administration of property belonging to the religious denomination and can  
14 be controlled by secular authorities in accordance with any law laid down by a competent  
15 Legislature for it could not be the injunction of any religion to destroy the institution and its  
16 endowment by incurring wasteful expenditure on rites and ceremonies. It should be noticed,  
17 however, that under Article 26(d) it is fundamental rights of a religious denomination or its  
18 representative to administer its properties in accordance with law. And the law therefore, must  
19 leave the right of administration to the religious denomination itself, subject to such  
20 restrictions and regulations as it might choose to impose." My Lords, this is 26(d) which is  
21 subject to law because textually it is so. "A law which takes away the right of administration  
22 from the hands of a religious denomination altogether and vests it in any other authority would  
23 amount to a violation of the right guaranteed under Clause (d) of Article 26."

24 Thereafter, Your Lordships may kindly come to... My Lord, thereafter, the Honourable Court  
25 goes into each provision of the Act under challenge and either declares it void or does not  
26 declare it void. My Lord, I have an issue; it is a small issue, it's regarding *Dittum*. *Dittum* is My  
27 Lord, it was Section 54 and 55. I may not trouble Your Lordships much but My Lord *Dittum*  
28 is, what would I use for the purpose of offering prayers to the deity. My Lord that, court says,  
29 that is a secular activity and that can be decided that, don't use, say, '*chandan*' but use  
30 something else etc., which according to me is purely, purely only a religious activity. Unless it  
31 is so wasteful that I buy, say, 10 kilos of gold, then it may be difficult, but page 189 is page 54.  
32 It is, but I will not trouble Your Lordships with that.

33 Now come to page 202. Page 202 ***Ratilal Panachand Gandhi vs. State of Bombay and***  
34 ***Another***. My Lord, this is again, please see the bench composition; the same. Out of seven in  
35 ***Shirur Mutt***, five honourable judges, Chief Justice M.G. Mahajan, Justice B. K. Mukherjea,  
36 Justice S. R. Das, Justice Vivian Bose and Justice Ghulam Hassan, and 203 Your Lordships

1 would find, it is two days after, that is 18th March, 1954. According to me, it takes the same  
2 view and obviously, the same learned judge was the author, and it takes the same view. And  
3 therefore, I may not bother Your Lordships with this.

4 Kindly now come to the third judgment which I will read from here and thereafter, I'll read  
5 only excerpts for the rest of the judgement, and that is very important judgment, My Lord,  
6 **Devaru**. It is **Venkataramana Devaru and Others vs. State of Mysore and Others**.  
7 This is possibly...

8 **CJI SURYA KANT:** Page?

9 **TUSHAR MEHTA:** Page 224, 225, sorry. 225.

10 **JUSTICE JOYMALYA BAGCHI:** **Devaru**, five judge?

11 **TUSHAR MEHTA:** **Devaru**, five judge. Yes, **Devaru** is a five honourable judges.

12 **JUSTICE JOYMALYA BAGCHI:** **Shirur Mutt** is seven judge.

13 **TUSHAR MEHTA:** **Shirur Mutt** is seven, **Ratilal Gandhi** is five, **Devaru** is five.

14 **CJI SURYA KANT:** **Ratilal** is also five judge.

15 **TUSHAR MEHTA:** Yes, **Ratilal** is also five honourable judge bench, the same, incidentally,  
16 My Lord. I am saying the same composition because I don't have to read. Same composition  
17 and the same learned judge has authored the judgement pronounced after two days.

18 **CJI SURYA KANT:** Yes.

19 **TUSHAR MEHTA:** My Lord, this....

20 **JUSTICE B.V. NAGARATHNA:** Judgement is by Justice Venkatarama Iyer?

21 **TUSHAR MEHTA:** Yes. My Lord, this judgement in my reading and subject to what finally,  
22 the way Your Lordship reads, is possibly the first judgement and the only judgment which  
23 decides how to read 25 and 26 together. Now, this is the first in point of time. There is, My  
24 Lord, **Syedna case** that excommunication case deals with, My Lord, but I'll not go into it  
25 because facts, we are not going into, My Lord. This was My Lords, kindly see page 227, what  
26 was under challenge. "Substantial question of law..." Your Lordship gets, My Lord?

27 **JUSTICE B.V. NAGARATHNA:** Yes.

28 **TUSHAR MEHTA:** "The substantial question of law which arises for decision in this appeal  
29 is whether the right of a religious denomination to manage its own affairs in matters of religion  
30 guaranteed under Article 26(b) is subject to and can be controlled by a law protected by Article  
31 25(2)(b) throwing open a Hindu public to all cases and sections of the Hindus." This was the

1 question, My Lord. Kindly see what was the section which was, validity of which was under  
2 challenge, is at page 229. In **Devaru** judgment My Lord, this was under challenge, Section  
3 3(1) of the impugned Act which is at page 229. Your Lordship gets? My Lord, the Chief Justice  
4 gets? 229.

5 **CJI SURYA KANT:** 229, yes.

6 **TUSHAR MEHTA:** "Notwithstanding any law, custom or usage to the contrary, persons  
7 belonging to the excluded classes shall be entitled to enter any Hindu temple and offer worship  
8 therein in the same manner and to the same extent as Hindus in general, and no member of  
9 any excluded class shall, by reason only of such entry or worship, whether before or after the  
10 commencement of this Act, be deemed to have committed any actionable wrong or offence or  
11 be sued or prosecuted therefore." My Lord, this was the entry of Schedule Caste persons in the  
12 temple.

13 Now please see My Lord, page 230.

14 **JUSTICE JOYMALYA BAGCHI:** Very, very similar to Section 3 of the Kerala Act.

15 **JUSTICE B.V. NAGARATHNA:** Madras Temple Entry Authorisation Act.

16 **JUSTICE JOYMALYA BAGCHI:** Very similar to Section 3 of the Kerala Act.

17 **CJI SURYA KANT:** Kerala came '65. '47, Madras.

18 **JUSTICE B.V. NAGARATHNA:** 1947.

19 **TUSHAR MEHTA:** That, I'll come to My Lord... I'm not touching the **Sabarimala** part,  
20 because I will deal with in a different manner as a *sui generis* case. Right now when Your  
21 Lordships are examining questions of law and the judicial policy which Your Lordships would  
22 apply henceforth, My Lord, it may be advisable for me not to be coloured by one particular *sui*  
23 *generis* case, though it is my case that it is wrongly decided; deserves to be declared a wrong  
24 law for more than one reasons, but I leave it at that for the time being.

25 Please come to page 230, the second part. "On January 26, 1950 the Constitution came into  
26 force, and thereafter, on February 11, 1950, the Plaintiffs raised the further contention by way  
27 of amendment of the plaint that in any event, as the temple was a denominational one, they  
28 were entitled to the protection of Article 26 that it was a matter of religion as to who were  
29 entitled to take part in worship in a temple and that Section 3 of the Act, insofar as it provided  
30 for, the institution being thrown open to communities other than Gowda Saraswat Brahmins,  
31 was repugnant to Article 26(b) of the Constitution." On these pleadings, the Parties went to  
32 trial." This was a case arising from the civil suit. Please mark, not at 226 or 32 where Affidavits  
33 decides questions of faith and belief. Now kindly see, My Lord...

1 **JUSTICE B.V. NAGARATHNA:** When the suit was filed, Article 226 had not yet come on  
2 the statute book.

3 **TUSHAR MEHTA:** Yes, yes.

4 **JUSTICE B.V. NAGARATHNA:** During the pendency of the suit, Constitution was  
5 enforced.

6 **TUSHAR MEHTA:** My Lord, suit was filed before Constitution came into force.

7 **JUSTICE B.V. NAGARATHNA:** Yes.

8 **TUSHAR MEHTA:** I'm not saying that. I'm saying, My Lord, that this was a case where there  
9 was a factual adjudication. My Lord, some 5th line from the top, I'll read. "On these pleadings  
10 the Parties went to trial. The subordinate judge of South Canara who tried the suit held, that  
11 though the temple had been originally founded for the benefit of certain immigrant families of  
12 Gowda Saraswat Brahmins, in course of time, it came to be resorted to by all classes of Hindus  
13 for worship and that accordingly it must be held to be..."

14 **JUSTICE B.V. NAGARATHNA:** Suit was of 1915.

15 **TUSHAR MEHTA:** Yes, yes. I mean, that's not the argument, I mean, I'm just factually  
16 saying.

17 **JUSTICE B.V. NAGARATHNA:** We are just saying historically, therefore, they amended  
18 the pleading after the Constitution came into force.

19 **TUSHAR MEHTA:** Yes, yes.

20 **JUSTICE B.V. NAGARATHNA:** There was no...

21 **TUSHAR MEHTA:** Then they raised 26(b) etc., by way of an amendment, correct.

22 **JUSTICE B.V. NAGARATHNA:** Yes.

23 **TUSHAR MEHTA:** "Dealing with the contention that Plaintiffs had the right under Article  
24 26(b) to exclude all persons other than Gowda Saraswat Brahmins from worshipping in the  
25 temple, he held that matters of religion in that Article had reference to religious beliefs and  
26 doctrines, and did not include rituals and ceremonies, and that in any event, Article 17 and  
27 25(2), which had been enacted on grounds of high policy must prevail." They relied upon and  
28 rightly relied upon Article 17.

29 Please come to 232 My Lord, somewhere in the bottom. "To resume the history of the present  
30 litigation subsequent to the dismissal of civil appeal by so and so, AS No. so-and-so was taken  
31 up for hearing and on the application of the Appellants, the proceedings in the writ petition

1 were admitted as additional evidence. On a review of the entire material on record, including  
2 those relating to proceedings of writ petition, the learned judges held, it established that Shri  
3 Venkataramana temple was founded for the benefit of Gowda Saraswat Brahmin community  
4 and that it was therefore, the denominational one. Then dealing with the contention that  
5 Section 3 of the Act was in contravention of Article 26(b), they held that as a denominational  
6 institution would also be a public institution, Article 25(2)(b) applied and that thereunder, all  
7 classes of Hindus were entitled to enter into the temple for worship. But they also held that,  
8 the evidence established that there were certain religious ceremonies and occasions during  
9 which Gowda Saraswat Brahmins alone were entitled to participate, and that the right was  
10 protected by Article 26(b). They accordingly reserved the rights of Appellants to exclude all  
11 members of public during those ceremonies and on those occasions, and these were specified  
12 in the decree."

13 Now My Lords may kindly see, the questions are framed at page 234. And the questions are  
14 almost, are similar to the cases which Your Lordships are, to the questions Your Lordships are  
15 answering. Question no. 2 at page 234. First, My Lord. "Is the Shri Venkataramana temple at  
16 Mulki, a temple as defined under 2(2)? If it is, is it a denominational temple? If it is a  
17 denominational temple, are the Plaintiffs entitled to exclude all Hindus other than Gowda  
18 Saraswat Brahmins from entering into it for worship on the ground that it is a matter of  
19 religion within the protection of Article 26(b) of the Constitution? If so, is Section 3 of the Act  
20 valid on the ground that it is a law protected by Article 25(2)(b) ...", that is for reform etc.,  
21 "...and that such a law prevails against the right conferred by Article 26(b)?" And it is not  
22 thereafter relevant My Lord. Please have a look now at the findings. Page 235 at the bottom,  
23 Mr. Nambiar, at the last 5th or 6th line from the bottom. "He contended on the basis of these  
24 documents...", Your Lordship gets? I am skipping what is not relevant for the present "...and  
25 other evidences in the case, that whether the temple was a private or public institution was  
26 purely a matter of legal inference to be drawn from the above materials, and that  
27 notwithstanding that, the point was not taken in pleadings, it could be allowed to be raised as  
28 a pure question of law. We are unable to agree with this submission, the object of requiring a  
29 Party to put forward etc., etc."

30 Then kindly see para 2. The next question is whether the suit temple is a denominational  
31 institution. "Both the courts below have concurrently held that at the inception the temple was  
32 founded for the benefit of Gowda Saraswat Brahmins, but the subordinate judge held that as  
33 in course of time, public endowments came to be made to the temple and all classes of Hindus  
34 were taking part freely in worship therein, it might be presumed that they did so as a matter  
35 of right, and that therefore, the temple must be held to have become dedicated to Hindu public  
36 generally." So, they rejected the argument of a private temple, that it's a public religious

1 institution. "The learned judges of the High Court, however, came to a different conclusion.  
2 They followed the decision of so-and-so and held that the temple was a denominational one.  
3 "The learned Solicitor General attacks the correctness of this finding on two grounds. He firstly  
4 contends that even though the temple might have been dedicated to the Gowda Saraswat  
5 Brahmins, that would make it only a communal and not a denominational institution unless  
6 it was established that there were religious tenets and practices special to the community and  
7 that had not been done."

8 Now, kindly come to the next page, 237. My Lord, some 7th or 8th line from the bottom, "The  
9 law on the subject..." Your Lordship gets?

10 **JUSTICE B.V. NAGARATHNA:** Page?

11 **CJI SURYA KANT:** "The law on the subject is well settled..."

12 **TUSHAR MEHTA:** 237, 7th or 8th line from the bottom. "The law on the subject is well  
13 settled. When there is a question as to the nature and extent of a dedication of a temple that  
14 has to be determined on the terms of the deed of endowment, if that is available, and where it  
15 is not, on other materials legally admissible and proof of long and uninterrupted user would  
16 be cogent evidence of the terms thereof. Where therefore, the original deed of endowment is  
17 not available and it is found that all persons are freely worshipping in the temple without, let  
18 alone hindrance, it would be proper inference to make, they do not do so as a matter of right,  
19 and that the original foundation was for their benefit as well. But where it is proved by  
20 production of deed of endowment, etc." My Lord, I can skip that.

21 Then Your Lordships may kindly come to 3. "On the finding that Shri Venkataramana temple  
22 at Mulki is a denominational institution founded for the benefit of the Gowda Saraswat  
23 Brahmins, the question arises whether the Appellants are entitled to exclude other  
24 communities from entering into it for worship on the ground that it is a matter of religion  
25 within the protection of Article 26(b). It is argued by the learned Solicitor General that  
26 exclusion of persons from entering into a temple cannot *ipso facto* be regarded as a matter of  
27 religion that whether it is so must depend on the tenets of the particular religion which the  
28 institution in question represents, and that there was no such proof in the present case. Now  
29 the precise connotation of the expression 'matter of religion' came up for consideration by this  
30 court in ***Shirur Mutt***, and it was held therein that it embraced not merely matters of doctrine  
31 and belief pertaining to the religion but also the practice of it or to put it in terms of Hindu  
32 theology, not merely it's *gnana* but also is *bhakti* and *karma kandas*." My Lords, this is what  
33 I was indicating, My Lord. "The following observations of Justice Mukherjea are particularly  
34 apposite." I'll skip that; I have already read.

1 "It being thus settled that matters of religion in Article 26(b) include even practices which are  
2 regarded by the community as part of its religion, we have now to consider whether exclusion  
3 of a person from entering into a temple for worship is a matter of religion, according to Hindu  
4 ceremonial law. There has been difference of opinion...", My Lord that can be skipped. Your  
5 Lordships may directly come to page 242, para 4. Para 4, Your Lordship gets? That brings us  
6 on the main question for determination in this appeal. Your Lordship gets, My Lord? Now,  
7 this is, according to me, the important finding starts. "Whether the right guaranteed under  
8 Article 26 (b) is subject to a law protected by Article 25(2)(b), throwing the suit temple open  
9 to all classes and sections of Hindus." My Lords, first of all, the court was not dealing with the  
10 first part of 25(2)(b), namely, social welfare and reform, but the logic would apply, the same  
11 logic will have to apply. "We must now examine closely the terms of the two Articles, Article  
12 25, omitting what is not material." Thereafter, they have quoted, My Lord, Their Lordships  
13 have quoted. Last line, "We have held that matters of religion in Article 26(b) include the right  
14 to exclude persons who are not entitled to participate in the worship according to the tenets of  
15 the institution. Under this Article therefore, the Appellants would be entitled to exclude all  
16 persons other than Gowda Saraswat Brahmins from entering into the temple for worship.  
17 Article 25(2)(b) enacts that a law throwing open public temples to all classes of Hindus is valid.  
18 The word 'public' includes in its ordinary acceptation, any section of the public, and the suit  
19 temple would be public institution within Article 25(2)(b), and Section 3 of the Act would  
20 therefore, be within its protection." The court reads 26(b) in line or in tune or in harmonious  
21 way with 25(2)(b). "Thus, the two Articles appear to be apparently in conflict. Mr. M.K.  
22 Nambiar contends that this conflict could be avoided if the expression, 'religious institutions  
23 of a public character' is understood as meaning institutions dedicated to the Hindu community  
24 in general, though some sections thereof might be excluded by custom from entering into  
25 them, and that, in that view, denominational institutions founded for the benefit of a section  
26 of Hindus, would fall outside the purview of Article 25(2)(b) as not being dedicated for the  
27 Hindu community in general. He sought support for this contention in the law relating to entry  
28 of excluded classes into Hindu temples and in the history of legislation with reference thereto  
29 in **Madras**. According to *Agamas*..." My Lord, I have shown at the outset, My Lord, *Agamas*  
30 are one of the last in the line of *Vedas*, *Vedangas*, etc., etc. The court considered, "*Agamas* a  
31 public temple inures where it is not proved to have been founded for the benefit of any  
32 particular community, for the benefit of all Hindus including the excluded classes. But the  
33 extent to which a person might participate in the worship therein, would vary with the  
34 community in which he was born. In so-and-so vs. so-and-so the following statement of law  
35 was quoted by the learned judges." Your Lordships can skip that.

36 Now directly come to page 245, the second unnumbered para. "Now the contention of Mr.  
37 Nambiar is that Article 25(2)(b) must be interpreted in the background of the law as laid down

1 in ***Gopala Muppanar vs. so-and-so***, and the definition of temple given in the statutes  
2 mentioned above, and that the expression 'religious institutions of a public character' must be  
3 interpreted as meaning institutions which are dedicated for worship to the Hindu community  
4 in general, though certain sections thereof were prohibited by custom, from entering into them  
5 and that in that view, denominational temples will fall outside Article 25(2)(b)." This is the  
6 discussion, distinction between public character and denominational temple, which perhaps  
7 may not arise in the questions which are referred, but I'm reading it further. "There is  
8 considerable force in this argument. One of the problems which had been exercising the minds  
9 of the Hindu social reformers during the period preceding the Constitution was the existence  
10 in their midst, of communities which were classed as untouchables. A custom which denied to  
11 large sections of Hindus, the right to use public roads and institutions to which all other  
12 Hindus had a right to access, purely on the grounds of birth could not be considered reasonable  
13 and defended on any sound democratic principle, and efforts were being made to secure its  
14 obligation by legislation. This culminated in enactment of Article 17 as follows." My Lord, this  
15 justifies my contention that all sections of Hindus is necessarily referable to this caste  
16 discrimination which was being taken care of, by the founding fathers and mothers of the  
17 Constitution. "Construing Article 25(2)(b) in light of Article 17, it is arguable that its object  
18 was only to permit entry of excluded classes into temples which were open to all classes of  
19 Hindus, and that, that would exclude its application to denominational temples. Now,  
20 denominational temples are founded, *ex hypothesi* for the benefit of particular sections of  
21 Hindus..." Your Lordships can thereafter, consider skipping it and please come to 246, bottom  
22 para.

23 Before that, something above. Let me complete this, I think; otherwise, para 2 would be  
24 difficult to... Yes. "...diverts trust funds for the benefit of persons who are not beneficiaries  
25 under the endowment, he would be committing a breach of trust, and though a provision of  
26 the Constitution is not open to attack on the ground that it authorises such an act, is it to be  
27 lightly inferred that Article 25(2)(b) validates what would, but for it, be breach of trust and for  
28 no obvious reason of policy as in case of Article 17? There is, it should be noted, a fundamental  
29 distinction between excluding persons from temples open for purpose of worship to Hindu  
30 temples in general, and on the ground that they belong to excluded communities, and  
31 excluding persons from denominational temples on the ground that they are not objects within  
32 the benefit of the foundation. The former will be hit by Article 17 and the latter protected by  
33 Article 26, and it is the contention of the Appellants that Article 25(2)(b) should not be  
34 interpreted as applicable to both these categories and that it should be limited to the former.  
35 The argument was also advanced as further supporting this view, that while Article 26 protects  
36 denominational institutions of not merely Hindus, but all communities such as Muslims and  
37 Christians, Article 25(2)(b) is limited in its operation to Hindu temples." My Lords, the second

1 part; obviously, second part is under consideration, not social welfare and reform. That is  
2 religious neutral, or throwing open, this is being discussed. "And that, it could not have been  
3 intended that there should be imported into Article 26(b), a limitation which would apply to  
4 institutions of one community and not of others. Article 26, it was contended, should therefore  
5 be construed as falling wholly outside Article 25(2)(b), which should be limited to institutions  
6 other than denominational ones. The answer to this contention is that it is impossible to read  
7 any such limitation into the language of Article 25(2)(b). It applies in terms, to all religious  
8 institutions of a public character without qualification or reserve. As already stated, public  
9 institutions would mean not merely temples dedicated to the public as a whole, but also those  
10 founded for the benefit of sections thereof, and denominational temples would be comprised  
11 therein. The language of the Article being plain and unambiguous, it is not open to us to read  
12 into it limitations which are not there, based on *a priori* reasoning as to the probable intention  
13 of Legislature. Such intention can be gathered only from the words actually used in the statute  
14 and in a Court of law, what is unexpressed has the same value as what is unintended. We must  
15 therefore hold that denominational institutions are within Article 25(2)(b)." So, first ground  
16 My Lord, is traversed by this judgment. "It is then said, that if the expression 'religious  
17 institutions of a public character' in Article 25(2)(b) is to be interpreted as including  
18 denominational institutions, it would clearly be in conflict with Article 26(b)."

19 My Lords, please remember, 26 is an article conferring fundamental rights on denominations,  
20 so they say, they test the argument, learned judges, that if 25(2)(b) is also made applicable to  
21 denominations, how will you reconcile it with 26(b) rights of a denomination? "In conflict with  
22 Article 26(b), and it is argued that in that situation Article 26(b) must, on its true construction  
23 be held to override Article 25(2)(b). Three grounds were urged in support of this contention  
24 and they may now be examined." The first. "It was firstly argued that while Article 25 was  
25 stated to be subject to other provisions of this part, there was no such limitation on the  
26 operation of Article 26 and that therefore, Article 26(b) must be held to prevail over Article  
27 25(2)(b)." So, textual interpretation, that textually, one limitation made by the same draft  
28 person, My Lords, in 25, is not incorporated in 26, and therefore, it should be presumed that  
29 they never intended it to be governed by the Part III. "But it has to be noticed that the  
30 limitation subject to other provisions of this part occurs only in Clause 1 of Article 25 and not  
31 in Clause 2." My Lord, this, I have some issue as a proposition of law. It can never be said that  
32 Article 25(2) is also unbridled and is not supported by other provisions of the Fundamental  
33 Rights chapter, but be that as it may. "Clause 1 declares the rights of all persons to freedom of  
34 conscience and right freely to profess, practice and propagate religion. It is this right that is  
35 subject to other provisions in the Fundamental Rights chapter. One of the provisions to which  
36 the right declared in Article 25(1) is subject is Article 25(2)." So, since 25(1) says all provisions  
37 of this chapter, even this Article is also included in the chapter; so, 25(2)(b) will control 25(1).

1 "A law therefore which falls within Article 25(2)(b) will control the right conferred by Article  
2 25(1) and the limitation in Article 25(1) does not apply to that law. It is next contended that  
3 while the right conferred under Article 26(d) is subject to any law which may be passed with  
4 reference thereto, there is no such restriction on the right conferred by Article 26(b). It is  
5 accordingly argued that any law which infringes the right under Article 26(b) is invalid and  
6 that Section 3 must accordingly be held to have become void. Reliance is placed on the  
7 observations in *Shirur Mutt*. The result then is that there are..." Now, this is important My  
8 Lord.

9 **JUSTICE B.V. NAGARATHNA:** One thing Mr. Solicitor. In Article 25(1), it says, "Other  
10 provisions of this part." Other provisions may...

11 **TUSHAR MEHTA:** May not include 2.

12 **JUSTICE B.V. NAGARATHNA:** ...Article 25 itself.

13 **TUSHAR MEHTA:** So, it may not include 2.

14 **JUSTICE B.V. NAGARATHNA:** Subject to Clause 2, it would have been written.

15 **TUSHAR MEHTA:** Therefore, My Lord...

16 **JUSTICE B.V. NAGARATHNA:** Other provisions will not include 25.

17 **TUSHAR MEHTA:** Correct. And therefore, not include 25(2).

18 **JUSTICE B.V. NAGARATHNA:** Correct.

19 **TUSHAR MEHTA:** "The result then is that there are two provisions of equal authority,  
20 neither of them being subject to the other." This is the real problem which presently we are  
21 facing. "The question is how the apparent conflict between them is to be resolved. The rule of  
22 construction is well settled that when there are, in an enactment, two provisions which cannot  
23 be reconciled with each other, they should be so interpreted that, if possible, effect could be  
24 given to both. This is what is known as the rule of harmonious construction. Applying this rule,  
25 if the contention of the Appellant is to be accepted, then Article 25(2)(b) will become wholly  
26 nugatory in its application to denominational temples though, as stated above, the language  
27 of that Article includes them. On the other hand, if the contention of the Respondents is  
28 accepted then full effect can be given to Article 26(b) in all matters of religion subject only to  
29 this that as regards one aspect of them, that is entry into temples for worship, the rights  
30 declared under 25(2)(b) will prevail while in the former case Article 25(2)(b) will be put wholly  
31 out of operation, in the latter, effect can be given to both that provision and Article 26(b). We  
32 must accordingly hold that Article 26(b) must be read subject to Article 25(2)(b)." It is for Your  
33 Lordships to decide whether they did so because of the issue involved, namely, some class

1 being excluded. That was a real problem; the law tried to bring in a reformatory law, provision  
2 in terms of Section 3, or as a proposition of law, the court said, according to me it is a  
3 proposition of law which is settled that 26 will have to be read in conformity with and not in  
4 conflict with Article 25(2)(b). "It remains to deal with..."

5 **JUSTICE AHSANUDDIN AMANULLAH:** Just a minute. The right to entry into temple  
6 for worship, is it to be fine-tuned with right to enter per se? Right only to entry to a temple and  
7 right to entry for worship?

8 **TUSHAR MEHTA:** There are separate rights... these are separate rights, but in facts of this  
9 case, since the contention of the temple was that...

10 **JUSTICE AHSANUDDIN AMANULLAH:** Suppose a devotee is there, he goes there only  
11 for *darshan*, not for worship. Right to worship is taking part in the ritual or is it composite?

12 **TUSHAR MEHTA:** That is recognised. The judgment further recognises them, but let me  
13 tell Your Lordships, both are different rights. Right to enter for worshipping, right to enter for  
14 *darshan* is different; right to enter for worshipping, that is conducting rituals is different. Here  
15 was a case where the concerned denominational temple said that the statutory provision which  
16 permits Dalits to enter the temple is bad.

17 **JUSTICE AHSANUDDIN AMANULLAH:** Only for entry, that is permitted.

18 **TUSHAR MEHTA:** Therefore, I'm putting it very simply without any verbal gymnastics. This  
19 is what the contention was, and this is how it was rejected. Their argument was that right to  
20 restrict them from entering is my 26(b) rights; and other side said, no, no, the law is traceable  
21 under 25(2)(b); it's a reform law, and therefore, court says we will have to reconcile both.

22 **JUSTICE M.M. SUNDRESH:** To put it in the lighter vein, probably the Bench could have  
23 decided what do they mean by 'public character'. That could have really resolved it, instead of  
24 trying to reconcile, do this and that. It is going in a different route.

25 **TUSHAR MEHTA:** My Lord, if Your Lordships come to the judgement which they rely upon,  
26 My Lord, *Gopala Muppanar*.

27 **JUSTICE M.M. SUNDRESH:** Activity comes under the public character, then  
28 automatically 25(2)(b) will be...

29 **TUSHAR MEHTA:** Correct. Would Your Lordships come to page 245, to answer My Lord  
30 Justice Sundaresh's query. 245.

31 **JUSTICE B.V. NAGARATHNA:** Public character will come.

1 **TUSHAR MEHTA:** There is a judgement which this Bench refers to, *Gopala Muppanar*  
2 *vs Subramaniya Iyer*. This is the judgement of Privy Council which exactly does what Your  
3 Lordships are right now indicating, and that could have been an option.

4 **JUSTICE M.M. SUNDRESH:** That could have been the proper option, instead of trying to  
5 figure out something which is not there.

6 **TUSHAR MEHTA:** I'm sorry, it's Madras High Court, not Privy Council.

7 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, we would like you to enlighten us on this  
8 because we just placed *Devaru*. *Devaru* holds Subclause 1 of Article 25 makes it subject to  
9 other provisions of this part, thereby, Article 26, but Subclause 2 does not have this subjecting  
10 clause or subordination clause, but if you see Subsection 2, it is only an enabling provision.

11 **TUSHAR MEHTA:** Enabling.

12 **JUSTICE JOYMALYA BAGCHI:** It's an enabling provision to make statutory enactments.  
13 And we all know that in the idea of *grundnorm* that the constitutional fundamental right  
14 provision has a higher prerogative than a statutory enactment.

15 **TUSHAR MEHTA:** Correct.

16 **JUSTICE B.V. NAGARATHNA:** Yes.

17 **JUSTICE JOYMALYA BAGCHI:** Now, if you see Clause 2 from that perspective, the *non*  
18 *obstante* word is, 'nothing in this Article'. This Article is Article 25 and not 26.

19 **TUSHAR MEHTA:** Correct.

20 **JUSTICE JOYMALYA BAGCHI:** And in that situation, Mr. Solicitor, we would like you to  
21 enlighten us, whether a law made in the enabling scope of Clause 2...

22 **TUSHAR MEHTA:** (b).

23 **JUSTICE JOYMALYA BAGCHI:** ...would not be tested on the anvil of 26, a fundamental  
24 right. This has not been considered in *Devaru*.

25 **TUSHAR MEHTA:** No, it is, it is. Let me complete. It is.

26 **JUSTICE B.V. NAGARATHNA:** Added to this observation...

27 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, I may be wrongly reading *Devaru*; please,  
28 place...

29 **TUSHAR MEHTA:** No, My Lord, maybe, I'm wrong, but let me see, the way I read it My  
30 Lord.

- 1 **JUSTICE B.V. NAGARATHNA:** The other observation is, Clause 2 of Article 25 is in two  
2 parts; one is to preserve what exists. What exists is, existing law which can also include a  
3 custom or a usage.
- 4 **TUSHA R MEHTA:** Your ladyship is reading where, My Lord?
- 5 **JUSTICE B.V. NAGARATHNA:** 25(2) is in two parts. The first part with the *non obstante*  
6 clause is to preserve the operation of any existing law which can include even a custom or a  
7 usage, because, that is law. The second part is, or nothing in this Article will prevent the State  
8 from making any law, as my learned Brother Justice Bagchi said, that is enabling the State to  
9 make a law for social reform. The first part of Article 25...
- 10 **TUSHAR MEHTA:** Kindly, would the Honourable Court read (a), 25(2)(a)?
- 11 **JUSTICE B.V. NAGARATHNA:** No, no.
- 12 **TUSHAR MEHTA:** "Nothing in this Article shall affect the operation of any existing law..."
- 13 **JUSTICE B.V. NAGARATHNA:** That is the first part.
- 14 **TUSHAR MEHTA:** First part, "...or prevent the State from making any law..."
- 15 **JUSTICE B.V. NAGARATHNA:** So, the second part is enabling the State.
- 16 **TUSHAR MEHTA:** Preserving is for...
- 17 **JUSTICE B.V. NAGARATHNA:** In the first part, the Constitution preserves the existing  
18 law, which will include even a custom or an usage. Although...
- 19 **TUSHAR MEHTA:** No, My Lord. Your Ladyship is on Article 13?
- 20 **JUSTICE B.V. NAGARATHNA:** Although existing law is defined under Article 366; it is  
21 defined under Article 366, correct?
- 22 **TUSHAR MEHTA:** For this part it is 13, but we may not travel there My Lord...
- 23 **JUSTICE B.V. NAGARATHNA:** 13 and 366 also could be reconciled. There is a definition  
24 of existing law under Article 366.
- 25 **TUSHAR MEHTA:** The definition clause...
- 26 **JUSTICE B.V. NAGARATHNA:** And existing law can also be read as custom or usage  
27 which comes within the scope of law under Article 13. So, we are saying, this Subclause 2 of  
28 Article 25 is in two separate parts; one is a preservation of what was...
- 29 **TUSHAR MEHTA:** There is enabling.

- 1 **JUSTICE B.V. NAGARATHNA:** And the other is enabling.
- 2 **TUSHAR MEHTA:** Correct, My Lord. There is no issue on that. Preservation, My Lord, but  
3 what will be preserved or what is enabled, is (a) and (b). Please see My Lord, what is to be  
4 preserved? "Regulating or restricting any economic, financial, political or other secular activity  
5 which may be associated with religious practice." If existing before the Constitution, would be  
6 preserved; if not existing, it would not prevent the Parliament or the Legislature as the case  
7 may be, from making any law, but without touching the religious practice, those activities  
8 which are associated with religious practice but are purely in the nature of economic, financial,  
9 political or other secular activities.
- 10 **JUSTICE B.V. NAGARATHNA:** Enabling the State to do it in future.
- 11 **TUSHAR MEHTA:** Correct.
- 12 **JUSTICE B.V. NAGARATHNA:** The future.
- 13 **TUSHAR MEHTA:** Correct.
- 14 **JUSTICE B.V. NAGARATHNA:** That is...
- 15 **TUSHAR MEHTA:** It can even be amendment of the... it can even be amendment.
- 16 **JUSTICE B.V. NAGARATHNA:** By an enactment or whatever way it has to do.
- 17 **TUSHAR MEHTA:** It has to be by enactment.
- 18 **JUSTICE B.V. NAGARATHNA:** But what existed on the day the Constitution came into  
19 force, that...
- 20 **TUSHAR MEHTA:** We are not at odds. Your Ladyship is right. That is, if it is an activity  
21 which existed, which is economic, financial, political or secular...
- 22 **JUSTICE B.V. NAGARATHNA:** The existing law...
- 23 **JUSTICE M.M. SUNDRESH:** Existing law only with respect to economic, financial...
- 24 **TUSHAR MEHTA:** Yes, My Lord.
- 25 **JUSTICE M.M. SUNDRESH:** ...political or secular.
- 26 **TUSHAR MEHTA:** Yes My Lord, there is no dispute on that.
- 27 **JUSTICE B.V. NAGARATHNA:** It is "or".
- 28 **JUSTICE M.M. SUNDRESH:** "Or" is only for present and future, but the field of  
29 interference is clearly indicated.

1 **TUSHAR MEHTA:** My Lord, may I know, for what we are doing this exercise? To answer  
2 what?

3 **CJI SURYA KANT:** Do you want to read anything further in this judgement? I think what  
4 relevant part has been...

5 **TUSHAR MEHTA:** Yes, yes. I'm reading only two pages now. There are only two pages.  
6 Kindly see, 249, "The learned..."

7 **CJI SURYA KANT:** Really labouring hard to only for reconciliation between two provisions,  
8 25 and 26. We understand that part.

9 **TUSHAR MEHTA:** The way *Devaru* has tried hard. I'm only showing. Page 249. "The  
10 learned Solicitor General for the Respondents assails this position of the decree on two  
11 grounds. He firstly contends..." Your Lordships can skip. "...but we agree with that right  
12 protected by Article..." Let me read fully, sorry. "He firstly contends that the right to enter into  
13 a temple which is protected by Article 25(2)(b) is a right to enter into it for purposes of worship  
14 that that right should be liberally construed and that the modification in the question  
15 constitute a serious invasion of that right and should be set aside as unconstitutional. We agree  
16 that the right protected by Article 25(2)(b) is a right to enter into a temple for the purposes of  
17 worship and that further it should be construed liberally in favour of the public. But it does  
18 not follow from this that right is absolute and unlimited in character. No member of Hindu  
19 public could, for example, claim as a part of right protected under Article 25(2)(b) that a  
20 temple must be kept open for worship at all hours of the day and night, or that you should  
21 personally perform those services which the *Archakas* alone could perform. It is again a well-  
22 known practice of religious institutions of all denominations to limit some of its services to  
23 persons who have been specially initiated, though at other times the public in general are free  
24 to participate in the worship. Thus, the right recognised by Article 25(2)(b) must necessarily  
25 be subject to some limitations or regulations and what's one such limitation or regulation must  
26 arise in the process of harmonising the right conferred by Article 25(2)(b) with that protected  
27 by Article 26(b)." So, again they harmonise it; that's all I can say.

28 Now My Lord, come, last four lines. "But where..." Last paragraph, My Lords. "We have  
29 held...", page 249. "We have held that the right of a denomination to wholly exclude members  
30 of the public from worshipping in the temple, though comprised in Article 26(b) must yield to  
31 the overriding right declared by Article 25(2)(b) in favour of the public to enter into a temple  
32 for worship but where the right claim is not one of general and total exclusion of public from  
33 worship in the temple at all times but exclusion from certain religious services, they being  
34 limited by the rules of the foundation to the members of the denomination, then question is  
35 not whether Article 25(2)(b) overrides that right so as to extinguish it, but whether it is

1 possible so to regulate the rights of persons protected by Article 25(2)(b) as to give effect to  
2 both the rights. If the denominational rights are such that to give effect to them would  
3 substantially reduce the right conferred..." Now, proportionality. Kindly see applying  
4 proportionality without any high-sounding words. "If the denominational rights are such that  
5 to give effect to them would substantially reduce the rights conferred by Article 25(2)(b) then  
6 of course, on our conclusion that Article 25(2)(b) prevails as against Article 26(b), the  
7 denominational right must vanish but where there is not the position and after giving effect to  
8 the rights of the denomination, what is left to the public of the right of worship is something  
9 substantial and not merely the husk of it. There is no reason why we should not construe  
10 Article 25(2)(b) as to give effect to Article 26(b) and recognise the rights of the denomination  
11 in respect of matters which are strictly denominational, leaving the rights of the public in other  
12 respects unaffected. The question then is one of fact as to whether the rights claimed by the  
13 Appellants are strictly denominational in character and whether, after giving effect to them,  
14 what is left to the public of the right of worship is substantial." So, apply, My Lord, not in so  
15 many words, proportionality doctrine, that proportionality if requires 26(b) to be given  
16 precedence or prominence, give 26(b) the precedence of prominence. If the effect of 25(2)(b)  
17 is almost nullifying 26(b), don't give effect to 25. That's My Lord, how I understand this  
18 judgement.

19 **JUSTICE B.V. NAGARATHNA:** Harmonious construction.

20 **TUSHAR MEHTA:** Harmonious construction. No article is subordinate, no article is  
21 subservient and therefore, Their Lordships say that read both together, consider facts of each  
22 case, and if you find that giving effect to one is almost nullifying the second, then don't give  
23 effect to one. Therefore, the key word would be 25(b) is an enabling provision and not a  
24 fundamental right. 25(2)(b) is not a fundamental right of anyone. It enables to curtail  
25 fundamental rights.

26 **JUSTICE JOYMALYA BAGCHI:** In some way, perhaps, I'll reframe the question. Any  
27 legislation to achieve the purpose of 25(b) may have a constitutional import, like the Right to  
28 Information Act, which is a statutory enactment giving expression to 19(1). So, any right to  
29 entry to temple legislations, like the *Madras*, or any other legislations.

30 **TUSHAR MEHTA:** Your Lordships are right.

31 **JUSTICE JOYMALYA BAGCHI:** It may be giving the constitutional expression to 25(b) to  
32 objects. So, the objects of the Constitution are articulated.

33 **TUSHAR MEHTA:** The social welfare and reform, for example.

34 **JUSTICE JOYMALYA BAGCHI:** Yes.

1 **TUSHAR MEHTA:** This would... Your Lordship's example is reform.

2 **JUSTICE JOYMALYA BAGCHI:** So, I have a very common, similar example of the  
3 statutory act like the Right to Information Act; a statutory legislation which articulates the  
4 fundamental right to speech, expression and information. Similarly, any Right to Temple Act  
5 has to be seen from the angle of Article 20, Clause 2(b) having a constitutional import  
6 enforcing 2(b) rights.

7 **TUSHAR MEHTA:** Otherwise, My Lord, my worry is this. If we read 26...

8 **JUSTICE JOYMALYA BAGCHI:** No, we followed you, Mr. Solicitor. We followed your  
9 submission.

10 **TUSHAR MEHTA:** If we read it in isolation, then something horribly wrong, something  
11 which shakes Your Lordships' conscience, or something shakes the conscience of the  
12 Legislature. Legislature reflects ultimately, people's will, that this cannot be permitted in a  
13 denomination. And therefore, we must come out with a law. Then, My Lord, 26(b) making it  
14 absolute, would thwart reformative actions also. But it should... Therefore, weighing for which  
15 one is dominant, which one is prominent.

16 **JUSTICE JOYMALYA BAGCHI:** This is an argument, which we are presently articulating,  
17 was not advanced in *Devaru*.

18 **TUSHAR MEHTA:** It was not. I bow to it.

19 **JUSTICE JOYMALYA BAGCHI:** Legislation like right to enter a temple is a statutory  
20 instrument and in view of the *non obstante* expression restricting it to Article 25, whether 26  
21 can be a touchstone of its [UNCLEAR] constituent. That issue was not really raised or decided.

22 **TUSHAR MEHTA:** Yes, My Lord. Now I come to *Durgah Committee*. Now I'll move fast.  
23 These were the three judgments I wanted to read. The *Durgah Committee* takes a  
24 departure, and in my respectful submission, contrary to what is laid down in seven judge  
25 judgment of *Shirur Mutt* and says that essential religious practice is the test. So, the court  
26 would decide that not only this practice is religious practice; whether it is essential for that  
27 religion or not, which in my respectful submission, My Lord, a wrong insertion by judicial  
28 interpretation, not coming out either from the text of 25 or 26, nor coming out from *Shirur*  
29 *Mutt*, which it seeks to rely. May I start today or tomorrow? This would be a new point.

30 **JUSTICE B.V. NAGARATHNA:** Actually, this judgment in *Venkataramana Devaru*,  
31 there can be a possibility of 26(b) prevailing over 25. There can be.

32 **TUSHAR MEHTA:** In facts, yes, in facts of the case. Your Ladyship is right.

1 **JUSTICE B.V. NAGARATHNA:** There can be, yes.

2 **TUSHAR MEHTA:** Absolutely. Absolutely.

3 **JUSTICE B.V. NAGARATHNA:** You didn't say that.

4 **TUSHAR MEHTA:** No, no, I... what I said was, Your Ladyship...

5 **JUSTICE B.V. NAGARATHNA:** We inferred it.

6 **TUSHAR MEHTA:** No, My Lord.

7 **JUSTICE B.V. NAGARATHNA:** So, our inference is correct.

8 **TUSHAR MEHTA:** That is the difference between the intellectual level of a judge and a  
9 lawyer, but what I said was that you will have to decide on facts whether 25(2)(a) is prominent,  
10 what is the object, or 26(b) right is prominent on facts of each case, but Your Ladyship's  
11 articulation was better. I respectfully agree.

12 **COUNSEL:** My Lord, just a small request. Your Lordships, the transcripts which are  
13 available, if Your Lordships could direct that to be shared with the Counsels, it will assist all of  
14 us to avoid repetition, Your Lordships. The transcripts of the hearing, if Your Lordships could  
15 make it available to the Counsels, it will help us in avoiding repetition so that Your Lordships  
16 are best assisted.

17 **CJI SURYA KANT:** We will make it available.

18

19

20

***END OF DAY'S PROCEEDINGS***