

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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1 **RAVI PRAKASH GUPTA:** My Lord, these are the revised written submissions.

2 **CJI SURYA KANT:** Start.

3 **RAVI PRAKASH GUPTA:** ...were already uploaded My Lord prior to the starting of the
4 arguments, now this... these are the revised written submissions.

5 **CJI SURYA KANT:** Fix the mic properly and then start.

6 **RAVI PRAKASH GUPTA:** Your Lordship, please My Lord. Your Lordship can straight
7 away come to the page no. 8 of my written submissions, because on certain points I want to
8 make some clarification. I'm on behalf of the original writ petitioner, Indian Young Lawyers
9 Association.

10 **CJI SURYA KANT:** It's alright. So, how does it make any difference?

11 **RAVI PRAKASH GUPTA:** Kindly take... Kindly see page 8. This is very important how the...
12 this PIL has come up. Case history, paragraph 1. There were four annexures, four articles
13 rather, in the newspaper in the month of June 2006. Kindly see, one was of Barkha Dutt - "The
14 Scent of Women". Then there was a this... "A touching faith: An actress touches a deity and
15 causes an uproar" by Sharvani Pandit. Then the third was "Keeping the faith, losing our
16 religion". This was the third by Vir Sanghvi. And the fourth one is very important. It is "Sex
17 slur fells Sabarimala". Because there was some news item, which I have already annexed to
18 this written submissions also. This also the part of the writ petition, Annexure 4. I have also
19 annexed to this written submissions also. We are... There was an allegation *ki* that the priest
20 has been found in the brothel with the prostitute. So, this was the allegation again on this issue.
21 I have annexed that particular news item.

22 **JUSTICE M.M. SUNDRESH:** Counsel, what is it? Please come to the issue here. We had
23 been hearing them at length, we are hearing you at length. Come to the issue here.

24 **RAVI PRAKASH GUPTA:** I'm coming to the issue, but there is some problem. The problem
25 here is this, every time this is being alleged as if I am challenging the faith of others. I'm not
26 challenging. Therefore, I have to bring into Your Lordships' notice the prayer which we have
27 made. We have quoted the prayer. Kindly see the prayer.

28 **JUSTICE M.M. SUNDRESH:** Yes.

29 **RAVI PRAKASH GUPTA:** Kindly, see page 9. I will not take much time My Lord, but certain
30 facts are to be clarified. Page 9. See my Prayer A. "Issue any appropriate *veto* direction

1 commanding the Government of Kerala, Devaswom Board of Travancore, Chief Mantri of
2 Sabarimala, the District Magistrate of this and their officers to ensure entry of female devotees
3 between the age group of 10 to 50 at the Lord Ayyappa Temple at Sabarimala, Kerala, which
4 has been denied to them on the basis of certain anti-Hindu, ill-conceived Hindu custom or
5 usage. As reported in certain newspapers, including an article written by such and such..."
6 Then... and consequently in the middle of this...

7 **CJI SURYA KANT:** So, we understand your entire petition was based upon certain news
8 items.

9 **RAVI PRAKASH GUPTA:** News items.

10 **CJI SURYA KANT:** Very good. Next.

11 **RAVI PRAKASH GUPTA:** This was the news item, and which has attracted certain riots
12 here.

13 **CJI SURYA KANT:** Rules also. Like others which are in the rules also.

14 **RAVI PRAKASH GUPTA:** So, it has attracted certain riots here.

15 **CJI SURYA KANT:** And Prayer B then you sought quashing of the rules.

16 **RAVI PRAKASH GUPTA:** Yes. Now kindly see, the main thing is this. The entire array of
17 prayers, I am not challenging any faith; rather I have reposed the faith; therefore, we are
18 seeking the entry. Suppose if you want to enter into any temple, why we are entering into the
19 temple? Only in order to offer...

20 **CJI SURYA KANT:** How do you reconcile Prayer A with para 3 on page 10?

21 **RAVI PRAKASH GUPTA:** Prayer A?

22 **CJI SURYA KANT:** Your Prayer A, how do you reconcile with para 3 on page 10?

23 **RAVI PRAKASH GUPTA:** Affidavit?

24 **JUSTICE B.V. NAGARATHNA:** No, no. Para 3 on page 10.

25 **JUSTICE M.M. SUNDRESH:** According to you...

26 **RAVI PRAKASH GUPTA:** Issue... Prayer C?

27 **CJI SURYA KANT:** Prayer A.

28 **RAVI PRAKASH GUPTA:** Yes.

1 **CJI SURYA KANT:** Prayer A is to allow the women in the age group of 10 to 50 to enter the
2 temple. This is what you are asking. You are asking the State Government, Board and every
3 authority a direction that they must ensure the entry.

4 **RAVI PRAKASH GUPTA:** I am obliged.

5 **CJI SURYA KANT:** Now in para 3 you say you do not challenge the faith, belief. How do you
6 reconcile with two prayers; the Prayer A and para 3?

7 **JUSTICE M.M. SUNDRESH:** According to your prayer, belief is to allow the women. Belief
8 is to allow the women that has been changed. So for that the original belief should be restored.

9 **RAVI PRAKASH GUPTA:** No, I'm explaining what is the belief.

10 **JUSTICE M.M. SUNDRESH:** That's what we're saying. The belief is women should be
11 allowed.

12 **RAVI PRAKASH GUPTA:** Just I am explaining the subsequent para. Just one minute, My
13 Lord. I'm obliged to Your Lordships. Paragraph 3 - What is the belief? Can we see that I have
14 taken out the belief out of the judgment of the Kerala High Court that is reported in the AIR
15 1993 Kerala 42. I have quoted the extract of it. Page 10.

16 **CJI SURYA KANT:** Yes.

17 **RAVI PRAKASH GUPTA:** I'm just reading. " The summary of the..."

18 **JUSTICE B.V. NAGARATHNA:** How does a juristic body... how does a juristic body which
19 is your association, have belief?

20 **RAVI PRAKASH GUPTA:** My Lord, I'm not sure it is a belief.

21 **JUSTICE B.V. NAGARATHNA:** Juristic body cannot be having a belief for human being,
22 an individual who can have...

23 **RAVI PRAKASH GUPTA:** I may just...

24 **JUSTICE B.V. NAGARATHNA:** ...have conscience.

25 **RAVI PRAKASH GUPTA:** I will come to it. First see what is the belief, what is the belief...

26 **JUSTICE ARAVIND KUMAR:** Counsel, who is the president of this association?

27 **RAVI PRAKASH GUPTA:** Pardon?

28 **JUSTICE ARAVIND KUMAR:** Who is the president of this association?

29 **RAVI PRAKASH GUPTA:** President is Naushad Ali and there was a lot of...

- 1 **JUSTICE B.V. NAGARATHNA:** How is the believer?
- 2 **RAVI PRAKASH GUPTA:** I'm telling every explanation... everything is there in the written
3 submissions, but Your Lordships may just allow me to just pass on certain pages, every
4 question what Your Lordships is saying is explained in this written submission.
- 5 **CJI SURYA KANT:** Alright, proceed further.
- 6 **JUSTICE B.V. NAGARATHNA:** Unless you satisfied a juristic entity has...
- 7 **RAVI PRAKASH GUPTA:** Just bear me, only for few minutes. Just bear me, it will come.
8 Your Ladyship's answer is there. Kindly see what is the belief. How the belief has been found
9 in the Kerala High Court. That I am quoting the judgment of Your Lordship. Kindly see My
10 Lords. It is very important. The *Tantri*, Your Lordships got it? At page 10, bottom? The
11 judgment of the Kerala High Court. "The *Tantri* of the temple Sri Maheswararu had mentioned
12 about the *Devaprasnams* conducted at Sabarimala by astrologers in Exhibit C2. He had
13 mentioned in that reply that in all the *Devaprasnams* it was revealed that young women
14 should not be permitted to worship at the temple." There was no such customs... something
15 like that uses. Then further, "The report of the *Devaprasnam* conducted in 1985," kindly see,
16 next please, "from 05.04.1985...", it is not very old, "...to 08-04-1985 was exhibited as Exhibit
17 clause. That is a *Devaprasnam* publication, which was filed there before the Honourable High
18 Court, the authenticity of which is not in dispute. The English translation of the relevant
19 portion contained at page 7 of the original report reads as follows. 'It is seen that the deity does
20 not like young ladies entering the precincts of the temple.'" This is the belief.
- 21 **CJI SURYA KANT:** Alright.
- 22 **RAVI PRAKASH GUPTA:** What has been fought by the Kerala High Court. Is it in regard
23 of the Lord Ayyappa or it is the insult of the Lord Ayyappa that the deity does not like the
24 young ladies? This is not the belief. This could never be the belief. Your belief is like this...
- 25 **JUSTICE B.V. NAGARATHNA:** How are you concerned with all this? You please tell us.
- 26 **RAVI PRAKASH GUPTA:** I'm concerned, I'm a believer.
- 27 **JUSTICE B.V. NAGARATHNA:** Concerned with all this?
- 28 **CJI SURYA KANT:** Are you the chief priest of the country?
- 29 **JUSTICE B.V. NAGARATHNA:** Who are you concerned with?
- 30 **RAVI PRAKASH GUPTA:** Kindly see, My Lord.
- 31 **JUSTICE B.V. NAGARATHNA:** Yes.

- 1 **RAVI PRAKASH GUPTA:** Firstly, I am, I will also answer subsequently.
- 2 **JUSTICE B.V. NAGARATHNA:** Mind your business.
- 3 **RAVI PRAKASH GUPTA:** I am coming to that particular point also. I am first a woman,
4 then I am a Hindu.
- 5 **JUSTICE B.V. NAGARATHNA:** Your point?
- 6 **RAVI PRAKASH GUPTA:** Then I am any other thing. First I am a woman. And why woman
7 hood has been attacked? And you say from your own side that you're putting certain words
8 into the mouth of the Lord Ayyappa.
- 9 **CJI SURYA KANT:** We understood your argument.
- 10 **RAVI PRAKASH GUPTA:** That Lord Ayyappa does not like the young ladies?
- 11 **JUSTICE B.V. NAGARATHNA:** Indian Young Lawyers Association has no other business?
12 They can't work for the welfare of the Bar or assist the Bench or the legal system of this
13 country?
- 14 **RAVI PRAKASH GUPTA:** There are so...
- 15 **JUSTICE B.V. NAGARATHNA:** Other than doing this kind of work?
- 16 **RAVI PRAKASH GUPTA:** My Lord, there are so many PILs which are filed by the lawyers,
17 and have been admitted and in this particular case I will come to this conclusion....
- 18 **JUSTICE B.V. NAGARATHNA:** Work for the Bar, work for younger members, work for
19 their welfare those who are struggling in the country from rural areas. They have difficulty
20 coming to the cities to argue cases. They are brilliant minds, people who have come from the
21 villages, great minds. They have more wherewithal. Work for them rather than doing this kind
22 in the Supreme Court.
- 23 **JUSTICE ARAVIND KUMAR:** Mr. Counsel, your Association has passed a resolution.
- 24 **RAVI PRAKASH GUPTA:** Not only Association...
- 25 **JUSTICE ARAVIND KUMAR:** No, no. Authorising, authorising filing of a PIL?
- 26 **RAVI PRAKASH GUPTA:** There are... Just a minute.
- 27 **JUSTICE ARAVIND KUMAR:** And whether the president is a secretary to this.
- 28 **RAVI PRAKASH GUPTA:** This is not only an Association.
- 29 **JUSTICE ARAVIND KUMAR:** We are asking you on facts.

1 **RAVI PRAKASH GUPTA:** There are... there are five other individual women lawyers also.

2 **JUSTICE ARAVIND KUMAR:** Whether a resolution has been passed by the Association?

3 **RAVI PRAKASH GUPTA:** All these questions My Lord, I will come to this particular point
4 when Chief Justice Dipak Misra has refused to withdraw this petition. When there was a threat
5 to the writ petitioner, the threat was to the Naushad Ali. Police protection was given by this
6 Honourable Court.

7 **JUSTICE ARAVIND KUMAR:** Alright, alright.

8 **RAVI PRAKASH GUPTA:** To the petitioners also and to me also there were the threat to
9 the Counsel also. Then the police protection was given. I will ask the order of this Honourable
10 Court.

11 **JUSTICE ARAVIND KUMAR:** First you answer the question posed by us. We are simply
12 asking whether a resolution was passed. If so, whether the president is a signatory to this
13 Association.

14 **RAVI PRAKASH GUPTA:** It does not.

15 **JUSTICE ARAVIND KUMAR:** If so, now it is his locus?

16 **RAVI PRAKASH GUPTA:** Justice Dipak Misra has made it very clear now it is a court
17 matter. And even if the President of the Association tries to withdraw his writ petition, I will
18 not allow.

19 **CJI SURYA KANT:** Mr. Gupta...

20 **RAVI PRAKASH GUPTA:** That is his [UNCLEAR].

21 **CJI SURYA KANT:** Mr. Gupta, first, don't mention individual names of the judges. They,
22 the Honourable Judge was not only he remained judge of this court, he remained Chief Justice
23 of India. So he will talk that the Supreme Court... the then Supreme Court observed like this.
24 The then Supreme Court... don't attribute to individual judges, number one. Number two, the
25 question is very simple to you, it's not a very complicated legal issue, that did the Association
26 pass any resolution?

27 **RAVI PRAKASH GUPTA:** No.

28 **CJI SURYA KANT:** But even before my brother asked...

29 **RAVI PRAKASH GUPTA:** To my knowledge, it was not.

30 **CJI SURYA KANT:** Was there any Association? How an association is formed in India?

- 1 **RAVI PRAKASH GUPTA:** My knowledge there is no such Association.
- 2 **JUSTICE B.V. NAGARATHNA:** Are you a registered body?
- 3 **RAVI PRAKASH GUPTA:** If there is there, I will ask for.
- 4 **JUSTICE B.V. NAGARATHNA:** Are you a registered body?
- 5 **CJI SURYA KANT:** You are not.
- 6 **RAVI PRAKASH GUPTA:** I am a registered body. No, no, this is a registered body,
7 otherwise I could not have filed it My Lord. It is a registered body of the lawyers of this court.
- 8 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] of Young Lawyers.
- 9 **RAVI PRAKASH GUPTA:** Most of them are women lawyers, they are the members of this
10 Association, but there are males also. Unfortunately, unfortunately or fortunately, whatever
11 Your Lordship...
- 12 **JUSTICE M.M. SUNDRESH:** Don't embarrass and expose yourself and embarrass the
13 court by taking up the causes like this.
- 14 **JUSTICE B.V. NAGARATHNA:** Yes.
- 15 **JUSTICE M.M. SUNDRESH:** We can't say anything beyond this. It's a clear case of abuse
16 of process of law exhibited by the Counsel before the nine-judge bench. We are very, very sorry
17 to say this.
- 18 **JUSTICE B.V. NAGARATHNA:** Having devastating consequences.
- 19 **RAVI PRAKASH GUPTA:** Kindly see..
- 20 **JUSTICE M.M. SUNDRESH:** We are hearing illuminating arguments on both sides.
- 21 **RAVI PRAKASH GUPTA:** Kindly see, kindly see, because the issue...
- 22 **JUSTICE M.M. SUNDRESH:** And then because now a petition like this...
- 23 **RAVI PRAKASH GUPTA:** One of the issue, one of the issue, that is the Issue No. 7...
- 24 **JUSTICE M.M. SUNDRESH:** [UNCLEAR] discomfort.
- 25 **RAVI PRAKASH GUPTA:** The Issue No. 7 relates to this whether such an...
- 26 **JUSTICE M.M. SUNDRESH:** [UNCLEAR] without going to touch upon the question of
27 law.
- 28 **RAVI PRAKASH GUPTA:** [UNCLEAR] What he has stated about it.

- 1 **JUSTICE M.M. SUNDRESH:** Alright, now tell us tell us what do you want to say on the on
2 the seven issues framed. We will not be not... at least now we don't want to expose or embarrass
3 you. Please go into the legal issue and then make your submission. To that extent still we are...
4 we are reasonable enough to, to hear you. Please tell us on the issues framed. We only said
5 listen, we already said...
- 6 **RAVI PRAKASH GUPTA:** I'm coming, I'm coming, I have to address...
- 7 **JUSTICE M.M. SUNDRESH:** Both sides...
- 8 **RAVI PRAKASH GUPTA:** I have to address the issues.
- 9 **JUSTICE M.M. SUNDRESH:** Listen, listen to us.
- 10 **RAVI PRAKASH GUPTA:** Provided the refute order, provided...
- 11 **JUSTICE M.M. SUNDRESH:** Why don't you listen to us?
- 12 **RAVI PRAKASH GUPTA:** Just My Lord...
- 13 **JUSTICE M.M. SUNDRESH:** Listen, one minute. Both sides have agreed more than once,
14 even at the beginning that we will not address the issues of fact because that will be decided at
15 a latter point of time. We are addressing this purely on the questions of law. We have said it,
16 please go into the questions of law. That's why we are asking you if you have nothing else to
17 offer, say it and we'll go to the next person.
- 18 **JUSTICE B.V. NAGARATHNA:** Yes.
- 19 **JUSTICE M.M. SUNDRESH:** Please. You are... hopefully you understand what we are
20 saying.
- 21 **RAVI PRAKASH GUPTA:** My Lord I will... Since the Issue No. 7 was there, I have
22 addressed.
- 23 **JUSTICE M.M. SUNDRESH:** Yes.
- 24 **RAVI PRAKASH GUPTA:** There is an order of the Chief Justice, Dipak Misra that this
25 cannot be withdrawn by the President because of the threat. This PIL we will not allow. That
26 order I have already annexed with the written submissions.
- 27 **CJI SURYA KANT:** Perfectly fine.
- 28 **RAVI PRAKASH GUPTA:** So, now it is a court matter. He has very categorically stated this
29 is a court matter now.

1 **JUSTICE B.V. NAGARATHNA:** We want to know why you filed this PIL at all? What won't
2 you... what was it that you wanted to achieve?

3 **RAVI PRAKASH GUPTA:** No My Lord, during the course of argument before the
4 Constitution Bench, before the division...

5 **JUSTICE B.V. NAGARATHNA:** What good has come out of it?

6 **RAVI PRAKASH GUPTA:** These issues were raised at the time of the admission of the writ
7 petition. It was before the Two Judges Bench, then it was referred to the Three Judges Bench,
8 then it was referred to the Constitution Bench, now it is before the Nine Judges Bench. So, it
9 has taken a long distance, it has travelled a long distance. And now at the apex level before the
10 Nine Judges Bench, if Your Lordship is asking one issue which is related to the division bench
11 at that moment, at the time of the maintainability of the writ petition, so therefore, I am
12 addressing. Kindly see, one by one. Just allow me, My Lord.

13 **JUSTICE M.M. SUNDRESH:** Please. No problem, we are hearing you.

14 **RAVI PRAKASH GUPTA:** Now kindly see next page. At page 12 then the notice was issued,
15 and after the Kerala High Court judgment, I have already stated that what the belief was - the
16 belief was to the exclusion of others. Then kindly see page 14. Lord Ayyappa was a Buddhist,
17 and it has been admitted by the State of Kerala...

18 **JUSTICE ARAVIND KUMAR:** You are saying you are a believer and you are saying you are
19 having faith and now you say no, no Lord Ayyappa himself was someone else. What is this,
20 sir?

21 **RAVI PRAKASH GUPTA:** Kindly bear with me for some time, because this is what the State
22 of Kerala has... The State of Kerala has...

23 **JUSTICE B.V. NAGARATHNA:** What is your belief, we want to know. Not what State of
24 Kerala belief...

25 **RAVI PRAKASH GUPTA:** I believe... I will not enter into any temple unless I don't have the
26 belief. For example, just 4 kilometres from here, there is a temple of the Lord Hanuman where
27 you have to offer a bottle of drinks. I don't know whether Your Lordships have heard about it
28 or not. I do not enter in it.

29 **JUSTICE M.M. SUNDRESH:** Your belief before... [UNCLEAR]

30 **RAVI PRAKASH GUPTA:** I don't want to offer a bottle of drink to the Lord Hanuman. So,
31 I will not enter. Suppose if I enter into the temple and say what you are doing it, I will not allow
32 you, then Your Lordship can say. Once I'm entering into a temple or in a masjid or in a church,

1 we have to follow the norms. So, so far the faith is concerned, belief I'm saying, the belief, what
2 has been extracted in the judgment of the division bench of Kerala High Court and that after
3 research they have said that Lord Ayyappa does not like young ladies. This could not be the
4 belief to the exclusion of others. Now kindly see next thereafter. So far as the Buddhist
5 connection is there, that... The Great Tang Records of the Western Regions by Xuanzang. In
6 his book it was mentioned about the Lord, about this Lord Ayyappa, which they used to call
7 him Alokeswara. Then, My Lord, I have given this brief description of the Lord Ayyappa, the
8 life. I know Your Lordship must be knowing about it because it was believed that he has born
9 out of the Lord Shiva and Vishnu as a Mohini, and this boy was found at the bank of the Pampa
10 River. There was a king, so, king took him, because he had no child, and he brought him up.

11 At the age of the 12 years near about, the queen thought that he will become the king. In order
12 to stop him from succeeding to the kingdom, she said that there was some relative or
13 something like that; that I will like to make him. So, she instigated the king, howsoever to oust
14 Lord Ayyappa from the house, and she succeeded. And she said that she feigned that I am ill
15 and I need the milk of the tiger. So, ask this child to go to the forest and bring that milk of the
16 tiger. It is a forest region.

17 **JUSTICE M.M. SUNDRESH:** Mr. Gupta, we are not hearing you on merit. We have already
18 said that. You reserve everything. Then when after we answered the question. Please, please.
19 No, we are... we are already running short of time. Honourable Chief Justice, his grace is
20 enough to extend the time from time to time again only on the promise that everybody should
21 be heard. You are eating the time of your own colleagues.

22 **RAVI PRAKASH GUPTA:** I will finish before lunch.

23 **JUSTICE M.M. SUNDRESH:** We'll hear you. No problem. Please go to the legal issue. Once
24 again we are telling you, please go into the seven issues raised.

25 **RAVI PRAKASH GUPTA:** I'm coming, I'm coming, My Lord.

26 **JUSTICE M.M. SUNDRESH:** No, you're not even coming.

27 **RAVI PRAKASH GUPTA:** I'm coming to those issues. Kindly have...

28 **JUSTICE M.M. SUNDRESH:** You say, you are coming. You are standing there itself, that's
29 a problem.

30 **RAVI PRAKASH GUPTA:** Kindly see page...

31 **JUSTICE B.V. NAGARATHNA:** You are not coming, please come, please come to the issue.

1 **RAVI PRAKASH GUPTA:** I will conclude it before the lunch, My Lord. No problem. Kindly
2 see the page 16 then. Page 16, the threats part to the Counsel and to the petitioners.

3 And the fact is this that the court has made it very clear it is a court matter.

4 **CJI SURYA KANT:** Mr. Gupta, you may now come to page... Mr. Gupta, you come to page
5 20 of your... the rest is all we have seen it.

6 **RAVI PRAKASH GUPTA:** Kindly see page 20, page 20.

7 **CJI SURYA KANT:** Now what you want to say?

8 **RAVI PRAKASH GUPTA:** Now, my preliminary objection, my preliminary objection, is to
9 the very reference order.

10 **CJI SURYA KANT:** That objection has already been rejected. Reference has been made. Now
11 proceed further.

12 **RAVI PRAKASH GUPTA:** My Lord, that has not been rejected on that ground.

13 **CJI SURYA KANT:** Yes.

14 **RAVI PRAKASH GUPTA:** I am relying on the judgment of Justice Surya Kant in this matter
15 in *Aligarh University* case. Kindly hear me on the point of the validity of the reference
16 order. Reference is to be made to settle an unsettled law. Reference is never made to unsettle
17 a settled law. In this particular case, the reference has been made to unsettle a settled law,
18 which was already going on for the last 65 years. And Solicitor General has agreed, Devaswom
19 board has agreed, the State of Kerala has agreed. They have agreed to the *Devaru* case. The
20 only thing where the Solicitor General has differed is only the superstitious beliefs. That is the
21 only point which he says is there is a part of the religion as per the *Shirur Mutt* case, you
22 can't interfere, within the definition of the rites and ceremonies. Rites and ceremonies does
23 not include superstitions, I will come to that particular part later on. But first, my serious
24 objection is to the reference which has been made by the three Honourable Judges of the Nine
25 Judges Bench directly, against all the canons of law which has been laid down by this
26 Honourable Court; three judges. Their review petition was listed before five judges and in the
27 Five Judges Bench, only three judges, that is the Chief Justice Gogoi, who was a new one, who
28 was not a part of the earlier bench also, and Justice Indu Malhotra and Ajay Khanwilkar. Ajay
29 Khanwilkar and Indu Malhotra were there in the earlier Constitution Bench judgment. So, this
30 was a reference order passed by the three Honourable Judges and the other two judges are R.
31 F. Nariman and Chandrachud; they have rejected the review petition. They have said that this
32 review petition has been filed under the pressure of the public, under the pressure of the
33 worshippers, that's what he has admitted in his own dissenting opinion, that they have to

1 comply with this judgment under any circumstances. This judgment under Article 141, you
2 have to comply with it. And you are not complying and filing the review petition here. So, this
3 was... So, kindly see, My Lord, the preliminary objections to this particular reference order.

4 **CJI SURYA KANT:** The reference is not maintainable. We understood that. Your objection
5 is that reference is not maintainable.

6 **RAVI PRAKASH GUPTA:** Not maintainable, but there are decided cases I would like to
7 argue, My Lord.

8 **CJI SURYA KANT:** You can come to page 33, you are relying on my judgment in *Aligarh*
9 *Muslim University*, we appreciate that.

10 **RAVI PRAKASH GUPTA:** Kindly hear me. I have cited certain judgments also. We are
11 addressing a Nine Judges Bench. We have to bring to their notice what are the judgments
12 which have already been passed in, Your Lordships' judgement.

13 **CJI SURYA KANT:** Yes. That's why we are pointing out.

14 **RAVI PRAKASH GUPTA:** Therefore, kindly hear me on the point of the validity also My
15 Lord. Because otherwise, just repeating the arguments on interplay between 25 and 26, is not
16 going to help Your Lordships, in this matter. Because so many arguments have taken place.
17 These are.... Those so many arguments which are already before Your Lordships, Your
18 Lordship can form the opinion. I will come in the last, but so far as the other parts which have
19 not been addressed by either side, that I would like to address. So, there's something new
20 should come before Your Lordship. Kindly see the Three Judges Bench judgment. Para 30,
21 page 20 for a moment.

22 **CJI SURYA KANT:** Mr. Gupta, for your facility only I am pointing out page 33 you are
23 summing up by citing my judgment in *Aligarh Muslim University* matter. You can...

24 **RAVI PRAKASH GUPTA:** *Aligarh University* matter of course, My Lord...

25 **CJI SURYA KANT:** You can read that and conclude that reference is not maintainable.

26 **RAVI PRAKASH GUPTA:** Correct. So, but before that My Lord, just I will give a brief
27 description; there is *Bharat Petroleum* case and this is a *Pradeep Chandra Parija* case.
28 These are the two judgments where they have said that the Two Judges Bench cannot refer the
29 matter directly to the Five Judges Bench. You have to first refer it to the Three Judges Bench
30 and here the three Honourable Judges are referring the matter to the nine. In actual fact, the
31 speaking order does not refer this matter to the Nine Judges Bench. The speaking order says
32 that the matter is referred to the Seven Judges, and that was the understanding was given to
33 R.F. Nariman also. Kindly see the minority judgment... kindly see the judgment of this Chief

1 Justice Gogoi on this particular issue. Kindly see. Kindly see page 21 where the matter was
2 referred to the Seven Judges.

3 **JUSTICE M.M. SUNDRESH:** Yes.

4 **RAVI PRAKASH GUPTA:** Page 21, I may just read paragraph 4. And there was no error
5 pointed out in the *Sabarimala* judgment.

6 **JUSTICE M.M. SUNDRESH:** There is no dispute...

7 **RAVI PRAKASH GUPTA:** No error, no lacunae, not is it also not *per incuriam* also.
8 Kindly see, kindly see.

9 **JUSTICE M.M. SUNDRESH:** We agree, we agree that... The question is the reference is
10 made with [UNCLEAR] judge's bench as you are saying.

11 **RAVI PRAKASH GUPTA:** That's correct kindly see... Kindly see para 4, page 21. Kindly
12 bear with me.

13 **JUSTICE M.M. SUNDRESH:** [UNCLEAR] opinion will merge with majority, that's all...

14 **RAVI PRAKASH GUPTA:** I will be grateful if Your Lordship [UNCLEAR] starts at page 21,
15 paragraph 4. Can I read it? "It is time that this court should evolve a judicial policy." My Lord,
16 look at the reference could be made on the basis of the judicial policy evolving a judicial policy,
17 my first objection to this one. "Befitting to its plenary powers to do substantial and complete
18 justice and for an authoritative enunciation of the constitutional principles by a larger bench
19 of not less than Seven Judges." This was the reference. This was the Chief Justice Gogoi has
20 done it; Three Judges Bench mentioned about the Seven Judges Bench. Then kindly see the
21 next paragraph what he says and what is the basis of the reference order, My Lord, kindly see.
22 "In this context, the decision of the Seven Judges Bench of this court in *Commissioner,*
23 *Hindu Religious Endowments, Madras versus Shirur Mutt* case, holding that what
24 are the essential religious practices of a particular religious denomination should be left to be
25 determined by the denomination itself and the subsequent view of the Five Judges Bench in
26 *Durgah Committee Ajmer versus Syed Hussain Ali* carving out a role for the court in
27 this regard to exclude what the courts determined to be secular practices or superstitious
28 beliefs seem to be in apparent conflict requiring consideration by a larger bench. It is not a
29 reference to any error which has been pointed out in the *Sabarimala* case." The subject
30 review petition, kindly see next paragraph. "The subject review petition as well as the writ
31 petitions may accordingly remain pending until determination of the questions indicated
32 above by a larger bench as may be constituted by the Honourable Chief Justice of India."

1 Now, you are making a reference for what? You don't want to review. You say it is a reference
2 where we will elicit the opinion of...

3 **CJI SURYA KANT:** Mr. Gupta, objection against the reference have already been turned
4 down by the Nine Judge Bench by the order of 10th February 2020.

5 **RAVI PRAKASH GUPTA:** I will come to that.

6 **CJI SURYA KANT:** You are not filing a review petition.

7 **RAVI PRAKASH GUPTA:** The question...

8 **CJI SURYA KANT:** We are not hearing a review petition against that order of 10th February.

9 **RAVI PRAKASH GUPTA:** My Lord, I cannot file any review. The question here is this that
10 Seven Judges Bench...

11 **CJI SURYA KANT:** Our time is of course not of any value but your time is very valuable,
12 please consider that part in my...

13 **RAVI PRAKASH GUPTA:** Your Lordships may feel my arguments may be totally irrelevant
14 but even then I will request Your Lordships you hear some irrelevant arguments also.

15 **JUSTICE B.V. NAGARATHNA:** Why should we hear irrelevant arguments? Please come
16 to relevant arguments.

17 **RAVI PRAKASH GUPTA:** Sometimes My Lord, in one perspective My Lord, at one point
18 of time the argument has been found to be irrelevant and in the future it has been found to be
19 relevant, and most of the minority opinions have later on been confirmed. See the opinion of
20 the Chief Justice V.P. Sinha. Now it is a minority opinion but it is still holding. Now the matter
21 has again been referred to Constitution Bench.

22 **JUSTICE M.M. SUNDRESH:** Saying something this side saying that....

23 **RAVI PRAKASH GUPTA:** Kindly, kindly hear me.

24 **JUSTICE M.M. SUNDRESH:**you say for you it can be reviewed, you say for other things
25 it can't be reviewed.

26 **RAVI PRAKASH GUPTA:** Kindly, now see kindly the minority judgment of the RF My Lord,
27 at page 22 I've quoted. Kindly see what he has said and what he had been giving the impression
28 while he was sitting in the Constitution Bench. Paragraph 1, the bold portion of it. He has then
29 outlined seven issues, R.F. Nariman says, which may be referred to a larger Seven Judges
30 Bench. Also the apparent conflict between Seven Judge Bench in the *Shirur Mutt* case and
31 the *Devaru* case, the *Durgah* case, *Durgah Committee* case. So kindly see, My Lord, that

1 even the minority judgment Justice RF Nariman, who has dismissed the review petition, he
2 was also under this impression this matter has been referred to the Seven Judges, from where
3 Nine Judges have come? I do not know. I have not seen any...

4 **CJI SURYA KANT:** All right, all right.

5 **JUSTICE B.V. NAGARATHNA:** *Shirur Mutt* has to be reconsidered that is Seven Judge
6 Bench, naturally Nine Judges have to sit.

7 **RAVI PRAKASH GUPTA:** No, My Lord. There but I should be given an opportunity on that
8 particular point, I should be given an opportunity. Once in the judgment very categorically
9 stated if the minority judgment R.F. Nariman could follow it only a Seven Judges Bench and
10 then thereafter the matter, Nine Judges Bench has been constituted.

11 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta, that issue is no longer *res integra*. That issue
12 is no longer *res integra*. Come to your written submission, page 26.

13 **RAVI PRAKASH GUPTA:** My Lord, I will come. I will...

14 **JUSTICE JOYMALYA BAGCHI:** Just come to page 26.

15 **RAVI PRAKASH GUPTA:** My Lord, I'm coming. I'm coming to that point also because,
16 these are the some of the issues.

17 **JUSTICE JOYMALYA BAGCHI:** Just come to page 26.

18 **RAVI PRAKASH GUPTA:** No, first My Lord, Justice Surya Kant has asked to just explain
19 to the latest judgment on *Aligarh Muslim University*.

20 **CJI SURYA KANT:** Mr. Gupta, we are requesting you please come to page 33.

21 **RAVI PRAKASH GUPTA:** I'm coming, I'm coming.

22 **CJI SURYA KANT:** Whatever estoppel you want to apply against me, why don't you do that
23 outright?

24 **RAVI PRAKASH GUPTA:** Now, My Lords, now...

25 **JUSTICE ARAVIND KUMAR:** Mr. Gupta, problem is you are standing there and you are
26 saying I'm coming, I'm coming, but you are not coming.

27 **RAVI PRAKASH GUPTA:** Now I have come. Now I have come.

28 **JUSTICE ARAVIND KUMAR:** Come to page 33.

29 **RAVI PRAKASH GUPTA:** Page 33.

1 **JUSTICE M.M. SUNDRESH:** Problem is he wants to see [UNCLEAR].

2 **RAVI PRAKASH GUPTA:** Kindly see, the latest judgment on reference...

3 **JUSTICE ARAVIND KUMAR:** Otherwise, we will only come.

4 **RAVI PRAKASH GUPTA:** I have come now. Then kindly hear me on this point. Page 33,
5 para 26. "The latest judgment on reference is the minority view of the Justice Dipankar Datta
6 and Justice Surya Kant and Justice S. K. Sharma also, "where a fractured verdict is given upon
7 jumping reference to larger bench. In *Aligarh Muslim University versus Naresh*
8 *Agarwal* dated such and such, a Three Judge Bench presided over by the then Chief Justice
9 of India *vide* order dated 12-02-2019, made this reference to a bench of Seven Judges. Here,
10 the Supreme Court was not just confronted with the issue of the minority status of Aligarh
11 Muslim University, but was also grappling with the jurisdictional issue relating to the validity
12 of the reference made by the two Honourable Judges of the Supreme Court by way of order
13 dated such and such in *Anjuman-e-Rahmania*. " Then I have quoted the portion of
14 judgment. This is... "In this regard..." The para 92. "In this regard it is imperative to refer to
15 the findings of the Constitution Bench in *Central Board of Dawoodi Bohra*
16 *Community & Anr versus State of Maharashtra & Anr* which while adjudicating the
17 correctness of previous decisions on the Bombay Prevention of Excommunication Act, also
18 laid down pertinent principles on the procedure for making references. The decision in
19 *Dawoodi Bohra* essentially clarified the framework concerning how a reference should be
20 made, particularly when a bench of lesser strength, doubts the correctness of a decision of a
21 larger or co-equal branch. It held that..." Kindly see the paragraph which have been pointed.

22 **CJI SURYA KANT:** *Dawoodi Bohra* in para 1, 2, 3 and 4 on the next page that will answer
23 everything. Next page.

24 **RAVI PRAKASH GUPTA:** My Lord, this paragraph 12, if I can read this Your Lordship.
25 Kindly see. This is from a *Dawoodi Bohra* case, paragraph 12 at the bottom of the page 33.
26 "Having carefully considered the submissions made by the Learned Senior Counsel for the
27 Parties and having examined the law laid down by the Constitution Benches, in the above said
28 decisions we would like to sum up the legal positions in the following terms:

29 1) The law laid down by this Court in a decision delivered by a bench of larger strength is
30 binding on any subsequent bench of lesser or co-equal strength.

31 2) A bench of lesser quorum cannot doubt the correctness of the view of the law taken by a
32 bench of larger quorum. In case of doubt, all that the bench of lesser quorum can do is to invite
33 the attention of the Chief Justice and..."

34 **CJI SURYA KANT:** Now, please bear in mind every word.

1 **RAVI PRAKASH GUPTA:** "... and request for the matter being placed for hearing before a
2 bench of larger quorum than the bench whose decision has come up for consideration." Chief
3 Justice means Chief Justice at the administrative side, not at the judicial side. This was not
4 placed. Kindly see, "it will be open only for a bench of co-equal strength to express an opinion
5 doubting the correctness of the view taken by the earlier bench of co-equal strength,
6 whereupon the matter may be placed for hearing before a bench consisting of a quorum, larger
7 than the one which pronounced the decision laying down the law, the correctness of which is
8 doubted.

9 3) The above rules are subject to two exceptions. (i) The abovesaid rules do not bind the
10 discretion of the Chief Justice in whom rests the power of framing the roster and who can
11 direct any particular matter to be placed for hearing before any particular bench of any
12 strength."

13 **CJI SURYA KANT:** "Of any strength."

14 **RAVI PRAKASH GUPTA:** Yes, I'm coming, My Lord. This is on the administrative side.

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

16 **RAVI PRAKASH GUPTA:** Not at the judicial side. "(ii) In spite of the rules laid down
17 hereinabove, if the matter has already come up for hearing before a bench of larger quorum
18 and that bench itself feels that the view of the law taken by a bench of lesser quorum, which
19 view is in doubt, needs correction and reconsideration, then by way of exception, and for
20 reasons given by it, it may proceed to hear the case and examine..." Next page... "... the
21 correctness of the previous decision in question dispensing with the need of a specific
22 reference or the order of Chief Justice constituting the bench, and such listing. Such was the
23 situation in *Raghubir Singh* case also.

24 93, the principles enunciated in *Dawoodi Bohra* case enforce the provisions of the Supreme
25 Court rules referred to earlier, and also reiterate the well-established principles based upon
26 doctrines of predictability, consistency, finality, and the principles of *stare decisis*. The Two-
27 Judge Bench in *Anjuman* ought to have been understood and applied the law consistent with
28 these principles. The Two-Judge Bench in *Anjuman supra* being of lesser strength than the
29 Five-Judge Bench in *Azeez Basha* case, lacked the authority to explicitly question the
30 correctness of *Azeez Basha* and refer the matter to the Seven-Judges". The next, 94, "In
31 *Anjuman*, the bench not only referred...

32 **CJI SURYA KANT:** Have you understood para 93? Have you understood para 93 in the
33 context of the factual history?

1 **RAVI PRAKASH GUPTA:** First, I will... My Lord, I will then read the minority judgment of
2 Justice Surya Kant in this matter, because that will clear.

3 **CJI SURYA KANT:** Let's not read all those things. You can now come to para 97 and 98,
4 that's all.

5 **RAVI PRAKASH GUPTA:** 97, I'm grateful, My Lord. "In this light, we respectfully disagree
6 with the opinion of the Honourable Chief Justice that the reference in *Anjuman* passes
7 muster. Such a reading risks opening the floodgates to further complexity and disruption,
8 where smaller benches could disregard established principles and overturn decisions of larger
9 benches. This would erode the concept of well-settled principles, and destabilise the legal
10 framework, as each judgment would strive to chart new directions, undermining legal
11 certainty, and continuity. Ironically, the reference in *Anjuman...*"

12 **CJI SURYA KANT:** "Ironically, the reference in *Anjuman supra* strikes through the very
13 core of *Dawoodi Bohra* and the law laid down therein." Now read para 98.

14 **RAVI PRAKASH GUPTA:** I am obliged, My Lord. Then My Lord, skipping over, then I'm
15 just reading the minority...

16 **CJI SURYA KANT:** Read para 98 also and then sum up this also. Let us finish this argument.

17 **RAVI PRAKASH GUPTA:** Then page 37, paragraph... These are the issues which are to be
18 decided first, because the reference is under question is very doubtful. What you cannot
19 achieve directly, you cannot achieve indirectly. You want the *Sabarimala* to be reviewed, but
20 you don't want to say, because you could not find out a single error in that judgment. And what
21 you are doing? You are taking a roundabout, there are so many cases, and therefore a judicial
22 policy is to be evolved, and therefore the matter is referred to the Seven-Judges. Then all of a
23 sudden, the matter comes over the Nine-Judge Bench, and I was never given any opportunity
24 to argue on the validity of the reference order.

25 **JUSTICE JOYMALYA BAGCHI:** No, sir.

26 **RAVI PRAKASH GUPTA:** For the first time I'm arguing.

27 **JUSTICE JOYMALYA BAGCHI:** No, sir. Come to page 26.

28 **RAVI PRAKASH GUPTA:** 26?

29 **JUSTICE JOYMALYA BAGCHI:** Yes.

30 **JUSTICE ARAVIND KUMAR:** It is already been answered.

31 **RAVI PRAKASH GUPTA:** Page 26.

- 1 **JUSTICE JOYMALYA BAGCHI:** Come to page 26. Your additional written submissions.
- 2 **RAVI PRAKASH GUPTA:** I'm just... I'm obliged.
- 3 **JUSTICE JOYMALYA BAGCHI:** You have yourself quoted...
- 4 **RAVI PRAKASH GUPTA:** Page 26, My Lord.
- 5 **JUSTICE JOYMALYA BAGCHI:** Page 26, begin from the last para 22, starting at the end
6 of page 25. Please read that out, and then make your submissions.
- 7 **RAVI PRAKASH GUPTA:** Yes, 10-02-2020, this proceeding?
- 8 **JUSTICE JOYMALYA BAGCHI:** Yes, 10-02-2020.
- 9 **RAVI PRAKASH GUPTA:** Correct, "All the reference made by three Honourable Judges
10 was to only Seven-Judges..."
- 11 **JUSTICE JOYMALYA BAGCHI:** Yes.
- 12 **RAVI PRAKASH GUPTA:** "The then Chief Justice S. A. Bobde, referred the matter to Nine-
13 Judges Bench." Nobody can refer it to the Nine-Judges Bench.
- 14 **JUSTICE JOYMALYA BAGCHI:** Please read it.
- 15 **RAVI PRAKASH GUPTA:** The relevant paragraph 5 is quoted as under.
- 16 **JUSTICE JOYMALYA BAGCHI:** Now read that paragraph.
- 17 **RAVI PRAKASH GUPTA:** "The Bench of Nine Judges was constituted by the Chief Justice
18 of India to answer the reference. At the threshold, upon the objections raised by the Parties
19 taking exception to the reference...", that was a different objection, I will come to that
20 particular point. "...an issue as to whether this Court can refer questions of law to a larger
21 bench in a review petition was framed." In a review petition, that is very important, that was
22 the issue. "Their request to hear the issue regarding the maintainability of the reference as a
23 preliminary questions was acceded to. We have heard the learned Counsels for both sides on
24 the maintainability of the reference." My Lord, what was objected to, just I will tell you. I was
25 not heard in that matter also. I was also not heard at the time of the framing of the issues also;
26 I was completely excluded. Writ Petitioner Counsel was completely excluded when the issues
27 were framed.
- 28 **CJI SURYA KANT:** Please read that further...
- 29 **RAVI PRAKASH GUPTA:** Why this was...Why... Why this was...? When I raised the
30 objection, My Lord before the Nine Judges Bench, all of a sudden from the other side, they
31 came out with the plea that this reference could not have been made in the review petition

1 because there is a lot of dichotomy. This reference order has not been registered as a reference
2 case, as per the Supreme Court rules.

3 **JUSTICE JOYMALYA BAGCHI:** Yes, that is exactly...

4 **RAVI PRAKASH GUPTA:** It is a review.

5 **JUSTICE JOYMALYA BAGCHI:** If you read the order, next paragraph 11-05-2020 order,
6 you quoted a paragraph there. If you...

7 **RAVI PRAKASH GUPTA:** Undoubtedly, I'm reading, but I'm telling you what was the
8 context of the challenge...

9 **JUSTICE JOYMALYA BAGCHI:** With respect, if you go through that order, what you are
10 canvassing before us today was exactly...

11 **RAVI PRAKASH GUPTA:** I'm only on different platform. In the reference order... I am...
12 I'm coming... I understood Your Lordships question.

13 **JUSTICE JOYMALYA BAGCHI:** ...by the Supreme Court... will not permit a reference on
14 a review petition, then the power of the Chief Justice to make the reference was traced to an
15 Article 32 petition, and it was said that in Article 32 petition the power of the Chief Justice is
16 not governed by the Supreme Court rules, and this decision in 11-05-2020 was passed by the
17 earlier Nine Judge Bench and remains binding on this Nine Judge Bench.

18 **RAVI PRAKASH GUPTA:** May I clarify on this issue

19 My Lord?

20 **CJI SURYA KANT:** Now please come to page 40, and I think then you can sum up your
21 argument.

22 **RAVI PRAKASH GUPTA:** Page 40?

23 **CJI SURYA KANT:** Page 40, last paragraph where you are quoting my opinion. If you read
24 next two paragraphs then your argument is complete.

25 **RAVI PRAKASH GUPTA:** That is a... That is a judgment. Just kindly see page 39 bottom.

26 **CJI SURYA KANT:** 39, we have seen. After that 40 you can see.

27 **RAVI PRAKASH GUPTA:** Page 40.

28 **CJI SURYA KANT:** 4-0.

29 **RAVI PRAKASH GUPTA:** It is in continuation, last two lines of the page 39. "Justice
30 Dipankar Datta..." Justice Dipankar Datta was sitting along with Justice Suryakant and

1 Justice S.K. Sharma, "has attempted to clarify and reconcile the conclusion drawn by the
2 Supreme Court in **Central Board of Dawoodi Bohra** case. Insofar as smaller bench
3 cannot dictate the numerical strength of larger bench as that discretion lies solely with the
4 Chief Justice of India", that's what my contention is, "in his capacity as the master of roster."
5 But on the administrative side, not in the judicial side. "When a smaller bench doubts the
6 correctness of a decision of a larger bench, it has only two options available. First, it may place
7 the matter before the Chief Justice for consideration without prescribing or directing the
8 composition of the proposed larger bench. Second, it may refer the matter to a bench
9 immediately higher in strength for reconsideration of the earlier view. Only a bench of co-
10 equal strength can doubt the correctness of an earlier decision passed by a bench of equal
11 strength upon which the matter may be placed for hearing before a bench consisting of quorum
12 larger than one that delivered the original judgment". Now kindly may I proceed further or I
13 may just skip over and then come to the bottom, Justice Surya Kant's judgment in para 94.
14 "Really capitulates the precise problem with the reference order in **Anjuman Rehmania**
15 case.

16 **CJI SURYA KANT:** Now please read carefully 263.

17 **RAVI PRAKASH GUPTA:** Kindly see this judgment, minority judgment. Sometime
18 minority judgments are much... becomes in the future much more important than the majority
19 judgements.

20 **CJI SURYA KANT:** Yes, yes. Read para 263 and...

21 **RAVI PRAKASH GUPTA:** Therefore, the judgments are overruled in one way or that way.
22 Kindly see...

23 **JUSTICE M.M. SUNDRESH:** Mr. Gupta, listen to us. I think there is no difficulty in
24 listening to you.

25 **JUSTICE B V NAGARATHNA:** Here, here, this side.

26 **JUSTICE M.M. SUNDRESH:** You are looking everywhere except me.

27 **RAVI PRAKASH GUPTA:** I'm sorry, I have a cataract operation I'm sorry My Lords. I have
28 two problems physically; one is of the eye and of the ear also.

29 **JUSTICE M.M. SUNDRESH:** But we don't have difficulty in hearing your argument, no
30 problem.

31 **RAVI PRAKASH GUPTA:** Thanks to God there is no problem with the tongue. So...

32 **JUSTICE M.M. SUNDRESH:** We will tell you what, we...

1 **RAVI PRAKASH GUPTA:** Just, just give me...

2 **JUSTICE M.M. SUNDRESH:** Why don't you listen to us now? If you don't mind, our
3 problem is you are not listening to us. That's the problem.

4 **JUSTICE B.V. NAGARATHNA:** You have to hear, not just listen. Hear, hear my Learned
5 Brother.

6 **RAVI PRAKASH GUPTA:** I'm sorry My Lord.

7 **JUSTICE M.M. SUNDRESH:** There is a beautiful saying in Ramayana in our place. When
8 Rama through... through the... through the arrow through the eye of [UNCLEAR] he explains
9 it... it gets in so fast and then pierced it and went away so fast like... like the same voice of a
10 learned man, to a man who does not want to listen. So, he will go, he'll come so fast, he'll go so
11 fast. That explanation is given. It is just like that. If you want us to listen, then you have to
12 listen to us also. We understand your argument, you are relying upon the Honourable Chief
13 Justice's argument, we also accept it. As my Brother has put it, he asked you to read para 22
14 and 23. Now this is 23... in 22, it actually says, Seven Judge... reference to seven judge, not
15 challenged. Then the Honourable Chief Justice is at administrative side, that's what Chief
16 Justice is saying. He referred to Nine Judges Bench.

17 **RAVI PRAKASH GUPTA:** Nine Judges Bench.

18 **JUSTICE M.M. SUNDRESH:** That is saying like... in administrative order he referred to it.
19 It's not a judicial order.

20 **RAVI PRAKASH GUPTA:** My Lord, how can...

21 **JUSTICE M.M. SUNDRESH:** And now what you are saying that that is inferring with the
22 observation made in the other judgment. Is it is ...

23 **RAVI PRAKASH GUPTA:** The Seven Judges Bench was never constituted.

24 **CJI SURYA KANT:** Mr. Gupta, the problem in *Anjuman* with regard to the legality or
25 validity or propriety of that reference, I have just tried to sum it up in three four lines.

26 **RAVI PRAKASH GUPTA:** I am reading, My Lord. I'm going to start.

27 **CJI SURYA KANT:** Page 41, para 263, that responds to you.

28 **RAVI PRAKASH GUPTA:** I am obliged, My Lord. Kindly see. Can I start from the top?

29 **CJI SURYA KANT:** "In *Anjuman* ..." Yes.

30 **RAVI PRAKASH GUPTA:** Page 41, 263. "In *Anjuman* the bench not only referred the
31 matter but also specified the numerical strength of the bench to which it should be referred."

- 1 **CJI SURYA KANT:** Now, it's Two Judge Bench.
- 2 **RAVI PRAKASH GUPTA:** Two Judge Bench.
- 3 **CJI SURYA KANT:** *Anjuman* is Two Judge Bench. "The bench not only referred the matter
4 but also specified the numerical strength of the bench to which it should be referred to. Further
5 direction that the matter be placed before the Chief Justice for the limited purpose of notifying
6 the composition of the Seven Judge Bench."
- 7 **RAVI PRAKASH GUPTA:** Correct.
- 8 **JUSTICE B.V. NAGARATHNA:** Yes.
- 9 **RAVI PRAKASH GUPTA:** So, that's what I'm saying. Three Judges headed by Chief Justice
10 Gogoi, Three Judges only. Two have dismissed. They have referred directly to Seven Judges as
11 what is written. Then in the Chamber it was referred to Nine Judges.
- 12 **CJI SURYA KANT:** Yes.
- 13 **RAVI PRAKASH GUPTA:** At the administrative side or whatever side.
- 14 **CJI SURYA KANT:** Now, just read the next line.
- 15 **RAVI PRAKASH GUPTA:** There is no proceedings where the matter has been referred to
16 the Nine Judge Bench. At least I could not locate any proceedings where the matter was
17 referred to the Nine Judge Bench. It was only to Seven Judge Bench and that what was the
18 impression of the Justice R.F. Nariman also that the matter is going to be referred to the Seven
19 Judge Bench, not to the Nine Judge Bench, and there is no need at all.
- 20 **CJI SURYA KANT:** Now, just read the next line.
- 21 **RAVI PRAKASH GUPTA:** Kindly see. Paragraph 264, if Your Lordship may...
- 22 **CJI SURYA KANT:** 263. You can read the left out line before and thereafter you can proceed
23 to the next point.
- 24 **RAVI PRAKASH GUPTA:** "...whatever command, we do not appreciate as to how a Two
25 Judge Bench could dictate its viewpoint to the Chief Justice of India. This in our... to our mind
26 effectively impaired the Chief Justice's authority as a master of the roster. Allowing such a
27 practice would enable benches of lesser strength such as to the Two Judge Bench to undermine
28 the decisions of the larger benches potently even an 11 Judge Bench."
- 29 **CJI SURYA KANT:** So, this reasoning does not apply when the Chief Justice himself is
30 presiding the bench. Now please proceed.

1 **RAVI PRAKASH GUPTA:** Chief Justice of India. But at a judicial side, the Chief Justice
2 Gogoi has taken a view, Three Judges Bench, referred it to the Seven Judges without referring
3 to the Five Judges Bench.

4 **CJI SURYA KANT:** Alright. Now, next point.

5 **RAVI PRAKASH GUPTA:** That's it. So, kindly see page 264 also. I can just read, My Lord.
6 "We reiterate that such actions completely undermine the principles of *stare decisis* as well-
7 established doctrine that mandates the consistent application of legal principles once
8 pronounced by authoritative courts. This principle is rooted in the idea that once a court has
9 determined a rule applicable to a specific set of circumstances, it should be followed in all
10 future cases involving substantial similar facts." Then My Lord, kindly skip over then come to
11 the... Just a minute.

12 **CJI SURYA KANT:** You can now come to your Part III, page 50.

13 **RAVI PRAKASH GUPTA:** Page?

14 **CJI SURYA KANT:** Page 50, Part III.

15 **RAVI PRAKASH GUPTA:** Then the Presidential reference also. Just for a moment, because
16 Presidential references 2 or 3 times has been referred back to the President. Under Article 143,
17 in *Ayodhya* case the reference was there, I was there at that moment of time. And in
18 *Ayodhya* case, reference was challenged by R.K. Garg. And this Court after dealing with the
19 entire propositions, then he came to this conclusion that these questions cannot be answered.
20 This is the another aspect of that reference. Apart from validity at the preliminary stage,
21 whether such and such judges this bench could refer it to the larger bench is keeping the
22 middle bench, there is another issue here is this whether the issues which are referred to Your
23 Lordship... and I have already stated when the issues were framed the Counsel for the writ
24 petitioner was not included, there is a speaking order of the Chief Justice Bobde. He has
25 selected some few senior lawyers, and said they will decide what will be the issue, we should
26 be adhered to it. And that has been given the stamp of approval by the Chief Justice Bobde,
27 that these are the issues Seven-Judges. So those issues, I was not there. Now those issues, if I
28 had been there, I would have also incorporated the issue relating to the validity of the reference
29 order. So, I could not incorporate that particular issue.

30 **CJI SURYA KANT:** Now you can come to your preliminary submissions...

31 **RAVI PRAKASH GUPTA:** Sorry, My Lord. Now, so far as the first Presidential reference is
32 concerned, this is a... kindly see there are page 43, kindly see.

1 **CJI SURYA KANT:** Presidential reference is over, Mr. Gupta. Now you can come to page 50.
2 5-0.

3 **RAVI PRAKASH GUPTA:** My Lord, one thing I want to make it clear, in the Presidential
4 reference there is a specific provision the Supreme Court rules say. The problem, because we
5 are the advocate on records, so we know how to deal with the Registry and how to deal with
6 the Supreme Court rules. The senior advocates may or may not enlighten on their views.
7 Whatever Your Lordship, the Chief Justice of India has got the power to constitute a bench.
8 Here the doubt has been, can he constitute the bench of any number of the judges? Can he
9 constitute the bench of the Eleven-Judge or Thirteen-Judges for overruling a bench of the
10 Three-Judges Bench? There has to be certain guidelines.

11 **JUSTICE B.V. NAGARATHNA:** That has not happened, so you don't have to go into it.

12 **RAVI PRAKASH GUPTA:** That's correct. Therefore, since the Chief Justice being here, it
13 requires a little bit amendment also because this case has not been registered as a reference
14 case. Presidential references cases are always registered as a reference case no. 1, 2, 3, 4, like
15 this. And so far as these references cases, because Your Lordship is saying, I'm not saying,
16 because reference case in a review petition and then Your Lordship say it is a reference case
17 only. Reference case has not been registered under the Supreme Court rules, so there has to
18 be a little amendment. So, there has to be a little amendment, very little amendment in a
19 provision that reference case must be separately registered where there will be no Parties.
20 Now, my problem here is what? The same review petition cause title is here, and Your Lordship
21 is hearing the reference within the parameter of that cause title. Now suppose if in case Your
22 Lordship decides something, it will be taken as decided within, in the review petition. And
23 then later on in the same breath, Your Lordship is saying the court says that after this matter,
24 the review petitions will be listed, the same review petition will be listed there.

25 **CJI SURYA KANT:** Mr. Gupta, we have understood your point. It's a good suggestion for
26 our consumption or administrative side; we will consider that part. 75 years whatever practice
27 has been followed has been followed, but if you want a new practice to be introduced, maybe
28 that you have a good suggestion, we will consider that. Now you can...

29 **RAVI PRAKASH GUPTA:** Just one minute, two minutes allow me My Lord. So far as the
30 reference is concerned, Presidential reference which is very important...

31 **CJI SURYA KANT:** Why are you unnecessarily wasting time on Presidential reference?

32 **RAVI PRAKASH GUPTA:** Only one minute I will take. Why I am saying is this, the merit
33 of the reference will also be examined by this Honourable Court. At one point of time, just one

1 minute, Your Ladyship has once remarked, I have heard of, I do not know, I may be incorrect,
2 "it appears to be a case of panic in vacuum". These were the remarks of My Ladyship.

3 **JUSTICE B.V. NAGARATHNA:** I've not used that expression.

4 **RAVI PRAKASH GUPTA:** I don't know, I may be wrong, I'm sorry for that. So, at what
5 point of a time there was a need to make such a reference? Your Lordship has to see all the
6 issues and then say that well, I'm not going to answer...

7 **CJI SURYA KANT:** We understood your argument.

8 **RAVI PRAKASH GUPTA:** ...any issue, collectively or individually. We will not give any
9 answer to this issue, this issue, this issue, this issue.... I will, to collectively or individually, as
10 in the Presidential reference also, the court has said, well, I'm not going to answer these issues
11 which have been sent by the President of India under Article 143 of the Constitution of India,
12 So, Your Lordship has also examined whether every issue is to be addressed by every judge of
13 this court, or the judge may say, well, this is well-settled, I am not going to disturb anything
14 and we are not going to answer this issue. Kindly see next.

15 **CJI SURYA KANT:** Now, you come to page 50, your preliminary submissions.

16 **RAVI PRAKASH GUPTA:** Now preliminary submissions My Lord. I'm grateful Your
17 Lordships. Page 50, para 31. Now there are certain preliminary submissions which I have
18 made. Before coming to the merit, 2 or 3 things are very clear. This is a reference case, this is
19 not a review petition although the cause title is of the review petition. So, far as Sabarimala is
20 a religious denomination or not, that has been conclusively decided by 4:1, and it cannot be
21 obeyed. Why? Because there is no such issue referred to Your Lordships. Even what are the
22 essential ingredients of constituting the religious denomination that will also not be discussed
23 by Your Lordship some have tried to address on those issues, but this is not the issue here.
24 Conclusively it is, so it cannot be disturbed, these findings are... now whatever the
25 **Sabarimala** has to take the help is of the non-religious denomination...

26 **JUSTICE M.M. SUNDRESH:** We understand. Next point.

27 **RAVI PRAKASH GUPTA:** Kindly see, next. So far as the Rule 3(b) is concerned... 2(b), 3(b),
28 kindly see 3(b) of the Kerala Hindu places of public worship, Authorization of Entry Rules
29 1965, page 51, that has been declared to be *ultra vires* by the 5(2)1. This has also not been
30 referred to, any of the issues which relates, so it is also conclusive and final. So, **Sabarimala**
31 case cannot be touched whatever may be the reference order, whatever may be the judgment.
32 **Sabarimala** case cannot be referred to, it cannot be reopened, it is final and conclusive, and
33 Your Lordship has to implement that particular order despite all the public protest or the...

1 **CJI SURYA KANT:** We already said we agree with you on this topic, yes.

2 **RAVI PRAKASH GUPTA:** I am obliged. Kindly see next, my last on merit. My Lord, I will
3 take it to the history of India in context of the Indian history then only this could be examined.
4 Religion is such a thing I will come to later on My Lord, that it cannot be defined under any
5 circumstances. Submissions on various superstitious beliefs/accretions. "That the Solicitor
6 General on behalf of the Union of India..." that is very important we are we are deferring to,
7 from the Solicitor General, "agreed that in case of conflict between Articles 25 and 26, they
8 should be harmonized to the extent that while giving right to religious denomination under
9 Article 26, right of individuals under Article 25(1), and that of a State to make law under 25(2)
10 may not be reduced to husk."

11 My Lord 'husk' is very important in the judgment of the *Devaru* case. You can do, harmonize,
12 what is the problem, no problem, but don't reduce the other side. To reduce to such an extent
13 that it becomes 'husk', there remains nothing of that man. So therefore, *Devaru* case has
14 harmonized in such a manner and now the question here is this he has also agreed to the extent
15 that *Devaru* case is correct, and there is no error, My Lord, Gopal Subramaniam has also
16 agreed to this proposition if I'm not wrong. Extent "*Devaru* case is correct and there is no
17 error wherein *Sri Venkataramana Devaru versus* such and such at page... Justice
18 Venkatarama Aiyar, "if the denominational rights are such that to give effect to them would
19 substantially reduce the rights conferred by Article 25(2)(b) then of course on our conclusion,
20 that Article 25(2)(b) prevails as against Article 26(b), the denominational rights must vanish,
21 but where that is not possible position after giving effect to the rights of the denomination,
22 what is left to the public of the right of worship is something substantial and not merely the
23 husk of it". That is very important, 'husk' expression 'husk.' "There is no reason why we should
24 not so construe 25(2)(b) as to give effect to Article 26(b) and recognize the rights of the
25 denomination in respect of matters which are strictly denominational, leaving the rights of the
26 public in other respects unaffected. The State of Kerala has already stated in their Affidavit
27 women of all ages must be allowed". This is a statement, I may just explain the State of Kerala,
28 and I filed a writ petition. Left government was there, they filed the Affidavit, they said that
29 the women of no ages should be debarred, all should be allowed, thereafter the government
30 had changed. When the matter came after notice, they changed the extent and they filed
31 another Affidavit. Then Chief Justice Dipak Misra was quite annoyed, that if you are filing the
32 Affidavit in such a reckless manner, you are changing the state because the change of the
33 government, we are not going to allow. Make your stand clearly that what is your stand,
34 whether the first Affidavit or the second Affidavit? Then the State of Kerala Counsel has said
35 that well, I'm relying on the first Affidavit because it was the first Affidavit, and very
36 categorically I have stated that the women of no ages should be debarred, they all should be

1 allowed. So, this is what the State of Kerala... Therefore, I'm saying that Union of India, State
2 of Kerala there were some boards, all are in our favour. Except 20 or 30%, in the last they
3 deviate.

4 Kindly see. Then the State of Kerala, the next page 54. "The Solicitor General, however, differs
5 over the ambit of Article 26(b) and says superstitious beliefs..." Here is that diversion and
6 which I highly oppose the submission of the Solicitor General on this issue. "Wherein then
7 Justice B.K. Mukherjea at page 28 categorically observed under Article 26(b). Therefore, a
8 religious denomination or organisation enjoys complete autonomy in the matter of deciding
9 as to what rites and ceremonies are essential according to the tenets of religion they hold and
10 no outside authority has any jurisdiction to interfere with their decision in such matters. The
11 petitioner submits that this interpretation of Solicitor General would bind the judiciary and
12 would strengthen the hands of those who are practicing witchcraft and befooling and cheating
13 the innocent people from the last several centuries, which had a firm rule in India for more
14 than 1000 years. It is submitted that subsequently Five Judges Bench in **Durgah**
15 **Committee** case reported in such and such realise this lacuna. And therefore, the then Justice
16 Gajendragadkar clarified that one should not get confused with many accretions added in due
17 course of time to the core set of rites or ceremonies practiced by religious denomination. He
18 observed at page 411 and 412 that in order that the practices in question should be treated as
19 part of religion, they must be regarded by the said religion as if essential and integral part,
20 otherwise even purely secular practices which are not an essential or integral part of the
21 religion are apt to be clothed with religious form and may make a claim for being treated as
22 religious practices within the meaning of Article 26. Similarly, even practices, though religious,
23 may have sprung from nearly superstitious beliefs and may, in that sense, the extraneous and
24 unessential accretion..." My Lord this is very important. What Justice Gajendragadkar was of
25 this opinion, in religion since it is coming from a very long age... ages, one, a belief was very
26 good belief, and then later on subsequently percolated into a dogma and religious. So he says,
27 accretions in due course of time which converts into superstitious belief. So, that what Justice
28 Gajendragadkar has departed and he said it like this and we have... My Solicitor General has
29 also differed and says that it is within the ambit of the... Page 55. "Since most of the religious
30 denominations like Sabarimala, Ajmer Dargah are ancient institutions, many rites and beliefs
31 may get added in due course. So, the core religious practices could be permissible under Article
32 26 but not all historical accretions, including many ill practices like superstitions which may
33 in due course of time may get added to the basic theme of the religious denomination. The
34 Solicitor General failed to appreciate the danger of religious horrors practiced in many parts
35 of this country..." Not in the country; abroad also, My Lord. "...which do not fall within the
36 ambit of rites and ceremonies."

1 Now kindly see the Khajuraho temples and some Odisha temples which are being erected on
2 the advice of the *Agamas*. Kindly see, para 34. "It is submitted that if superstitions were
3 permitted in the name of religion and even judicial review is not permitted..." My Lord, 32,
4 142, 226 has no value. "...then whatever has been achieved since abolition of *sati* in 1829 shall
5 be undone at the very apex level. It is submitted that virtuous images in the form of *mithun*
6 over the outer walls of Khajuraho temples between 885 A.D. to 1050 for the purpose of
7 pleasing the *Bhutas*/spirits, which is perfectly as per the architectural design proposed by
8 *Agamas* as per Agni Purana and other Hindu religious scriptures like Brihat Samhita, Matsya
9 Purana..." Next page. "...In construction of Vishnu temple, torana of the same should be
10 decorated with *mithuna* sculptures, sculptures along with other essential items like
11 *Vidhyadhara*, *Gandharva*, lion, tiger etc. Similarly, the Agni Purana have also beautifully
12 concluded that the last four *Shakhas*, division of temple should be decorated with erotic
13 imagery. The *Brihatsamhita*, a treatise of 6th century, have also referred that the door of any
14 Saiva temple should be adorned with the figures of birds, trees, pots and with male and female
15 figures, as well as those of leaves, creepers and other fiend attending on Shiva." Regarding
16 Khajuraho temples, Gyan Brata Chakravarti, My Lord, he is a very...

17 **CJI SURYA KANT:** What is your argument here?

18 **RAVI PRAKASH GUPTA:** My argument here is this, that suppose if you... what if they go
19 to the extreme side that the judicial review should not be...

20 **CJI SURYA KANT:** You forget about them, you concentrate on your view.

21 **RAVI PRAKASH GUPTA:** I am coming to that particular point. Now kindly see My Lord,
22 for example, if Your Lordship hold it, there are two aspects, judicial review and thereafter
23 whether it should be permitted at all. Suppose if it is being found to be a part of the religion, it
24 is a part of the Article 26(b) and court cannot look into it. Now they say so far as the Khajuraho
25 temples, the images which are there, which the Mahatma Gandhi has said they should be
26 raised and... but is still persisting. Suppose if I erect a Khajuraho Temple type of temple in my
27 colony, and the inhabitants are objecting to it, then this court cannot look into it because it is
28 a part of the religion. So, where we will stand? Not only Khajuraho Temples in several Odisha
29 temples also.

30 **CJI SURYA KANT:** Mr. Gupta, we don't want that religious debate here. If you do not know
31 anything about the temple and cannot [UNCLEAR] a temple, please don't argue... raise an
32 argument only for the sake of live time.

33 **RAVI PRAKASH GUPTA:** Kindly see the other examples.

1 **CJI SURYA KANT:** You have no knowledge of these temples we are referring to. Your
2 knowledge is extremely poor, if you want us to quote.

3 **RAVI PRAKASH GUPTA:** So, far as these type of temples, the worship is going on...

4 **CJI SURYA KANT:** Now, please proceed further. Don't waste our time also now.

5 **RAVI PRAKASH GUPTA:** Now next, kindly see the...

6 **CJI SURYA KANT:** You have absolutely no knowledge of any of these things you are
7 referring to.

8 **RAVI PRAKASH GUPTA:** Kindly see page 57, the Gita. What the Gita says, can I quote the
9 Gita My Lord? Kindly see page 57, what the Gita says. Paragraph 36, bottom page 57, I'm just
10 quoting two lines of the Gita. "Holy Gita mentions about worshipping *Bhutas*, by depraved
11 kinds of people." This has also been mentioned in Chapter 17, Shloka 4 of Gita where few
12 depraved sections of society worship them. Next page, 58, kindly see My Lord the middle
13 portion, I have given the English translation. Your Lordships got the middle portion at page
14 58, what the Gita says. "Those in the mode of goodness worship the celestial gods; those in the
15 mode of passion worship the *Yakshas* and *Rakshasa*; those in the mode of ignorance, worship
16 ghosts and spirits." So, this division has been made and in Gita it has been mentioned. Then
17 Your Lordship has to see that the religion, if you leave the religion...

18 **CJI SURYA KANT:** Your entire translation is wrong. You have no knowledge of the Sanskrit
19 words, and you are wrongly translating and giving a complete mis-feedback and misdirecting
20 us.

21 **RAVI PRAKASH GUPTA:** I admit, I do not know that...

22 **CJI SURYA KANT:** Therefore, why you are relying upon, when you do not know the subject?

23 **RAVI PRAKASH GUPTA:** My Lord, I can give you the source...

24 **CJI SURYA KANT:** Confine to your legal... We have already told you that we are only within
25 the framework of 25 and 26. Who is asking you to explain yes, but what is the *Yaksha* and what
26 is *Rakshasa*?

27 **RAVI PRAKASH GUPTA:** My submission before Your Lordship is this...

28 **CJI SURYA KANT:** The translation of *Rakshasa* is ghost?

29 **RAVI PRAKASH GUPTA:** Your Lordship may be correct, because whatever I could catch
30 hold of, I have given and I've produced it. And I have also given the meaning of each and every
31 word which has been used in this shloka. That is also the...

- 1 **JUSTICE B.V. NAGARATHNA:** What is your argument? What is your argument?
- 2 **RAVI PRAKASH GUPTA:** I'm coming, religion.
- 3 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta, we will read this portion. I think the most
4 important arguments is capsulated from page 74 onwards.
- 5 **RAVI PRAKASH GUPTA:** I'm coming to 74, I'm sorry My Lord, I'm obliged.
- 6 **JUSTICE JOYMALYA BAGCHI:** ...page 74 onwards, they are more focused on the
7 questions. Other, all this history about religion we will read it.
- 8 **RAVI PRAKASH GUPTA:** Now kindly see My Lord, just thereafter My Lord, that page 59,
9 para 38.
- 10 **JUSTICE B.V. NAGARATHNA:** Go to page 75.
- 11 **RAVI PRAKASH GUPTA:** I'm coming My Lord, but before that, at page 60, "The National
12 Crime Records Bureau, an office attached to the Indian Ministry of Home Affairs, it started
13 collecting data on human sacrifices..." at page 60, paragraph 39, "...human sacrifices." This is
14 a Government of India record. Then I may skip over it. "When these children are sacrificed,
15 they are usually mutilated..." page 61 quoted portion. "Their ears and nose are sliced off to
16 unleash a stream of blood which is collected in vessels and offered to goddess. In *Krishna*
17 case, a whole was drilled into his head to facilitate this. Several *tantriks* are known to drink
18 the blood during the ritual, which is usually performed on new moon and full moon nights".
19 Next kindly see... then I will skip over this one. Now come to the page 60.
- 20 **JUSTICE PRASANNA B. VARALE:** ...and come to page 75 that will help you sir.
- 21 **RAVI PRAKASH GUPTA:** Very important, My Lord very important is that, just...
- 22 **JUSTICE PRASANNA B. VARALE:** That part you please leave us to... leave us to...
- 23 **RAVI PRAKASH GUPTA:** One very important is *Sati Pratha*.
- 24 **JUSTICE PRASANNA B. VARALE:** Leave us to read it.
- 25 **RAVI PRAKASH GUPTA:** My Lord, I will just read...
- 26 **JUSTICE PRASANNA B. VARALE:** Save your time sir, we are worried about your time.
- 27 **JUSTICE JOYMALYA BAGCHI:** So many other Senior Counsels are there...
- 28 **RAVI PRAKASH GUPTA:** Kindly see... I am the only going to read what the Privy Council
29 has held in the *Sati Pratha*.
- 30 **JUSTICE JOYMALYA BAGCHI:** That we will read...

1 **RAVI PRAKASH GUPTA:** And whatever the other side mindset is, the same mindset was
2 reflected before the Privy Council also.

3 **JUSTICE JOYMALYA BAGCHI:** This is not disputed to fall within questions of Public
4 Order which is an exclusionary clause for Article 25 as well as 26. It doesn't really trouble us;
5 there is no dispute *inter se*. The issues that you are addressing more relevant come from page
6 74, 75.

7 **JUSTICE B.V. NAGARATHNA:** 75.

8 **JUSTICE JOYMALYA BAGCHI:** Please address us on that.

9 **RAVI PRAKASH GUPTA:** My submission is only this, 26(b) cannot be expanded to include
10 superstitious beliefs.

11 **JUSTICE JOYMALYA BAGCHI:** Perfect.

12 **RAVI PRAKASH GUPTA:** Therefore, I disagree with the Solicitor General on this decision.

13 **CJI SURYA KANT:** We appreciate that part of your contention, but that starts from page 76,
14 para 51. Please come there, it makes lot of sense what you probably want to say, we will
15 appreciate that part. We may agree, we may not agree, but you please come there.

16 **RAVI PRAKASH GUPTA:** I am coming to page 25.

17 **JUSTICE M.M. SUNDRESH:** Mr. Gupta, you can put it in a single line, see, you can... see
18 actually the Learned Solicitor General tried to restrict his own power. You can say the power
19 is rather wide to cover social welfare, social reform, and the third part of entry. What constitute
20 is a different thing, but 26, 25(2)(b) gives a power, though he himself is circumspect in saying
21 we don't wish to exercise it except that he gives an example of these are the areas we probably
22 venture into. Factually he wanted to...

23 **TUSHAR MEHTA:** Witchcraft etc., which are prohibited by law by several States by making
24 legislative...

25 **JUSTICE M.M. SUNDRESH:** In other word his argument is, such a power can be used very
26 sparingly, and in a given situation because obviously it will have a reflection on the religion,
27 religious practice, and therefore religion [UNCLEAR]. We are quite conscious about it, it is not
28 for us to trigger it as and when required, unless we are satisfied with the parameters we will
29 not do it, for that we are saying. We understood the argument hope you will also be
30 appreciating that. That is why we put a question to you under which power you have amended
31 Section 6 of the Hindu Succession Act, he said 26(2)(b). Is it a superstition or something like

1 that, it's a reform. When it comes to reform it can be done. We understand your argument,
2 yes.

3 **TUSHAR MEHTA:** Exclusion on the judiciary [UNCLEAR] through court will [UNCLEAR]
4 is a part of reform under 20.

5 **RAVI PRAKASH GUPTA:** If he agrees then no problem.

6 **JUSTICE M.M. SUNDRESH:** Very well. Go ahead.

7 **RAVI PRAKASH GUPTA:** It should be noted down. And now kindly see page 76, 'Religion',
8 page 76. I'm coming to page 76, paragraph 51, "That a combined reading of Articles 25 and 26
9 would show that Constitution makers have provided for three rights, namely the individual
10 rights to religion, the rights of religious denomination to manage. Three, state's right to
11 regulate various aspects of the religious affairs". Now next paragraph, "It is submitted that
12 religion has not been defined in the Indian Constitution. So, there could not be any
13 fundamental right of any individual or group of individuals over any religion, nor they can
14 claim any authority over the same, no one can issue any *fatwa* or command on behalf of any
15 religion existing from the time immemorial. There are no legal successor surviving who could
16 have claimed any right over the same. This right to religion is only given to religious
17 denomination or section thereof. The expression 'any section thereof' in Article 26 pertains to
18 the said religious denomination and not independently. Therefore, constitution makers have
19 guaranteed fundamental right to only religious denomination and not to any follower of
20 general religion existing from the time immemorial, except this...", kindly see next page, that
21 I've already clarified it has come during the course of the argument, whether the expression
22 "person which has not been defined in the Constitution" is defined... is defined in the General
23 Clauses Act, Clause 42, and the body corporate is there, administration is there. So, non-
24 denominational religious groups, they enjoy the right under Article 25. There is no problem
25 like that. They can enjoy within the definition of the person. Page 77, I have quoted that
26 particular provision of the person as such. Kindly see. So they enjoy.

27 Now page 78. Now I will just give the position of other countries. About 10 odd... 10-12
28 countries what I have seen the constitutions. So, I will be reflecting their positions, in their
29 constitutions. Page 78, paragraph 53. May I read My Lord? Page 78, paragraph 53. Paragraph
30 53. Should I start? Page 78, paragraph 53.

31 **CJI SURYA KANT:** Yes.

32 **RAVI PRAKASH GUPTA:** "This right is not confined to only his or her religion." Very
33 important, I am telling. It is a new argument altogether before Your Lordships. "The
34 expression 'his or her' is significantly missing like in Article 38(1) of the Constitution of

1 Nigeria, which provided that every person shall be entitled to manifest and propagate his
2 religion." This 'his' or 'her' is missing. So, I can practice any religion or belief in worship. "On
3 the other hand, the Constitutions of Bangladesh, Vietnam and Uganda expressly provided to
4 every person right to practice any religion. For example, Article 49(a) of Bangladesh
5 Constitution provides that every citizen has a right to profess, practice and propagate any
6 religion." They have categorically mentioned in their Constitution. "Similarly, the Article 24(1)
7 of the Constitution of Vietnam provided that everyone has a right to freedom of belief and
8 religion and has a right to follow any religion or to follow no religion. All religions are equal
9 before law. Similarly, Article 29(1)(c) of the Constitution of Uganda provides that freedom to
10 practice any religion and manifest such practice which shall include the right to belong to and
11 participate in the practices of any religious body or organisation in a manner consistent with
12 this Constitution." Then see the Constitution of Ireland. "It was so because our Constitution
13 borrowed principles from Article 44 of the Constitution of Ireland, which has confined rights
14 to only religious denomination. Pakistan Constitution too follows the same principle as laid
15 down in Indian and Ireland Constitutions. The other reason could be that..." Next page 79.

16 **CJI SURYA KANT:** All right, we understood that part.

17 **RAVI PRAKASH GUPTA:** Now kindly see...

18 **CJI SURYA KANT:** Now you are in H.M. Seervai at page 80.

19 **RAVI PRAKASH GUPTA:** I am obliged. At page 80, kindly see that. Third line from the top.
20 "The religious institutions carry many religious activities, ritual ceremonies and without entry
21 into the same, one may not fully practice religion. H.M. Seervai in his book such and such, the
22 para 12.50 - 'It is obvious that religion has both a personal and institutional side. No doubt
23 men may pray in their homes and hit the heaven with their prayers, but throughout the ages
24 men have worshipped in temples, churches, mosques and the like. In practice the personal life
25 is inseparable from the institution and the person would justify complain that he had been
26 denied the freedom of religion if the right of private worship was conceded, but the right of
27 public worship was denied. Article 25 to 28 recognised this two-fold aspect of religion. Thus,
28 right to practice religion includes right to entry in the public religious institutions. This right
29 is not limited to citizens but to all persons of any faith.'" This is very important, this is my
30 separate arguments.

31 **CJI SURYA KANT:** We have understood.

32 **RAVI PRAKASH GUPTA:** I can, as a matter of fact can go to the masjid, nobody can...
33 provided we follow their rituals, whatever they have laid down. "It does not restrict one's right
34 to his or her own religion but to freely profess, practice and propagate any religion. Thus,

1 barring a case of FGM..." Female genital mutilation, My Lord, FGM; I have given in short.
2 "...which is not only unconstitutional but also penal in nature, other four cases related to entry
3 of women were constitutional makers have not only given ample protection to the religious
4 rights of women, but have made it at par with men using the expression 'equally' in Article 25
5 of the Constitution. The next expression 'freely'..." My learned sister was emphasizing upon
6 the word "freedom"; freely. "...is very significant as there are no fetters over the right till it does
7 not disturb public order, morality and health. Thus, entry into religious institutions being part
8 of this right, could be exercised freely under Article 25(1). It may be submitted that the
9 expression "free" is concomitant with similar rights of freedom...", next please, "...guaranteed
10 under Article 19(1), but this right under Article 25(1) has been codified separately from Article
11 19(1)(a)-(g) while providing for certain rights under Article 19(1) like right to freedom of
12 speech and expression, right to form association/assemble, right to freely move in any part of
13 the India including right to trade and profession etc. The constitution makers took care not to
14 provide for right to profess, practice, propagate religion in Article 19(1), because rights under
15 Article 19(1) are limited to only citizens, only, while right under Article 25(1) is available to
16 every person. It may be stated that in several constitutions, this right has been clubbed with
17 other rights, for example, in Article 29 of the Constitution of Uganda, religious rights have
18 been clubbed with other rights by providing that protection of freedom of conscience,
19 expression, movement, religion, assembly and association. Similarly, in Article 2 of the
20 Canadian Constitution, while providing for religious right under Clause (a), Clause (b)
21 provided for freedom of thought, belief, opinion and expression including freedom of press
22 and other media of communication, Clause (c) provided for freedom of peaceful assembly and
23 Clause (d) provided for freedom of expression. Since religion has always been regarded as very
24 intrinsic to human living, like right to life and liberty guaranteed under Article 21. And so every
25 person has been given separate right under Article 25(1), subject to public order, morality and
26 health. It is submitted that the expression "free" appearing anywhere like in Article 19(1)(a),
27 carry with it corresponding duty so as not to disturb others right to also exercise their right.
28 There is no such concept like absolute freedom, and which may create disorders, and hence
29 this right has been made subject to public order which could be ordained not only by State,
30 but also by religious institutions. Again, the expression "freely" does not mean that one can
31 engage in any kind of ritual." Again, I am coming to that particular point, you can freely
32 exercise but not any kind of the freedom, any kind of the ritual. "If the expression "freely" is to
33 be read in juxtaposition with the expression "equally", it would mean that every person can
34 exercise this right which includes right to entry freely at par with everyone subject to public
35 order, health or morality. If this right is exercised at the place other than religious institutions,
36 then the same shall be subject to public order maintained by State. But if this right is exercised

1 freely and equally in religious institutions, then the same shall be exercised as per reasonable
2 and non-discriminatory norms laid down by their managements."

3 The next expression "belief", that is very important, although this issue was not in the
4 **Sabarimala** case because what was there in that, entry point. Entry is not the belief, your
5 belief cannot be this that well, my belief is this I will enter, you will not enter. This could not
6 be the belief, I don't agree with that belief. Para 56. The next expression...

7 **JUSTICE B.V. NAGARATHNA:** So, that means people who did not have any faith or belief
8 in that Lord, weren't allowed to enter the temple, that is your case.

9 **RAVI PRAKASH GUPTA:** In that case, will you take the undertaking before the entry of the
10 temple? If this is the undertaking you give, that you believe in this faith?

11 **JUSTICE B.V. NAGARATHNA:** Your case was people who don't have faith and belief in
12 that deity, allow them to enter.

13 **RAVI PRAKASH GUPTA:** No, no. How Your Ladyship has come to this conclusion? I do
14 not have the wisdom.

15 **JUSTICE B.V. NAGARATHNA:** Your whole case you are saying [UNCLEAR].

16 **RAVI PRAKASH GUPTA:** I am having full faith, therefore I'm entering. I have given the
17 example of Balaji Mandir.

18 **JUSTICE B.V. NAGARATHNA:** See, this is quite serious. A person who has full faith and
19 belief in in the lord or the deity, the goddess...

20 **RAVI PRAKASH GUPTA:** Naturally.

21 **JUSTICE B.V. NAGARATHNA:** ...will follow what is required for the performance of
22 worship.

23 **RAVI PRAKASH GUPTA:** Of course.

24 **JUSTICE B.V. NAGARATHNA:** If any such devotee is saying, I will break all *niyams* and
25 even then I will enter, such person cannot be encouraged by this court.

26 **RAVI PRAKASH GUPTA:** I understood your position. I understood Your Ladyship.

27 **JUSTICE B.V. NAGARATHNA:** This question of belief, we are not on superstition, leave
28 aside superstition. We are on the serious issue, anybody say who has faith and belief in a
29 particular deity, lord, goddess, let us take or even any other religion also wants to...

30 **RAVI PRAKASH GUPTA:** Of course, I agree.

- 1 **JUSTICE B.V. NAGARATHNA:** Yes.
- 2 **RAVI PRAKASH GUPTA:** I agree.
- 3 **JUSTICE B.V. NAGARATHNA:** Such a person will not say I will break the *niyams* and this
4 Court must give me the support for...
- 5 **RAVI PRAKASH GUPTA:** But it is not in this case My Lord, ***Sabrimala*** case it is not the
6 case. ***Sabarimala*** case, the case is this, that I am entering with the firm belief to follow all
7 rituals which are prescribed for any worshiper in the Sabarimala temple. But you say my belief
8 is this, I will go, you will not go.
- 9 **JUSTICE B.V. NAGARATHNA:** You are not a true believer...
- 10 **RAVI PRAKASH GUPTA:** That's what... That's what in the Kerala Division Judgment is
11 there. If the Lord Ayyappa does not like young ladies from where they brought it? And you
12 have imputed this verse into the mouth of the Lord Ayyappa because he's not here. Such kind
13 of the verse could be imputed by the astrologers and that too in 1985 only.
- 14 **JUSTICE B.V. NAGARATHNA:** Nine Judges. What was the controversy which was
15 brought to this court...[UNCLEAR]
- 16 **RAVI PRAKASH GUPTA:** Controversy is regarding the belief.
- 17 **JUSTICE B.V. NAGARATHNA:** ...the court is the question...
- 18 **RAVI PRAKASH GUPTA:** Therefore, I'm saying what is the belief.
- 19 **JUSTICE B.V. NAGARATHNA:** ...asking...
- 20 **RAVI PRAKASH GUPTA:** That is what I'm asking what is the belief?
- 21 **JUSTICE B.V. NAGARATHNA:** ...what is the controversy brought, why was it entertained,
22 what are we as Nine Judges doing now?
- 23 **RAVI PRAKASH GUPTA:** That... Kindly see page 82. Whatever their rights, what they are
24 ceremonies, what they are beliefs, I am adhering to, there is no problem like that.
- 25 **CJI SURYA KANT:** Mr. Gupta, we understand your argument is Lord Ayyappa has been
26 made to believe to be a *Brahmachari*, not by any religious practices but on... at the asking of
27 some astrologer, that is one of your arguments. Second, your argument...
- 28 **RAVI PRAKASH GUPTA:** That is not my argument, but that has been reflected in the
29 Kerala High Court judgement.

1 **CJI SURYA KANT:** Naturally you are heavily relying upon that judgment so therefore it is
2 your argument. You are relying upon that.

3 **RAVI PRAKASH GUPTA:** Judgement I have relied...how the belief has been created.

4 **CJI SURYA KANT:** Second, your argument is that the... if the women can climb to Mount
5 Everest, why not Sabari Hills? That is also your argument. Now we proceed. Now you can come
6 to page 86, para 59.

7 **RAVI PRAKASH GUPTA:** I'm obliged.

8 **CJI SURYA KANT:** Where you have explained the expression "or any section thereof",
9 please.

10 **RAVI PRAKASH GUPTA:** Yes, sir. "This provision confers right not upon religious
11 denomination, but also upon section of said religious denomination". The expression "or any
12 section thereof", 'thereof' is very important. It conjunctive with the expression religious
13 denomination, it cannot be separated. So, that section of the person would be... must be
14 belonging to that religious denomination. But this is not the case which is applicable in
15 **Sabarimala** case because 4:1 it has been allocated it is not a religious denomination. "The
16 expression 'or any section thereof' is conjunctive with the expression 'religious denomination'
17 and does not exist independently. 'Any section thereof' means that they must be belonging to
18 some religious denomination. The expression 'thereof' connects it to the religious
19 denomination, otherwise the constitution makers would have employed the expression 'any
20 section of society', but they have not deployed. 'Section thereof' which would have widened the
21 scope of Article 26 (a) to 26(c) the aforesaid right basically confers following rights- Right of
22 religious denomination 'or any section thereof' to create any religious institution for both
23 religious and charitable purposes. Right of religious... such religious denomination 'or any
24 section thereof' so created to manage its religious affairs. Right of religious denomination 'or
25 any section thereof' so created to own manage property". Just for a moment I can just pause
26 for a moment. Why there was a need for this Article 26(b) unnecessarily? When you are giving
27 the freedom of religion to everybody, it should also be given. The religion was different. The
28 expression in (a) what it uses 'religious' and 'charitable' that what Indra has also stressed upon
29 it. The expression, that is very important. And not all, why, because large number of religious
30 charitable institutions are imparting education in different parts of the country. There is a
31 DAV Trust, there is a Sanatan Dharma Trust, there is an Arya Samaj Trust, there is a
32 Vivekanand Trust. They are running hundreds of schools not from today, from the starting of
33 19th century they have set up their setup. Now all these religious and charitable institutions,
34 the Constitution makers were keeping in their mind that they should not be interfered with.
35 The moment you will start interfering into all these aspects, it will create a lot of problem. So,

1 they have carved up separately religious denomination. Okay, some powers should be given to
2 them, but don't make them this is not subject to judicial review, you cannot touch 32, 142, 226.
3 This is a... I don't think that this should be even the issue in the area of the issues.

4 **CJI SURYA KANT:** We appreciate that part. Para 61 in fact you explain... in para 61 you have
5 explained this aspect; you can read that two lines.

6 **RAVI PRAKASH GUPTA:** I am obliged. Page 88, para 61. "The State's power is not confined
7 to Article 25(2), but also, to every individual denominational and non-denominational right
8 which is subject to public order, morality or health. Thus, both Articles 25 and 26, could be
9 regulated under the expression 'subject to public order, morality or health'. Moreover, the
10 State under Article 25(2)(a) can to regulate any aspect related to religious practice in any such
11 religious institutions. The massive power was given by constitution makers to the State after
12 experiencing from conflicting judgments delivered in Australia on unique *Jehovah's*
13 *Witnesses*..." There is a famous case that has been mentioned in several Supreme Court
14 judgments."...and the judgment delivered by American courts over compulsory enacting of
15 national anthem in classroom as stated in *Shirur Mutt* case at page 1028." May I read this
16 one? "It is to be noted that both in American as well as in Australian Constitutions, the right
17 to freedom of religion has been declared in unrestricted terms with or... out any limitation
18 whatsoever. Limitation, therefore, have been introduced by courts of law in these countries on
19 grounds of morality, order and social protection, and adjustment of the competing demands
20 of the interest of government and the constitutional liberties is always a delicate and difficult
21 task. And that is why we find a difference of judicial opinion to such an extent in cases decided
22 by American courts where questions of religious freedom are involved. Our constitution
23 makers, however, have embodied the limitations which have been involved by judicial
24 pronouncements in America or Australia, in the Constitution itself, and the language of
25 Articles 25 and 26 is sufficiently clear to enable us to determine, without the aid of foreign
26 authorities, as to what matters come within the purview of religion and what to do."

27 Now just for a moment, My Lord, I can say, in America, the situation was entirely different.
28 American Constitution is 200 years back and in American Constitution, the First Amendment
29 which gives the right to the religious... that you can also practice, that they have provided there.
30 But at that time the situation was entirely different. We have gone far away from there;
31 therefore, I wanted to read certain extracts in the... in the provision of *Sati* Bill, that was very
32 important, but Your Lordship had said *ki* skip over that one. Because that was the same
33 mindset, which is the mindset of the other side. There is no difference between the two. I would
34 have proved it what the argument they have made before the Privy Council. Same argument
35 what the other side is making the arguments and I've quoted those argument before the Privy
36 Council, and Your Lordships can look into it that what the arguments were placed before the

1 Privy Council Committee, that how they have tried to protect. And there was a resolution
2 which has petitioned the Privy Council against that bill, and in that resolution... Resolution
3 was by the Hindu Raja and some 53 people were there. They petitioned against this
4 provisioned bill before the Privy Council, and they also passed a resolution that whosoever will
5 be supporting this bill whereby *Sati* has been prohibited, he will be excommunicated. This was
6 the resolution on record.

7 **CJI SURYA KANT:** Alright. So, what do you say now interplay between 25 and 26?

8 **RAVI PRAKASH GUPTA:** Paragraph?

9 **CJI SURYA KANT:** Interplay between 25, 26. Paragraph 63.

10 **RAVI PRAKASH GUPTA:** 63. Interplay. Interplay there is a lot of arguments, I have already
11 taken. Some I have already argued, but Your Lordships... I think...

12 **CJI SURYA KANT:** You have summed up those arguments very well. Anything new you
13 want to point out here?

14 **RAVI PRAKASH GUPTA:** My Lords, almost... The arguments was the other side has
15 already accepted. My Lord, I may read those one. I have no problem, but the thing is that...

16 **CJI SURYA KANT:** Those you have argued well.

17 **RAVI PRAKASH GUPTA:** It will be a repetition. "Essential religious functions of religious
18 denomination." There the *Shirur Mutt* case that Attorney General opinion, that are already
19 been done, sir. I don't want to trouble Your Lordships on that one. Therefore, I was saying
20 that....

21 **CJI SURYA KANT:** Page 96, I think.

22 **RAVI PRAKASH GUPTA:** Now, exclusionary practice at page 96. Kindly see. That is very
23 important, because this whole reference is with respect to the exclusionary practices, whole
24 reference. There are 2 or 3 cases they... the bench has got it and making it the ground reference
25 was made. So, I'm very touchy about the FGM, and I say that any kind of bodily mutilation
26 whether it of male or whether it is a female; not only male, not only female, male also because
27 he is a child and you are subjecting to some kind of... This thing is old. A century old practice.
28 In all... not in the Christianity but two Abrahamic religions; coming from Adam and Eve and
29 two Abrahamic religions of Judaism also this practice was practiced and that has been
30 followed in Islam also. It is not in Islam as such. It is not the essential part of Islam, male
31 circumcision, but it was already going on; so nobody has given thought to it. And whenever
32 any reformer will come out of it, then few people may just start crying that no, this is against
33 our religion. It has nothing to do with the religion; there are so many things like Urdu is not

1 the religion of the Islam. But still some people they believe it like this that Urdu is a religion of
 2 Islam; it has nothing to do. So, there are certain customary rites which bodily affect. Therefore,
 3 the main jurisprudential issue which was in the *Sati pratha* was what? Which will prevail, the
 4 State or religion? The State says this is my right, you cannot murder anybody, and practice
 5 says no, this is my right, religious people say that. What the William Bentinck said you have
 6 not consulted when the Hindu people. Then what the William Bentinck said that, you kindly
 7 postpone it. Then the William Bentinck said, that I will be failing in my duty, kindly mind the
 8 verse what he has said, 'I will be failing in my duty. I will not be pardoning myself if I delay the
 9 execution of this bill even for one single day'. Because, as per the British Gazette, there used
 10 to be 3 or 4 *sati* every day. So, he said that I will be blamed for those ladies, those who have
 11 been burnt alive and not only in this Bihar, this is the position... and sorry... in the Bengal this
 12 *Sati pratha* was there, this bill was confined to the Bengal as such. In Punjab after ten years
 13 of this abolition, because this abolition was confined to the Bengal, when Raja Ranjit Singh
 14 died, in his funeral four princesses and seven lady slaves...; he had 53 wives. Four princesses
 15 and seven lady slaves were burnt alive. This was a ghastly crime and the same argument other
 16 side is giving. There is no difference in the concept. Same logic, this is my religion, don't touch
 17 me. Raja Ram Mohan Roy and so many people, they have come out. This court has to be very
 18 careful so that the other side may not have this view that now they can extend up to the human
 19 sacrifices. And at any moment of time this can happen.

20 I will give one example, which I have not read it. Your Lordships must have heard about the
 21 Epstein island, what is this? Is it a religious place or it is a sex or this case? It is a religious
 22 place. I have not read that paragraph, Your Lordship said that. It is a religious place. It is a St
 23 James Island, where there is a temple at the top of it and there is a Baal, who was earlier used
 24 to be regarded as God in the Jews' Judaism, and ultimately later on he was defeated by Elijah
 25 and then he was taken as to be as *Shaitan*. And he has been mentioned 900 times there in the
 26 Hebrew Bible, Old Testament.

27 **CJI SURYA KANT:** Alright, proceed further.

28 **RAVI PRAKASH GUPTA:** So, kindly see that this kind of the practices will erupt because it
 29 is a very recent one. So, this court has to be very careful while treating upon the religion; never
 30 give such a liberty as full judicial review.

31 **JUSTICE B.V. NAGARATHNA:** Article 25(1) itself says subject to public order, morality
 32 and health.

33 **RAVI PRAKASH GUPTA:** Morality is different. Morality has...

34 **JUSTICE B.V. NAGARATHNA:** ... riders already.

1 **RAVI PRAKASH GUPTA:** A crime is a crime and that was the case before the *Sati pratha*,
 2 that what the William Bentinck has said. He had said, this is a State subject and religion used
 3 to say no, this is my religion, this is my subject and he has asserted his right of this. And I've
 4 also given a tug of war, how there was in a James II, he fought with the Pope, how Cromwell
 5 has executed the Charles I and then brought the democracy in this country. If you read the
 6 history, I've given in my written submissions, how there was a tug of war between the Pope
 7 who was sitting in the Rome, he used to give the dictates to the kings, all the kings in the
 8 Europe, and then James II revolted.

9 **CJI SURYA KANT:** We will go through it. Now proceed.

10 **RAVI PRAKASH GUPTA:** Kindly see my written submission on this issue because this is
 11 the tug of war going on, and whatever we have achieved till today may not be undone, My Lord
 12 only in order to protect a few fundamentals, because we have gone far away from there,
 13 civilization is moving forward. What we used to be the barbarians not only in one religion, in
 14 every religion. You read the *Yajurveda*, you will find the Horse *medha*, you will find the
 15 *Purusamedha*, what is this *Purushmedha*? Kindly read the English translation by the Griffith
 16 who has translated these, Vedas. What he has written? He was told that these *shloks* are going
 17 to control so many satellites, etc., when he translated it, he has learned the Sanskrit, he read
 18 the Sanskrit for that purpose, because some people were misleading him on this issue. Then
 19 he read himself. And then regarding the five stanzas he says that these are so vulgar, my
 20 Christianity does not allow you to translate, and one Muslim scholar has translated it, and
 21 uploaded it. So kindly see... And then ultimately, he came to this conclusion there were
 22 nomadic tribes, they were nothing, there is no... They were nomadic tribes traveling from
 23 there, and they came from Mesopotamian regions, they were called Mataniyaz. If Your
 24 Lordships will trace out the history, they were Mitanni there, and they were driven out by the
 25 Assyrians. One person has gone there to the... One group has gone to the Germany, they are
 26 also called Aryans, and one group has come here. It was a very martial community which has
 27 discovered the *rath*. *Rath* was a new invention made by... And there is a proof that how they
 28 migrated to India because there are certain clay tablets found in the Egyptian Museum. It is
 29 mentioned *ki* that in the name of the Varna, in the name of the Indra, this treaty is executed.
 30 These are... Vedas have no archaeological basis, because they were... because they were
 31 *shrutis*. They were being chanted generation to generation from father to son, and son to... No
 32 archaeological site is there. But when these people including me also, I am also Aryan, so what
 33 we have come from there... I'm not talking about the South Indians because they were driven
 34 out of the.... as per by view Harappa Mohenjo-daro, they were there. And Mohenjo-daro and
 35 Harappa there was no religion from till today, and it was the best civilization without any

1 religion. And the kind of the city they have developed, the city you will not find anywhere in
2 the Europe or any part of the world.

3 **CJI SURYA KANT:** Mr. Gupta, we will hear you on some other occasion, we will hear you
4 on some other matter as a historian, right now you please confine to only legal submissions.

5 **RAVI PRAKASH GUPTA:** Now, kindly see page 98. There are three phases of the women
6 where the discrimination was made. Three phases. The first phase, I have dealt at page 98,
7 when as soon as the child is born. Paragraph 70. "The dispractice of FGM is not limited to only
8 the Dawoodi Bohra Committee, but as per W.H.O. Report dated 31-01-2018, more than... page
9 98...

10 **CJI SURYA KANT:** We have... We have seen that, and we have seen the World Health
11 Organization issues which you have raised in para 71. We have read that also.

12 **RAVI PRAKASH GUPTA:** Then para 72, "In order to appreciate the efforts made in the... "

13 **CJI SURYA KANT:** You will come to page 104, Article 39, that's a new argument.

14 **RAVI PRAKASH GUPTA:** I'm grateful, I'm grateful. 104, "Certain principles of policy to be
15 followed by the State". Article 39. "Indian female genital mutilation is not only
16 unconstitutional...". In India there is no such problem like that. Second phase 105 if Your
17 Lordships...

18 **CJI SURYA KANT:** Where you are relying on directive principles.

19 **RAVI PRAKASH GUPTA:** Page 105, second phase of women life. Now, when she gets a
20 puberty as it is in the case of the *Sabarimala* that is her second phase. First, in the child she
21 is subjected to circumcision, then she grows, now puberty has come. The whole generation
22 today is only because of the womanhood, and what is under challenge is the womanhood, not
23 the women.

24 **CJI SURYA KANT:** Mr. Gupta, at page 105 and particularly 106, whatever you are
25 highlighting is now constitutionally declared unconstitutional through Article 17 and through
26 other...

27 **RAVI PRAKASH GUPTA:** 105, para 77.

28 **CJI SURYA KANT:** If you have... through other Part III of the Constitution. So, we need not
29 to unnecessarily refer to these things.

30 **RAVI PRAKASH GUPTA:** So, these are the practices since these were referred to Your
31 Lordships. So, Your Lordship has to make certain observations which my Lord was asking that
32 you come to the point. Now, the reference which is being made is not the *Sabarimala* case,

1 the reference is made because of these cases. And you took the alibi; the court took the alibi.
2 Well, these cases are also there undecided and therefore this... What cannot be done directly
3 cannot be done indirectly also.

4 **CJI SURYA KANT:** So, we can come to page 110.

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

6 **CJI SURYA KANT:** Issue No. 6.

7 **RAVI PRAKASH GUPTA:** I am coming. I am grateful, My Lord. The Issue No. 6. Sections
8 of Hindu, I have already stated, My Lord. Page 110." That so far as Issue 6 is conceived...
9 concerned relating to scope of expression 'sections of Hindus' appearing in Article 25(2)(b), it
10 is submitted that Article 25(2)(b) was codified in the light of various ill practices practiced in
11 Hindu temples. It does not exist independently but is dependent upon affirmative action of a
12 State. However, while framing any law for entry of any sections of Hindus, the law has to be
13 constitutionally valid. In *Sabarimala* case, the State of Kerala exercise power under Article
14 25(2)(b) allowing entry of every sections of society in all Hindu places of public worship,
15 including Sabarimala temple by passing Kerala Hindu Places of Public Worship Act. But in
16 exercise of powers conferred by Section 4 of said enactment while framing rules namely Kerala
17 Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 it provided under Rule
18 3(b) that women were not allowed to enter temple premises at such time during which they
19 were not by custom or uses..." This is what I have challenged. Belief I have not challenged.
20 Belief is different than the custom and uses. This I have challenged. There could not be any
21 such custom like this. "And the writ petitioner challenged this Rule 3(b) which has been struck
22 down 4:1 decision. Next question arises whether the expression 'all classes of sections of
23 Hindus' occurring in Article 25(2)(b) includes religious denomination protected under Article
24 26, it is submitted that Article 26 represents one section of society running a religious
25 denomination of any religion which is part of the general expression 'all classes or sections of
26 Hindus.' It has been so held by Constitution Bench in *Devaru* case." I'm just skipping over
27 that one.

28 Then the Issue No. 4. Constitutional morality. Constitutional morality is the law of the land
29 today, because it is decided by the majority of judges. Chief Justice Dipak Misra was delivering
30 the justice on behalf of Justice Ajay Khanwilkar also, and Justice Chandrachud has given a
31 separate verdict. So there are three judges. So, it is a majority judgment.

32 **CJI SURYA KANT:** Yes, that we have understood.

33 **RAVI PRAKASH GUPTA:** And it was also followed in High Court of Tripura.

1 **CJI SURYA KANT:** You can come to the most difficult question for you. And you are...
2 anchoring Issue no. 7.

3 **RAVI PRAKASH GUPTA:** I am coming, I'm coming to seven but one thing I may just clear,
4 because Justice Sanjay Karol, he was the Chief Justice then in the High Court of Tripura. There
5 was a ritual of animal sacrifices. I have quoted that portion. Your Lordships can read it from
6 my written submissions and he has read the entire story. And after following the **Sabarimala**
7 case, then he writes that these animal sacrifices are not the essential part of our religion. So,
8 what the learned Solicitor General was objecting to. This will immediately evade to after Your
9 Lordship's judgment, if the moment Your Lordship's judgment goes a little bit in the favour of
10 the religion... one has to be very careful in that regard. Now kindly see **Manohar Narula** has
11 already been argued.

12 Now, Issue No. 7. Issue No. 7, my Learned Sister also wants to say something because she...
13 She is Bhakti Pasricha and there was... Just one minute. My Lord will give that time. Five
14 minutes kindly allot her so that she can also speak, because this is...

15 **CJI SURYA KANT:** We will hear you madam, please have patience.

16 **BHAKTI PASRICHA:** Given an opportunity I would be addressing.

17 **RAVI PRAKASH GUPTA:** Okay. So she's very eager to... There was a lot of pressure,
18 allurements. She was removed from the central panel and apart from... Just...

19 **BHAKTI PASRICHA:** Not these submissions. Not these...

20 **RAVI PRAKASH GUPTA:** Okay.

21 **BHAKTI PASRICHA:** Your Lordships, I will submit my submissions in my way.

22 **RAVI PRAKASH GUPTA:** Okay. Now so I'm... I also got the life threatening, but I did not
23 bother. Giving the life for this purpose, I do not mind and I'm ready to die. So, these
24 threatening were there. Then Chief Justice Dipak Misra was very annoyed. You cannot stop
25 the judicial process by such kind of the threatening and he has provided the police protection,
26 I refused, and to the President also. His fault, Naushad Ali's fault was nothing, he was simply
27 a mainlander President, he was not knowing anything about the **Sabarimala**. My Ladyship is
28 right, whether you were knowing anything about it, so far as Naushad Ali is concerned, he was
29 not knowing anything but an impression has been given everything has been engineered by a
30 Muslim fellow and he started getting threats from all over the world. Then Chief Justice Dipak
31 Misra was shocked that what is happening? This Affidavit has been sworn in by the Bhakti
32 Pasricha, he was the General Secretary. *Vakalatnama* is also offered. Naushad Ali has nothing

1 to do. He was telling me, Mr. Gupta, what has happened? I was not knowing anything about
2 it, how this has happened, sir.

3 **JUSTICE B.V. NAGARATHNA:** Ensure that there is no...

4 **RAVI PRAKASH GUPTA:** So, far as... she will address on this issue, so as the Your Ladyship
5 is concerned, I know so many people, if you will go to the any tourist spot, in the wayside if
6 somebody tells you there is a one temple and very famous temple, you just drive out your car
7 there. What is the rituals are there, nobody knows about it, but even then you will turn your
8 motorcade there, let's see what is happened. Somebody has told you go to the Bhutan, this is
9 there, you go there, some devi is there. So, now I have started avoiding all these things, but at
10 one point of time, my family members, my wife will also said, why don't you go there, just it is
11 very near to you your wayside. So, we never go to the temple, what is very peculiar about it,
12 simply this: Hindu religion a very liberal, very, very liberal. You cannot even define it whether
13 you put Sanatana or Hindu, you cannot define by any expression at all. Or I can say that Hindu
14 religion is the abstract of all the religions; whatever is left that is Hindu religion. You come to
15 me, you will get the solace. If you don't agree with the tenets of Islam or Christianity or
16 anything Judaism, you come to me. So, this Hindu religion is so liberal, so it has a very
17 contrasting ideologies. It is getting rid of violence day-by-day. From Vedas which has started,
18 Buddhism has come, Buddhism has been driven out, then again so many things have
19 happened in the way of life. Therefore, Hinduism is called the way of life. It is not religion; it
20 is only a way of life; what way of life you are adopting that's all right. There is no fixed rules
21 etc. So, this temple is concerned, My Ladyship is right, you do not know anything about the
22 Lord Ayyappa. Of course I do not know, but this much I know that it is a Hindu temple.

23 **JUSTICE M.M. SUNDRESH:** What you are saying? Naushad is a very smart guy, because
24 he has rightly said, see, he did it here. Had he made his attempt to clean his own house, he
25 would not have been available to file this PIL. Got it?

26 **JUSTICE B.V. NAGARATHNA:** Please repeat Brother, what is it?

27 **JUSTICE M.M. SUNDRESH:** If you made attempt to make your own house in order...

28 **RAVI PRAKASH GUPTA:** Naushad is a namesake [UNCLEAR] President. He did not sign
29 *Vakalatnama*, he did not sign Affidavit.

30 **JUSTICE B.V. NAGARATHNA:** He has no interest in the matter.

31 **RAVI PRAKASH GUPTA:** He does not have any interest.

32 **JUSTICE B.V. NAGARATHNA:** Then why was it entertained by this court?

33 **RAVI PRAKASH GUPTA:** No, he was getting threatening...

- 1 **JUSTICE ARAVIND KUMAR:** So, where was the Resolution passed by the Association?
- 2 **RAVI PRAKASH GUPTA:** No resolution. I have already...No resolution.
- 3 **JUSTICE ARAVIND KUMAR:** The litigation has been ignited.
- 4 **RAVI PRAKASH GUPTA:** For every case we have to pass a resolution?
- 5 **JUSTICE ARAVIND KUMAR:** Of course.
- 6 **RAVI PRAKASH GUPTA:** We have a general body's meeting every day in the lunch hour.
- 7 **JUSTICE ARAVIND KUMAR:** Not general... Your committee sir.
- 8 **RAVI PRAKASH GUPTA:** Simply to decide, there is no such law that there has to be some
9 resolution once the president or the...
- 10 **JUSTICE ARAVIND KUMAR:** Have you annexed the bylaws of your Association?
- 11 **RAVI PRAKASH GUPTA:** In the bylaws, you have the provision...
- 12 **JUSTICE ARAVIND KUMAR:** Have you annexed it?
- 13 **RAVI PRAKASH GUPTA:** No, I have not annexed, sir. So, in the bylaws... but now we have
14 gone too far because once Chief Justice Dipak Misra made it very clear, even if you intend to
15 withdraw this, I am not going to allow you because it is a court matter now and I am assisting
16 Your Lordship.
- 17 **JUSTICE B.V. NAGARATHNA:** Counsel, Senior Counsel, since you are referring to the
18 learned former Chief Justice with great respect, rather than ensuring that there was security
19 provided to the advocates, he could have ensured that there was no need for a security threat
20 at all by not entertaining this petition. With great respect we are saying it.
- 21 **JUSTICE M.M. SUNDRESH:** Mr. Gupta, we will tell you, we heard you graciously. Just
22 because we are sitting in a constitution, but we don't want to express certain things. Probably
23 the fact that it has been filed by the petitioner will have an impact on how we should look at
24 these things.
- 25 **RAVI PRAKASH GUPTA:** My Lord, I am coming to that particular issue.
- 26 **JUSTICE M.M. SUNDRESH:** All that we can say is, without expressing much more than
27 this, it is a clear abuse of process of law.
- 28 **RAVI PRAKASH GUPTA:** Coming to that issue, how the PIL has developed for Your
29 Lordships information...
- 30 **JUSTICE M.M. SUNDRESH:** [UNCLEAR] they were telling you this.

- 1 **RAVI PRAKASH GUPTA:** I am the first lawyer...
- 2 **JUSTICE M.M. SUNDRESH:** Nothing else.
- 3 **RAVI PRAKASH GUPTA:** I may be creative with this one.
- 4 **JUSTICE M.M. SUNDRESH:** Yes.
- 5 **RAVI PRAKASH GUPTA:** I filed the first PIL in the field of the environment.
- 6 **CJI SURYA KANT:** Your best argument can be Mr. Gupta that it was *de facto*, *suo moto*
7 petition, *de jure* filed by an association and I think that's all your PIL...
- 8 **RAVI PRAKASH GUPTA:** But since that stage is over, and it is a court matter now...
- 9 **JUSTICE B.V. NAGARATHNA:** I think you should understand the realistic assessment
10 made by My Lord the Chief Justice on this case. Please realize it.
- 11 **CJI SURYA KANT:** Now we can proceed further.
- 12 **RAVI PRAKASH GUPTA:** Now kindly see constitutional morality...
- 13 **CJI SURYA KANT:** So, this is the article you relied upon, page 121, right, and we entertain
14 PIL based upon this kind of document which should have been thrown out rightly in the
15 dustbin? News item that some [INAUDIBLE].
- 16 **BHAKTI PASRICHA:** ...can be addressed by me Your Lordship. Only wearer knows where
17 the shoe pinches.
- 18 **CJI SURYA KANT:** Law will take its own course. If somebody had committed a misconduct,
19 the court should have directed that try him, hold a day-to-day trial, and make sure that he is
20 convicted.
- 21 **BHAKTI PASRICHA:** Your Lordship may kindly reserve these questions for me; I will
22 address all this.
- 23 **CJI SURYA KANT:** Yes, we will hear you. We are only on talking of the *locus* which is
24 generated on the basis of a news item regarding a criminal misconduct committed by someone,
25 the court should have taken *suo moto* directly day to day trial, make sure that if he is guilty of
26 this offence the law must take care of it, that's all. How does it... this article give you a cause of
27 action to rake up the issue ultimately which is adjudicated?
- 28 **RAVI PRAKASH GUPTA:** May I address Your Lordship?
- 29 **JUSTICE B.V. NAGARATHNA:** It is easy... It is easy to get articles written for the sake of
30 filing PILs.

1 **RAVI PRAKASH GUPTA:** The PIL concept as I told you...

2 **JUSTICE B.V. NAGARATHNA:** We are very much aware, we have entertained PILs when
3 we were in the High Court, we are entertaining PILs here for genuine causes, for getting relief
4 to the public who are in really need of it, not for articles being written in the newspapers which
5 are the basis of PILs entertained by this court.

6 **CJI SURYA KANT:** This is not even an article.

7 **JUSTICE B.V. NAGARATHNA:** Whatever it is.

8 **CJI SURYA KANT:** It's a misconduct committed by an individual who's in a religious
9 position he might be holding, a misconduct is misconduct. Nobody can be above the law. If as
10 a priest he had committed some offence which was under the penal law and offence, the court's
11 reaction, action should have been to make sure that if he is guilty, he must be brought before
12 the law, that's all.

13 **RAVI PRAKASH GUPTA:** My Lord PIL concept when *Hussainara Khatoon* case, that's
14 the first case...

15 **JUSTICE B.V. NAGARATHNA:** Every day My Lord the Chief Justice receives hundreds of
16 letters.

17 **RAVI PRAKASH GUPTA:** Naturally.

18 **JUSTICE B.V. NAGARATHNA:** Can all those be converted into PILs?

19 **RAVI PRAKASH GUPTA:** I appreciate, I appreciate on that particular point.

20 **BHAKTI PASRICHA:** I would be addressing that background because I know how it was
21 filed, so I would be addressing that background.

22 **RAVI PRAKASH GUPTA:** But one thing is there PIL is not an adversarial litigation. If you
23 are interested in any subject, you cannot...

24 **CJI SURYA KANT:** There you are right, absolutely right.

25 **RAVI PRAKASH GUPTA:** You have to be disinterested, otherwise the court will say you
26 have got the pecuniary advantage, pecuniary interest in this particular matter. So, PIL was
27 the... Chief Justice Dipak Misra has made it very clear, and it is a accepted norm. Once the
28 court take cognizance of the PIL it is not a matter of the Parties, it is purely a matter of the
29 court. Court can replace a cause, court can replace the petitioner, everybody because the court
30 is only concerned with the issues which are raised.

1 **CJI SURYA KANT:** You want to go into this debate; PIL also be an adversarial litigation.
2 Ultimately there will be Parties against whom suppose the court want to strike down certain
3 things, there will be Parties affected, they will always take an adversarial litigation, there is
4 nothing wrong in that.

5 **RAVI PRAKASH GUPTA:** Adversary litigation also...

6 **CJI SURYA KANT:** PIL can also, ultimately can have consequences which are adversarial in
7 nature, but there is nothing wrong in that.

8 **RAVI PRAKASH GUPTA:** Adversarial litigation I can understand in some matters, sir,
9 there could be the adversarial litigation. But adversary litigation is not in the sense that this
10 court will satisfy the writ petitioner in that matter. The court has itself to see whether such and
11 such provision should be struck down or not. So, in PIL once the court takes an account, it's a
12 court matter; that's my submission.

13 **CJI SURYA KANT:** the only difference Mr. Gupta, between [UNCLEAR] and a *bonafide* PIL
14 cases.

15 **RAVI PRAKASH GUPTA:** My Lord, one aspect I have forgotten, page 111. There is a
16 constitutional morality that I was addressing Your Lordship that this is a judgement by the
17 majority in the *Sabarimala* case and it has become the law of the land now. It has also been
18 followed by Justice Sanjay Karol when he was a Chief Justice of Tripura High Court, that
19 judgment I have also quoted now. Constitutional morality. This is not the issue which is related
20 to the writ petitioners as such, so I can speak even otherwise also. Constitutional morality is a
21 concept which differs from person-to-person. Constitutional morality cannot be split into
22 constitutional and morality. Morality is being taken by the Justice Chandrachud in the
23 *Sabarimala* case in entirely different context that the morality relating... connecting it to the
24 adultery or something like that. Constitutional morality is a one expression. It has nothing to
25 do with the expression but the issue which has been framed where I was not invited, My Lord.
26 In the issue they said the concept, the morality and constitution morality. What constitution
27 morality has to do with the morality as such? If I say anybody is intellectually dishonest, I am
28 permitted to say, that if I say you are dishonest...

29 **CJI SURYA KANT:** Alright, thank you, Mr. Gupta, anything else anything else?

30 **RAVI PRAKASH GUPTA:** Regarding this Issue No. 7, my learned sister would address that.
31 Let first my brother who had... I promised him.

32 **CJI SURYA KANT:** Thank you, thank you.

33 **RAVI PRAKASH GUPTA:** I'm grateful, I'm grateful.

1 **JUSTICE B.V. NAGARATHNA:** Only one thing we want to say by way of a reaction. PIL.
2 Public Interest Litigation has now become private interest litigation, publicity interest
3 litigation, *paisa* interest litigation and political interest litigation. All are called PILs, but we
4 entertain only real and genuine PILs.

5 **RAVI PRAKASH GUPTA:** Yes, it is being misused, it is being misused. Therefore, lot of
6 guidelines have been laid down in the Supreme Court rules and in all other High Court rules.

7 **JUSTICE B.V. NAGARATHNA:** It is not being followed.

8 **RAVI PRAKASH GUPTA:** The court has to be cautioned on that particular issue that
9 whether it is a misuse of PIL, there is some oblique motive, but here the ladies cannot have
10 any oblique motive that they want to enter into the Sabarimala temple so they could not have
11 any *malafide* intention behind it, except this they were shocked when this publication has
12 come that the *tantri* has been found in a brothel. So, this article was also there on the face of
13 it. So, these lawyers are concerned about it, it is a place. In regard to the lord... I mean to say
14 Lord Ayyappa, the deity of the Lord Ayyappa, Lord Ayyappa would also like it that somebody
15 should go to the court. How this *tantri* is sitting in my sanctum?

16 **CJI SURYA KANT:** Thank you. Thank you, Mr. Gupta.

17 **RAVI PRAKASH GUPTA:** I'm grateful. In spite of my all inability, My Lord, and having
18 physical handicaps of hearing and...

19 **CJI SURYA KANT:** Thank you very much.

20 **RAVI PRAKASH GUPTA:** I'm grateful.

21 **DARIUS KHAMBATA:** May I please, Your Lordships?

22 **BHAKTI PASRICHA:** Should I address now?

23 **RAVI PRAKASH GUPTA:** After this, if Your Ladyship can...

24 **DARIUS KHAMBATA:** May I Your Lordships? Your Lordships and we have heard many
25 arguments, many submissions, much wisdom, erudition come from all those in this court,
26 particularly from Your Lordship. And I would start by saying that we are all trying to resolve a
27 problem which affects all of us and our whole country, therefore, it should be a collaborative
28 effort rather than a confrontation. I would immediately say that every view that has been
29 expressed, whether one agrees with it or doesn't agree with it is sincere and *bona fide* towards
30 that end. It's a monumental task, let's not belie the task that is before Your Lordships today,
31 because Your Lordships in answering these seven questions will have to think or contemplate
32 of a myriad different situations to which they would apply. I, in fact, agree with several

1 submissions of the learned Solicitor General and my dear friend Mr. Subramaniam, and I'm
2 going to point that out, and on certain areas I have a different view which I will place before
3 My Lords. But, I believe, and I'm going to start with this, only for context, because I understand
4 Your Lordships are not going into any facts. I'm not getting... But only to give a context, I've
5 prepared a very short, brief factual note to explain what the matter in which I appear is,
6 because it will give rise to certain issues which perhaps have not come to the fore before Your
7 Lordships. And of course, the cardinal issue in that case is not part of the seven questions, I
8 must immediately start by saying that, because the... if My Lords have my brief...

9 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Khambata, whom are you representing?

10 **DARIUS KHAMBATA:** I represent Mrs. Goolrokh Gupta in SLP No. 18889 of 2012. Who is
11 she? She is a Parsi Zoroastrian lady. She always was and remains a Parsi Zoroastrian lady, who
12 married Mr. Mahipal Gupta, a Hindu under the Special Marriage Act. Now her parents are
13 residents of Valsad in Gujarat; it's a small town in Gujarat and one day she found that another
14 lady in her position was being denied entry to certain places of worship, including for the
15 funeral rites of her parents. So, she was concerned that the same thing might happen to her;
16 so, she filed a writ petition, where she sought a prohibition against the Respondent Trustees
17 of a public charitable trust, that I continue to be a Parsi Zoroastrian, I have not forsaken my
18 religion, I am a devotee, I am a believer. And just because I have married a Hindu, that is not
19 a crime. It's under the Special Marriage Act. Please don't stop me and she appealed to the court
20 to restrain them. Now in that context, the Gujarat High Court has decided, and that's the issue
21 in that case, that there is a deemed conversion that even if you get married under the Special
22 Marriage Act, a woman is deemed to be converted to the religion of her husband. She has no
23 independent religious identity, but her religious identity merges with that of her husband, and
24 therefore, without any act of conversion, change of belief, any ostensible act whatsoever, she
25 is deemed to have converted. Now of course, that will be argued in that particular matter; that's
26 not an issue that arises before Your Lordships. But please consider the ramifications of this.
27 Today every anti-conversion law is based on conversion by inducement, allurement, force,
28 fraud, undue influence, all that will be wiped out and rendered nugatory because the very act
29 of marriage itself will be a deemed conversion. So, it's a very far-reaching judgment. It doesn't
30 apply only to Parsi Zoroastrian ladies, it will apply across the board. And in my respectful
31 submission, with due respect to the Gujarat High Court, the dignity of women is seriously
32 undermined. This would violate every right under 14, 15, 21, 25.

33 Now I've set out in my note on page 2, that this is a trust run under a Trust Deed. It was settled
34 by someone who left money for this. The Trust Deed, para 5 of my factual note, I have just
35 extracted portions is for the benefit or upliftment of the Zoroastrian community of Valsad, for
36 the spread of the Zoroastrian religion and for education help and to help poor Zoroastrians. It

1 has no prohibition that if a Zoroastrian intermarries he or she is not entitled to the benefits of
2 the charity. So, one of the issues that might arise is that when...

3 **JUSTICE JOYMALYA BAGCHI:** Mr. Khambata, in the Gujarat High Court, when the trust
4 opposed the writ petition, was there any specific plea taken by the trust that the religion
5 prohibits or [UNCLEAR] conversion?

6 **DARIUS KHAMBATA:** There was a plea which was... which has not really been gone into
7 by the Gujarat High Court and the material produced before the Gujarat High Court did not
8 bear out this. In fact, the finding which I have set out in para 6 of my note belies that there was
9 any such prohibition in the religion. Before Your Lordships now in the Supreme Court, a whole
10 lot of further Affidavits, etc. are filed which in my respectful submission still do not bear out
11 that the religion prohibits it, but that's a matter to be argued before the relevant bench. Would
12 My Lords just see para 6 of my note? I have extracted two findings of the Gujarat High Court
13 in the short factual note. Page 2. "The majority judgment found two things. First, that there is
14 no prohibition to the petitioner or any woman who is born Parsi Zoroastrian married to non-
15 Parsi for continuing to profess Parsi Zoroastrian religion." That's a square finding of fact in
16 the impugned judgement. "And the second finding of fact is, we are not shown any material as
17 to how entry of a non-Parsi to an *Agyari*, which is a fire temple, for offering the prayer would
18 violate the integral part of Parsi Zoroastrian religion." I believe this position remains
19 untouched by even the further material that has been produced, but that's a separate matter.
20 In fact, that further material when we argue the actual case, we will be able to show *ex facie*
21 even on the material produced by the other side, that it bears out no such principle under the
22 Zoroastrian religion that women are to be excluded for intermarriage. Why? For a very simple
23 reason, none of the extracts say that. In fact, for over a hundred years or more there is an
24 unbroken practice that Parsi/Zoroastrian intermarried men and their children are freely
25 permitted entry. So, it's purely a case of discrimination, because if there was any such
26 prohibition in the religion it would then be for both, it would not be for one or the other. No
27 material I can say with the greatest of responsibility produced by them shows that this
28 prohibition attaches only to a woman; nothing has been produced, even in what they say is the
29 Zoroastrian religion. In fact, the Zoroastrian religion, My Lords, may not be... it's actually an
30 offshoot of a Rigvedic religion. People don't maybe know this. Most Zoroastrian don't know
31 this. And it's a Rigvedic religion but it is the first monotheistic religion ever, and all the
32 Abrahamic religions take a lot of their theory from the Zoroastrian religion. Heaven and hell,
33 day of final judgment, good and evil, all these are Zoroastrian concepts, all then later taken by
34 other religions. But the genesis is the Rigvedic. In fact, the old Avestan language is almost 95%
35 akin to old Sanskrit, that's a different argument for a different...

1 Now, one other thing about Zoroastrianism, and we'll be going to is, it has been described by
2 great scholars including the great Professor Zeno of Oxford, that it is a religion of free will par
3 excellence. It's a very forward-looking religion, so it would be almost impossible to find this in
4 scriptural texts that because you intermarry, a lady is cast out of the community. It's just... But
5 that again is, I reserve for the main matter, I'm not troubling My Lord with all that.

6 **JUSTICE B.V. NAGARATHNA:** So, marriage is the basis of discrimination *vis-a-vis* only
7 a lady?

8 **DARIUS KHAMBATA:** Only a lady and a deemed conversion, only a lady. A man can marry
9 outside, no deemed conversion he continues to be Parsi Zoroastrian, and his children are Parsi
10 Zoroastrian, but not so for a lady. And this is a man-made, pardon the expression, a man-made
11 imposition on otherwise a very progressive and a great religion. A great religion. Now there
12 was a leading case in Bombay which I've just referred to briefly at page 3. A division bench of
13 the Bombay High Court way back in 1908 which heard the evidence of almost 60 Witnesses
14 including priests, religious scholars, everyone, and came to the conclusion that the Zoroastrian
15 religion not only permits, but it enjoins conversion of a person born in another religion, and
16 of non-Zoroastrian parents. However, it found that although conversion was permissible,
17 Zoroastrian since their advent into India 1,200 years ago have never attempted to convert
18 anyone into their religion. Now this was the big... This is really what Article 25(1) is all about.
19 Please consider... it's a remarkable story. A minuscule community, a minority amongst
20 minorities has survived for 1,200 years with its religion intact, with many of its customs intact,
21 borrowing customs and practices, of course. I may be permitted to say this My Lord, that this
22 is really because of the tolerance and munificence of Hinduism. It must be said, and I will say
23 it. In no other place in the world could this have happened. It's a remarkable thing because
24 there were small bands of Zoroastrians who went to other countries, they've been long wiped
25 out, but for 1,200 years. Now...

26 **JUSTICE B.V. NAGARATHNA:** There is such story as to what that Parsi person told the
27 king...

28 **DARIUS KHAMBATA:** The high priest...

29 **JUSTICE B.V. NAGARATHNA:** That they... It will be like sugar...

30 **DARIUS KHAMBATA:** Sugar and milk and...

31 **JUSTICE B.V. NAGARATHNA:** They will be absorbed...

32 **DARIUS KHAMBATA:** And to the credit of the kings.

33 **JUSTICE B.V. NAGARATHNA:** ...of Hinduism.

1 **DARIUS KHAMBATA:** Absolutely and to the credit of the king because again, again many
2 Parsi Zoroastrian don't know this. It's apocryphal, there's a *Qissa-i-Sanjan* which may or may
3 not be accurate, but we all sort of accept it as part of the law that he imposed only five
4 conditions. What were the five conditions? Please speak our language, give up your language,
5 please adopt our national dress, please lay down your arms, and till the soil, please have your
6 weddings after dark, and if we are attacked, please rise to the defence of the realm. These are
7 the only five conditions. There were no conditions that please don't convert. But voluntarily,
8 the community has decided not to convert, and that is a policy which has stood the community
9 in good stead. Therefore, this is a forward-looking community and Parsis, Zoroastrian were
10 often conflated terms. Parsi is the race or community, Zoroastrian is the religion. So, you can
11 have a Parsi Christian, you can have a Parsi Bahai, you can have a Zoroastrian who's not a
12 Parsi. Parsi denotes coming from a region in Persia, Pars, but often it's mixed up. And one last
13 thing before Your Lordships rise and then of course, I'll come to the questions. We've set out
14 at page 4 that there is no such uniform practice even amongst Zoroastrians in India. Please
15 see the para 13, the Respondent Trust itself under its previous trustees freely permitted
16 intermarried Parsi women, Parsi Zoroastrian women into the temples and places of worship.
17 The Bombay Parsi Panchayat, form a very, very dignified and cogent address was made by a
18 young lady advocate, who said we must have autonomy whatever the pain, someone... has
19 itself passed a resolution way back in 1991 giving such free entry to intermarried Parsi women,
20 that's the main bunch of Parsis happens to be in Mumbai. And we have placed material on
21 record to show several Anjumans all across India; Delhi, Kanpur, Madras, Daman etc. all
22 permit entry. One or two, and particularly this Valsad one, suddenly under new trustees
23 decided that never mind our trust deed, we will impose our personal views and predilections
24 upon this. Therefore, My Lord, that's the setting; the contextual setting. So, the arguments
25 they are going to be this is certainly not a religious practice at all, it's a pure secular practice,
26 it's not even a practice, it's not even uniform. So, all those questions will arise. But to that
27 extent I am going to submit to Your Lordships that some element of judicial review in these
28 matters is necessary. One cannot take a totally hands off approach. This is the classic case
29 where judicial review will be required. I'm obliged.

30 **CJI SURYA KANT:** Mr. Khambata, after lunch, just refer to... [NO AUDIO STARTS]

31 **DARIUS KHAMBATA:** [NO AUDIO ENDS] Yes, certainly.

32 **CJI SURYA KANT:** Whichever you think that will have...

33

- 1 **DARIUS KHAMBATA:** May I please, Your Lordships? Your Lordship before the break had
2 asked to see the judgment of the Gujarat High Court. Would Your Lordship like me to show it
3 just now? May I show that?
- 4 **CJI SURYA KANT:** Yes.
- 5 **DARIUS KHAMBATA:** So, that is found in Volume 3.3.
- 6 **CJI SURYA KANT:** Volume 3?
- 7 **DARIUS KHAMBATA:** 3.3.
- 8 **CJI SURYA KANT:** 3.3?
- 9 **DARIUS KHAMBATA:** 3.3.
- 10 **CJI SURYA KANT:** Yes.
- 11 **DARIUS KHAMBATA:** It starts at page 1, but may I be permitted to go straight to page 53,
12 which is para 26? It starts at 28. Sorry, starts at page 28.
- 13 **JUSTICE B.V. NAGARATHNA:** Page 15, running page.
- 14 **DARIUS KHAMBATA:** Yes. Page 28, running page.
- 15 **JUSTICE B.V. NAGARATHNA:** Running page?
- 16 **DARIUS KHAMBATA:** Yes, running page 26. I'm sorry, running page of the compilation is
17 53, the internal page is 26. Para 26 at internal page 26. Compilation page 53.
- 18 **CJI SURYA KANT:** I think this judgment starts from page 32. That would be the internal
19 page 5 of the judgment.
- 20 **DARIUS KHAMBATA:** Yes, internal page 5, page 32. My Lord is absolutely correct.
- 21 **CJI SURYA KANT:** It's a three judge bench judgement.
- 22 **DARIUS KHAMBATA:** Three judge, but they went up to 2-1 decision, majority and one
23 dissent.
- 24 **CJI SURYA KANT:** I see. One dissent is a dissenting one. Dissenting is authored by whom?
- 25 **DARIUS KHAMBATA:** That is by Justice Kureshi, dissenting. My Lords, be kind enough to
26 turn to running page 53, para 26. The reasoning is really contained there. "In English common
27 law, marriage implied the merger of personality of the husband and wife. In reality it is meant
28 that the wife's personality..."
- 29 **JUSTICE AHSANUDDIN AMANULLAH:** Just a minute. Couldn't get that.

- 1 **DARIUS KHAMBATA:** I'm sorry.
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** Where is the... in the red, the red?
- 3 **DARIUS KHAMBATA:** Red 53, page 53.
- 4 **JUSTICE AHSANUDDIN AMANULLAH:** Red 53?
- 5 **DARIUS KHAMBATA:** Red 53.
- 6 **JUSTICE B.V. NAGARATHNA:** Yes.
- 7 **JUSTICE AHSANUDDIN AMANULLAH:** Where they start from? The line starts from?
- 8 **JUSTICE B.V. NAGARATHNA:** Para 26.
- 9 **DARIUS KHAMBATA:** Para 26 on...
- 10 **JUSTICE B.V. NAGARATHNA:** Para 26, page 56?
- 11 **DARIUS KHAMBATA:** Red page 53.
- 12 **JUSTICE AHSANUDDIN AMANULLAH:** 56?
- 13 **CJI SURYA KANT:** Referring to page 53?
- 14 **JUSTICE B.V. NAGARATHNA:** Yes, 53.
- 15 **DARIUS KHAMBATA:** 53.
- 16 **JUSTICE AHSANUDDIN AMANULLAH:** Just a minute, just give me a minute.
- 17 **DARIUS KHAMBATA:** Yes, "in English common law..." Does My Lord have that? My Lord,
- 18 Justice Amanullah has that?
- 19 **JUSTICE AHSANUDDIN AMANULLAH:** Just a minute.
- 20 **CJI SURYA KANT:** In this screen also it is there.
- 21 **JUSTICE AHSANUDDIN AMANULLAH:** Yes. Yes, yes. I've got it.
- 22 **DARIUS KHAMBATA:** Yes. "In English, common law, marriage implied the merger of
- 23 personality of the husband and wife." This is known as the Doctrine of Coverture under English
- 24 law. "In reality it is meant that the wife's personality is merged into that of the husband. In
- 25 view of this doctrine a man could not grant or give anything to his wife because she was his
- 26 dead self and if there were any contracts between the two before the marriage they stood
- 27 dissolved on marriage. The freehold property of the wife vested in the husband and during
- 28 contract he had management of her property and take all the profits derived therefrom. Her
- 29 personal property entirely passed to her husband, and he took it absolutely. Several things in
- Transcribed by TERES

1 her possession could also be taken over by the husband. Thus the merger of the personality of
2 the husband and wife meant that whatever property the wife had at the time of marriage and
3 whatever she acquired later on belonged to her husband. This situation was remedied by the
4 Married Women's Property Act, 1870, and English married women acquired the right to hold
5 and acquire property." Please mark the next sentence. "This English law doctrine was never a
6 part of Hindu law or Muslim law. Although under Hindu law there is a doctrine of merger of
7 personality, the wife being *ardhangi* of her husband and completed him, it may mean no more
8 than unity in a spiritual sense; no part of her property belonged to her husband. In fact most
9 of the *streedhan* she got was acquired by her at the time of her marriage. All gifts given to her
10 at the time of marriage belonged to her. Even whatever they acquired during marriage
11 belonged to her, though in distress the husband could use but he had to restore it later on.
12 Muslim law do not subscribe to the notion of unity of personality of husband and wife. Wife's
13 personality and individuality are not lost on her marriage. She continues to hold whatever
14 property he had at the time of marriage, and she can acquire property during the marriage. In
15 India, neither Parsis nor Jews subscribe to the notion of merger of personality in the sense as
16 in English law, but all such things are relatable to the right of the husband over the properties
17 of the wife in her individual capacity, and they may not be mixed up with her personality
18 known by the religion. In all religions, be it Christian, be it Parsi, be it Jews, the religious
19 identity of a woman, unless specifically law is made by the Parliament or the Legislature as the
20 case may be, as per the religions, shall merge into as that of her husband." But this is just
21 factually not correct at all, but I've just read it. "Such rights would be the rights other than
22 those as may be available to a woman given by nature and rights as otherwise specifically
23 protected by express provisions of statute. It is hardly required to be stated that such principle
24 is generally accepted throughout the world and therefore, until the marriage, after the name
25 of the woman, the name of the father is being mentioned, and after marriage name of husband
26 is being mentioned for the purpose of further describing her identity. It does not mean that
27 after marriage the woman or a female will have no right in an individual capacity which are
28 otherwise guaranteed by nature or identified and protected by statute, or the right of a woman
29 to live in dignified manner in society. But for the purpose of the present petition, we are
30 required to examine the rights as that of the woman in the context of family which originates
31 from marriage of a husband and wife, or in other words, such family in contradistinction to
32 the society at large. Even if the family is considered in its wider meaning originating from the
33 husband and wife, it may extend to their children, maybe son or daughter until they're
34 married. After marriage of son or daughter as the case may be with any female or male
35 respectively, for the purpose of society would be forming the independent family originating
36 from marriage of the said couple as the case may be. There is one additional reason why the
37 family should be identified as separate in contradistinction to society at large, because there

1 has to be specific certainty for identification as per religion in normal circumstances for the
2 son or daughter of the said couple who is born out of the said wedlock. If after his following a
3 particular religion and as observed earlier, if a man is married with a woman following another
4 religion, in normal circumstances, it should be deemed that woman has acquired the religion
5 of her husband after marriage. It is only then that the children born out of the wedlock will
6 also be identified in society, following a religion which was being followed by their father, prior
7 to the marriage. Test the situation from different angle. If a man born of A religion marries a
8 female of B religion; and if, for the sake of examination, it is considered that husband and wife
9 both continue to follow the original religion as was at the birth, then large number of ambiguity
10 may prevail about the religion of their children. Such, in our view, would not be in the larger
11 interest of society for the proper observance of the customs, traditions, etcetera. And therefore,
12 we find it proper to observe that in normal circumstances, when the marriage takes place
13 between a male and a female belonging to different religion, it should be presumed and
14 considered that the woman after marriage has merged into the religion of her husband, and
15 such will be the identity of their family originating from their marriage in comparison to the
16 society at large, and such identity would stand extended to their children too. Same situation
17 would remain in normal circumstances even for the man and woman who are married under
18 the Special Marriage Act. However, the aforesaid, as observed earlier, would apply in normal
19 circumstances, unless it is established in any court of law after undertaking fact-finding
20 inquiry that even after marriage the woman has continued with her own religion, which existed
21 prior to the marriage."

22 **JUSTICE M.M. SUNDRESH:** Rebuttable presumption.

23 **DARIUS KHAMBATA:** I am sorry?

24 **JUSTICE M.M. SUNDRESH:** Rebuttable presumption.

25 **DARIUS KHAMBATA:** Rebuttable presumption. So a woman has to go to a civil court and
26 get a declaration.

27 **JUSTICE M.M. SUNDRESH:** Yes.

28 **JUSTICE B.V. NAGARATHNA:** No, under Hindu law, unless both the parties are Hindus,
29 it does not become a Hindu marriage.

30 **DARIUS KHAMBATA:** Precisely.

31 **JUSTICE B.V. NAGARATHNA:** Therefore, if persons belonging to two different religions
32 want to get married, Special Marriage Act is there.

1 **DARIUS KHAMBATA:** Your Ladyship is absolutely correct. In fact, the Special Marriage
2 Act of 1872 did not permit that. Because it was not open to Hindus, Buddhists, Jains to get
3 married under that Act.

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

5 **DARIUS KHAMBATA:** But that was amended and finally the current Special Marriage Act
6 of 1954 permits that. And the objects and reasons say it's precisely to get over that. So, we are
7 now imparting all those old notions into a modern act. And therefore, 28 says, in fact, we have
8 the Parsi Marriage and Divorce Act. Two Parsis can get married under that Act, but if it's one
9 Parsi and one Hindu, then they have to go to the Special Marriage Act. "And therefore, the
10 onus is put on the woman, not on the man". A man can marry outside, he is not deemed to
11 give up his religion, but a woman is deemed to, she has to go and get a declaration from a civil
12 court. Today's constitutional democracy we can't have a situation like this.

13 My Lord, then if we go straight to para 32. I'm not reading every detail, but this is... I'm giving
14 you all the broad findings. Para 32, read page 62. "A born Parsi woman, by contracting civil
15 marriage with a non-Parsi under the Special Marriage Act, would cease to be Parsi, and she
16 would be deemed and presumed to have acquired the religious status of her husband, unless
17 declaration is made by the competent court for continuation of her status of Parsi Zoroastrian
18 after her marriage." As I said, it is well-settled, Parsi is a community or a race, it's not a religion
19 at all, it's an irreligious term. Zoroastrian is the term. "After the declaration is made by the
20 competent court after undertaking full-fledged fact-finding inquiry, on the aspects as to
21 whether after marriage she has totally abjured Hinduism, the community to which her
22 husband belongs, and she has continued to remain as Parsi Zoroastrian, and whether she has
23 adopted, continued the religion of Parsi Zoroastrian to gain any benefit; or whether the
24 community, namely Parsi Zoroastrian has treated her as a member of Parsi Zoroastrian for all
25 purposes or not." My Lord, the whole obsession is that you would normally be converted,
26 deemed converted, without any change of act or belief, but you might want to retain your
27 Zoroastrian religion to claim some property benefits, which is not so. The lady just wants to
28 be, continue her own religion, nothing more than that.

29 Then if we go to para 56. The conclusions. Read page 94. 56(1), "Every religion, be it Parsi
30 Zoroastrian, be it Christian, be it Islam or Hindu, showers its benefits to all mankind. But the
31 performance of various ceremonies by the believers or religious tenets is a different aspect. All
32 the religious places may be temples, mosques, churches, Agiaris are meant for the larger
33 benefits of mankind in general and for the followers of the said religion in particular. Whether
34 a particular place of worship is a public place or a private one would mainly depend upon its
35 use by the public at large and also the belief in the society be treated so. After adoption of the

1 Constitution, all religions are to be treated equally by the State. Article 25 of the Constitution
2 guarantees right to freedom of religion to all persons equally as per his own conscience, and
3 every citizen has the right to freely profess, practice and propagate any religion. 25(2) of the
4 Constitution permits the State from making any laws for regulating or restricting any
5 economic, financial, political or other secular activity which may be associated with the
6 religious practice. It also additionally provides the power to the State to make laws for social
7 welfare and for reform for Hindu religious institutions and such extends to Sikh, Jain or
8 Buddhist religious institutions."

9 Then 5. "The Constitution at the same time permits every religious denomination to manage
10 its own affairs as per Article 26 of the Constitution. Of course, the same is also subject to public
11 order, morality and health. However, such right guaranteed under Article 26 applies to only
12 integral part of the religious affairs, maybe as per religious tenets or otherwise, and not as per
13 the belief or a mere tradition which are not integral part of any particular religion. Hence, the
14 conjoined reading of both the rights under Article 25 read with 26 shows that any citizen has
15 the right to profess, practice and propagate any religion, subject to the right of every religious
16 denomination or section thereof to manage its own affairs in the matter of religion and other
17 rights guaranteed under Article 26 of the Constitution. To put it differently, if any person
18 wants to profess and practice any religion, the same is not so prohibited, but whether he or
19 she should be permitted to enter a place of worship or not would be a matter of religion by a
20 particular religious denomination or a section thereof. Rights guaranteed under 26 is to be
21 enjoyed by any religious denomination, but it has to give equal treatment to every person
22 professing and practicing a particular religion. Any action by any religious denomination
23 curtailing such right of equality amongst the persons professing and practicing a particular
24 religion can be said as violative of the rights guaranteed under Article 25 of the Constitution.
25 And if such a right is violated by any particular religious denomination or any section thereof,
26 such person may enforce the right guaranteed under Article 25, but if against a private party
27 and not the State within the meaning of Article 12, then before the civil court and if such, as
28 such to be enforced against the State or its instrumentalities..."

29 **JUSTICE M.M. SUNDRESH:** Civil court, she can claim against whom? Against whom she
30 can seek a declaration that religious practices?

31 **DARIUS KHAMBATA:** So, later in this very judgment and I believe that is the correct... 25
32 is what is known as a horizontal right; so, it can be claimed against any institution that seeks
33 to violate it. Therefore, in this case she could claim it against a public charitable trust. And in
34 any case, Your Lordships have held that a public charitable trust would be amenable to the
35 226 jurisdiction, because there are public functions, etc. So, she could claim it against the

1 Trust. It's a public charitable trust ultimately. So the Trust Deed would prevail. The Trustees
2 have to act in accordance with the Trust Deed and permit all the beneficiaries access.

3 **JUSTICE M.M. SUNDRESH:** Then she should seek a declaration that she is continued to
4 be a Parsi woman and by practising the [UNCLEAR].

5 **DARIUS KHAMBATA:** I would put it the... respect the other way around. There is no law
6 that says you give up...

7 **JUSTICE M.M. SUNDRESH:** No, we want to understand the judgment. What is the need
8 by this? She should... The question is practice before a civil court or she should dispel the
9 presumption before the court.

10 **DARIUS KHAMBATA:** I am obliged. In fact, ultimately this judgment has held that if
11 anyone wants to set up a practice of exclusion, then they have to go to a civil court and prove
12 on evidence that the religion contains that exclusionary principle.

13 **JUSTICE ARAVIND KUMAR:** Did she have children?

14 **DARIUS KHAMBATA:** She has children, yes.

15 **JUSTICE ARAVIND KUMAR:** What are their status?

16 **DARIUS KHAMBATA:** What are they? There are... that's the... That's a different matter.
17 The Bombay judgment again has held that children of Parsi fathers married outside are treated
18 as Parsi but not of Parsi mothers. That's a different judgment under a different, it's been
19 challenged a lot in a different matter, but that also is clearly discriminatory.

20 **JUSTICE JOYMALYA BAGCHI:** It's all come under boiling down on common law.
21 Common law of conversion.

22 **DARIUS KHAMBATA:** Yes, and what is...

23 **JUSTICE JOYMALYA BAGCHI:** A merger of the woman's personality into the man upon
24 marriage.

25 **DARIUS KHAMBATA:** Precisely.

26 **JUSTICE JOYMALYA BAGCHI:** So that is what...

27 **DARIUS KHAMBATA:** That is correct. There what is known as the Doctrine of Coverture
28 under English law.

29 **JUSTICE JOYMALYA BAGCHI:** It upholds with regard to merger of the woman in the
30 marriage.

- 1 **DARIUS KHAMBATA:** That's right.
- 2 **JUSTICE JOYMALYA BAGCHI:** And says that in a secular law... So, perhaps the issue
3 which may crop up on facts is, whether the common law will prevail over a statutory provision.
- 4 **DARIUS KHAMBATA:** Statutory provision and a Common law of Coverture...
- 5 **JUSTICE JOYMALYA BAGCHI:** Nothing can answer the statutory provision like in certain
6 cases or customs and uses in Contract Act...
- 7 **DARIUS KHAMBATA:** That's right.
- 8 **JUSTICE JOYMALYA BAGCHI:** Prevail over the contractual terms.
- 9 **DARIUS KHAMBATA:** My Lord is right. But in fact, courts and there are judgments which
10 we cited that this English Doctrine of Coverture is not even accepted in India, under Indian
11 law. It has never been accepted. In England also it is now no longer the law. So, suddenly to
12 revive it like this.
- 13 **JUSTICE B.V. NAGARATHNA:** It's because the right of conscience under Article 25(1) is
14 a right by birth and cannot be taken away by marriage.
- 15 **DARIUS KHAMBATA:** I am obliged, that puts it absolutely correct. I'm grateful. That is the
16 submission.
- 17 **JUSTICE JOYMALYA BAGCHI:** But a bigger question will arise, which in paragraph 59
18 the majority view...
- 19 **DARIUS KHAMBATA:** Yes.
- 20 **JUSTICE JOYMALYA BAGCHI:** ...relegates you to the suit, as to whether this right is
21 reasonable, not in common law but as a matter of essential religious practice to maintain the
22 sanctity and the integrality of the religion.
- 23 **DARIUS KHAMBATA:** My Lord is right.
- 24 **JUSTICE JOYMALYA BAGCHI:** That is the question which has been kept open.
- 25 **DARIUS KHAMBATA:** That is correct. That is correct, because that is kept open. The High
26 Court has not gone into that.
- 27 **JUSTICE JOYMALYA BAGCHI:** If the High Court...
- 28 **DARIUS KHAMBATA:** Correct.
- 29 **JUSTICE JOYMALYA BAGCHI:** ... might have rightly or wrongly says, writ is not
30 maintainable against the Trust, it's not an Article 12 entity.

1 **DARIUS KHAMBATA:** That's right. No, the majority is held, the writ is maintainable, the
2 dissent said writ is not maintainable. I'll show that. I'll show that finding.

3 **JUSTICE JOYMALYA BAGCHI:** But it relegates you in view of the fact, that it requires
4 disputed questions to be decided whether the integral part of the religion or not, which they
5 note in paragraph 59.

6 **DARIUS KHAMBATA:** So, if... My Lord is right. What the High Court has said is, "If you
7 want to establish that is an exclusionary practice..."

8 **JUSTICE JOYMALYA BAGCHI:** Besides this it make this accountable...

9 **DARIUS KHAMBATA:** "...then you must go to a civil court." But there's no presumption
10 that someone who is born a Zoroastrian converts only by virtue of marriage. There is no such
11 presumption in law is the contention, whereas the judgment has said though there is no
12 material before us to show this, I'll show that finding also. There is an automatic deemed
13 conversion by virtue of this Doctrine of Coverture, which is the woman has no independent
14 religious identity; it merges with that of her husband, which has never been accepted under
15 our law.

16 **JUSTICE M.M. SUNDRESH:** See this, we are not going to decide the judgment, but on the
17 reading of it, it looks very strange for us too, whichever way you look at it, how do we support
18 this? See, it is for an individual person to decide, see as my sister has put it; it's a freedom of
19 conscience followed by profession, practice and... It is for the individual person to come with.
20 How that person will prove it against the world...

21 **DARIUS KHAMBATA:** On a case-by- case basis.

22 **JUSTICE M.M. SUNDRESH:** I have given it up, I can't accept that, I'm going back. It's...

23 **DARIUS KHAMBATA:** My Lord is right, ultimately it's a case by... In a given case someone
24 may convert.

25 **JUSTICE ARAVIND KUMAR:** On [UNCLEAR], it cannot be static.

26 **DARIUS KHAMBATA:** Cannot, correct. So, in a given case someone may convert. There's
27 no bar against that.

28 **JUSTICE ARAVIND KUMAR:** It takes its colour depending upon the terrain it travels.

29 **JUSTICE M.M. SUNDRESH:** And it's for the person concerned...

30 **DARIUS KHAMBATA:** That's...

31 **JUSTICE M.M. SUNDRESH:** ...to travel. Very well.

1 **DARIUS KHAMBATA:** This is automatic.

2 **JUSTICE M.M. SUNDRESH:** We have not genuinely seeking an answer for a reason.

3 **DARIUS KHAMBATA:** So, My Lords, have seen, they have kept apart any evidence. They've
4 said in fact there's no evidence. I'll show, that's para 58. They don't find that. I'll just complete
5 reading.

6 **JUSTICE B.V. NAGARATHNA:** But in this case, marriage as a basis of classification is
7 discriminatory against women.

8 **DARIUS KHAMBATA:** Against women.

9 **JUSTICE B.V. NAGARATHNA:** That is the point.

10 **DARIUS KHAMBATA:** Because the same principle is not applied to a man and the same
11 thing should apply both ways, and that will lead to huge ramifications not only for Parsi
12 Zoroastrians, but across the board. It will lead... this judgment in that sense has not got wide
13 exposure, but it could lead to some terrible consequences.

14 May I just go to page 97, red, sub para 10. "While considering the scope of Article 26 of the
15 Constitution of any religious denomination or any section thereof, it is to be considered by the
16 concerned court or authority within the meaning of Article 12 of the Constitution as to whether
17 a particular matter of religion or religious practice or belief are integral part of the religion and
18 such would essentially depend on the evidence adduced before the court or the authority as
19 the case may be. However, if it is found that such matter is not an integral part of the religion,
20 then the religious institution has no right or authority to curtail the enjoyment of right to
21 profess religion by any citizen as guaranteed under Article 25."

22 Now, please see page 98, para 58. There are two very significant findings here. Read page 98,
23 para 58. "There is no prohibition to the Petitioner, or any woman, who is born Parsi
24 Zoroastrian married to non-Parsi for continuing to profess Parsi Zoroastrian religion." This is
25 absolutely correct. "However, while doing so, the religious denominations of the Respondent,
26 namely trustees of Valsad Parsi Anjuman, have curtailed her rights, contending that the
27 Petitioner being non-Parsi would not be entitled to enjoy such rights. The denial of such rights
28 is on the ground that entry to Agiaries where the Fire Temple is preserved, is not available to
29 non-Parsi. In support of the same, materials are produced, but no material is brought to our
30 notice by any authenticated religious tenet prohibiting entry to Agiaries by non-Parsi, may be
31 male or may be female." Then they consider what evidence was produced by the Anjuman and
32 say, there's nothing in this.

1 **JUSTICE M.M. SUNDRESH:** Then why did they dismiss it? They could have, that is a
2 finding, they could have allowed her.

3 **DARIUS KHAMBATA:** They could. They should have, in my respectful submission, with
4 these findings. It hangs by the slender of slender threads, which is automatic or deemed
5 conversion, Doctrine of Coverture. That's the only basis of this judgment.

6 And page 99, just the last four lines of para 58. "We are not shown any material as to how entry
7 of a non-Parsi to Agiary for offering prayer would violate the integral part of Parsi Zoroastrian
8 religion."

9 Then 59. "Further, the aspect may also be required to be considered, as to whether a lady who
10 was born Parsi until marriage, she has followed Parsi Zoroastrian religion after marriage, if
11 she is not even permitted to offer prayers at Agiary, even in capacity as non-Parsi, whether
12 such would adversely affect the dignity as a human being for offering prayers to the Almighty.
13 On the aspect of entry to funeral ceremony, at Tower of Silence, and for the right to have our
14 own funeral at Tower of Silence, we find it is not possible for us to decide on the evidence
15 available on record, as to whether such religious practices prohibiting non-Parsi is an integral
16 part of Parsi Zoroastrian or not. A detailed fact-finding inquiry may be required". So, a
17 prohibitory or exclusionary practice you will have to establish in a civil court on evidence.
18 Otherwise, there is no presumption that you will lose this benefit and as a beneficiary of a
19 public charitable trust.

20 **JUSTICE B.V. NAGARATHNA:** So it's like a violation of Article 25(1) right.

21 **DARIUS KHAMBATA:** 25(1) right is totally violated in the guise of saying, under 26(b), a
22 religious denomination has the right to manage its own affairs in matters of religion. This is
23 how wide sometimes it can be construed. Therefore, that balance has to be struck by Your
24 Lordships. My entire submission is going to be, not, one doesn't prevail over the other, there
25 has to be a balance struck. And that may have to be on a case-by-case basis, but a balance has
26 to be sought for. No supremacy of one over the other.

27 Then if we go to 61, at page 101.

28 **JUSTICE M.M. SUNDRESH:** In other words, on the basis of a practice, the belief is sought
29 to be questioned.

30 **DARIUS KHAMBATA:** Yes.

31 **JUSTICE M.M. SUNDRESH:** Question in the sense that you are a non-believer.

32 **DARIUS KHAMBATA:** Non-believer. Here is a case of a devotee, a believer, who wants to
33 continue believing; and you're showing her the door. And that too, in a community, which is a

1 dying community; such a small community. Today, informally, I may tell My Lords, the
2 statistics are, that over 50%, last three-four years, over 50% of Parsi youth are intermarrying,
3 intermarrying; whether male or female, both. Interfaith marriages.

4 **JUSTICE M.M. SUNDRESH:** In the judgment, whatever discussion they have made,
5 ultimately, this practice presupposes and presumes, that, once there is an inter-caste
6 marriage... inter-religious marriage, you give up the faith, and faith in this, under this.

7 **DARIUS KHAMBATA:** Yes, My Lord is right.

8 **JUSTICE M.M. SUNDRESH:** That's the difficulty.

9 **DARIUS KHAMBATA:** And you do it under a statute specially meant to protect it.

10 **JUSTICE B.V. NAGARATHNA:** It's virtually an excommunication.

11 **DARIUS KHAMBATA:** It is virtually that. Automatic, without going into the facts of the
12 case, the excommunication matter has been upheld on the ground that on religious grounds
13 you can excommunicate.

14 **JUSTICE B.V. NAGARATHNA:** There they are challenging excommunication.

15 **DARIUS KHAMBATA:** That may be, but...

16 **JUSTICE B.V. NAGARATHNA:** They are wanting this...

17 **DARIUS KHAMBATA:** That's a different type of a case.

18 **JUSTICE B.V. NAGARATHNA:** Sinha's judgement to be... That is their case.

19 **DARIUS KHAMBATA:** But that's a different case, because that's a case-by-case, the
20 following principles of natural justice, only on religious grounds. Here it's amass, automatic,
21 you have to do nothing more. You're banned from professing your religion, never mind if you
22 are a devout Parsi Zoroastrian. Out, automatically. This is a very far reaching.

23 And then please see 61, page 101. "In view of the aforesaid observations and discussions, we
24 find Issue no. 2 as such, would not arise, but if the action of the Respondent is to be tested in
25 light of Petitioner being a natural Parsi Zoroastrian having been married to a non-Parsi and
26 consequently having acquired Hindu religion after marriage in absence of any declaration of
27 competent Civil Court for her continuation to follow Parsi Zoroastrian religion and her status
28 as that of Parsi Zoroastrian the matter could be examined and we have found it proper to
29 examine, but it appears in the absence of any right claimed as non-Parsi no final view is..." So,
30 the lady does not say that I've given up my religion, but I still want to enter. She's devout, she
31 said I continue with my religion. So, they said, but you have not claimed on the ground that
32 you are not a Zoroastrian and yet you want to come in, so we are not going into that aspect.

1 That's right, she's not and she even today she's not claiming that. She is a continued devotee;
2 she doesn't want to say she ceased to be a devotee. Why should she?

3 **JUSTICE B.V. NAGARATHNA:** Otherwise in a Parsi Agiary, non-Zoroastrians are not
4 permitted?

5 **DARIUS KHAMBATA:** Are not permitted. That is correct. In India.

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

7 **DARIUS KHAMBATA:** In other countries they are permitted, but in India they are not. And
8 that might also be a practice evolved over the years as I mentioned to Your Lordships even
9 conversion, though it's a proselytizing or a religion that enjoins you to go out and convert,
10 1200 years, there are hardly any, if at all recorded cases of conversion and as a policy
11 conversion is not followed. But that's a practical policy, a very good policy, a wise policy, to my
12 mind at least. But that doesn't mean that when your men marry out, they and their children
13 get the benefit, when your women marry out they are shown the door. That's the sum total
14 even of this judgment.

15 **JUSTICE B.V. NAGARATHNA:** That is what. If the children of Parsi father have the benefit
16 of the Zoroastrian religion...

17 **DARIUS KHAMBATA:** Correct.

18 **JUSTICE B.V. NAGARATHNA:** That means it is by birth.

19 **DARIUS KHAMBATA:** It is by birth.

20 **JUSTICE B.V. NAGARATHNA:** So same thing will apply to the lady also, she has got her
21 religion by birth. How can it be taken away by marriage?

22 **DARIUS KHAMBATA:** It should. Just one or two last paras. If we go straight to para 61.
23 Sorry, 61 I read, I'm sorry. Para 62, the majority as held in a writ under 226 is maintainable.
24 But in the facts of the case because of this deemed conversion no writ was granted.

25 Now, as Your Lordships know, the Special Marriage Act, I'll just briefly show those provisions;
26 just two or three provisions I don't... I'm not getting into in detail because that's not really the
27 issue, but this is a good example to see how a court should approach these sorts of issues. And
28 as I said, for example, judicial review cannot be excluded in cases like this. Because one, there
29 is no practice we've shown right across even India. Abroad there is no question at all, there's
30 no such practice. Everyone is allowed in, it's everyone is... the children of both men and women
31 are welcome. In India, men are... children of women and men are welcome but not women.
32 But the women who are married out are... nevertheless allowed entry in their own right. Now

1 this judgment said even they are not permitted and we've shown the practice of the Bombay
2 Parsi Panchayat, which is largely a trust holding housing and properties, but it also runs a
3 religious Agiary.

4 **CJI SURYA KANT:** Mr. Khambata, the issue probably which you are raising that may not
5 be required to be responded on the... in terms of 25 or 26.

6 **DARIUS KHAMBATA:** Yes. My Lord is right.

7 **CJI SURYA KANT:** I think Section 19, 21 and 21(a) of the Act itself answer you may find.

8 **DARIUS KHAMBATA:** Will be very clear.

9 **CJI SURYA KANT:** There is nothing more, nothing less required. I think once you read
10 Section 19, answer find there.

11 **DARIUS KHAMBATA:** In fact that is why I was originally not going to go into this because
12 this is not really strictly a part of the issues before My Lords.

13 **CJI SURYA KANT:** Your probably one of the simplest submission can be, the majority
14 opinion runs contrary to the statutory scheme of 19, 21 and 21(a).

15 **DARIUS KHAMBATA:** My Lord is right. That's as simple as that. My Lord is absolutely
16 correct. And 25(1) as well. 14...

17 **CJI SURYA KANT:** 25(1) is an issue need not be gone into because the statute 54 probably
18 is well protected under 25(2).

19 **DARIUS KHAMBATA:** In fact, the statute, the objects and reasons makes it very clear why
20 it is brought in in 1954 and the old act of 1872 is gone. That persons of different faiths can get
21 married. There is no provision in the statute which automatically converts anyone to any faith.
22 So two of the sections are referred to in this judgment, Section 13, Marriage Certificate is
23 conclusive evidence, but nothing about whether that shows conclusivity on conversion. The
24 Gujarat High Court seems to have been impressed with that.

25 **CJI SURYA KANT:** The statutory laws of religion. I'm using the word 'statutory laws of
26 religion'.

27 **DARIUS KHAMBATA:** Yes.

28 **CJI SURYA KANT:** Only applies to Hindus and their allies defined or expressly mentioned
29 in 19. So therefore, if a marriage is solemnised under this Act by a Parsi, by a Muslim or by a
30 Christian, they do not lose their religious right.

31 **DARIUS KHAMBATA:** My Lord is right, and in fact 19...

1 **CJI SURYA KANT:** Yes.

2 **DARIUS KHAMBATA:** ...has a severance of status from the joint family; so that's really in
3 the context of a Hindu undivided family or a joint family, there is a severance of status.

4 **CJI SURYA KANT:** In the context of that.

5 **DARIUS KHAMBATA:** In the context of that. Even that does not result in automatic
6 conversion, only a severance of status. That's all that 19 is. And in any case, as My Lord has
7 said, doesn't apply to any other religions. So, this is the sum and substance of the factual case.

8 **CJI SURYA KANT:** No, 19 and 21.

9 **DARIUS KHAMBATA:** Yes.

10 **CJI SURYA KANT:** 21 talks of succession, but 19 can have some impact on Hindus. That do
11 they still be entitled to claim themselves, but that's a different debatable issue, that can be
12 looked into in some other proceedings, but as far as you are concerned, you are absolutely
13 adequately protected subject to what the other party will argue under 19, read with 21 and
14 21(2).

15 **DARIUS KHAMBATA:** My Lord is right. Absolutely correct. So, 19 squarely does not apply
16 to Zoroastrians. But My Lord, that ultimately will be in the matter, but therefore this is the
17 factual conspectus.

18 Now My Lord, may I be permitted to advance a few submissions on the questions before me?

19 **CJI SURYA KANT:** Yes.

20 **DARIUS KHAMBATA:** My Lord, I filed a note of supplemental submissions. This is Volume
21 2.4. Page 3 of Volume 2.4. And I won't go through everything obviously, because there are only
22 some areas which I wish to emphasise before My Lords. If My Lord see page 5 of Volume 2.4.
23 *Shirur Mutt* broadly held...

24 **CJI SURYA KANT:** Is it 3.4?

25 **DARIUS KHAMBATA:** 2.4. Volume 2.4.

26 **CJI SURYA KANT:** 2.5?

27 **DARIUS KHAMBATA:** 2.4 at page 5 they start, page 3 and then 5 onwards. Because
28 ultimately, a balance will have to be struck by Your Lordships, that is the sum total of this
29 exercise, and I think that is the sense I've got even from many of the submissions that I've
30 heard from the first set of Counsel. *Shirur Mutt* held, and I think that is right, that a religion
31 has a doctrinal component and a practices component. You cannot divorce practices, ritual

1 ceremonies, etc.; they are part of religion. And we are not, for one moment suggesting that
2 they're not. And in respect of the practices, ***Shirur Mutt*** used the expression, which are
3 regarded as integral parts of religion.

4 And at page 5 at the bottom...

5 **JUSTICE AHSANUDDIN AMANULLAH:** It's not coming.

6 **DARIUS KHAMBATA:** I'm so sorry, I'm so sorry. You have hard copies? I have hard copies
7 as well. I'm sorry, I didn't realise. These are with some judgments annexed; so, they're not as
8 bulky as it might seem.

9 **JUSTICE AHSANUDDIN AMANULLAH:** Volume 2.4 is it?

10 **DARIUS KHAMBATA:** 2.4. 2.4 but I have hard copies for Your Lordships also.

11 **JUSTICE M.M. SUNDRESH:** Which one you're reading? You are reading ***Shirur Mutt***?

12 **JUSTICE B.V. NAGARATHNA:** No, no, supplementary.

13 **JUSTICE ARAVIND KUMAR:** Supplementary submissions.

14 **DARIUS KHAMBATA:** Supplementary submissions.

15 **JUSTICE B.V. NAGARATHNA:** It is 2.4.

16 **CJI SURYA KANT:** It is there on the screen. Yes, you can...

17 **JUSTICE M.M. SUNDRESH:** Additional submissions, yes.

18 **DARIUS KHAMBATA:** [NO AUDIO] ***Shirur Mutt*** that a religion would also include
19 practices. And at 5(2), ***Ratilal Gandhi's*** case in the context of Article 25 has said, "Every
20 person has a Fundamental Right under our Constitution not merely to entertain such religious
21 belief as may be approved by his judgment or conscience, but to exhibit his belief and ideas in
22 such overt acts as are enjoined or sanctioned by his religion and further to propagate his
23 religious views for the edification of others and religious practices or performance of acts in
24 pursuance of religious beliefs are as much part of religion, faith or belief in particular
25 doctrines." That I think that is far too well settled a principle for Your Lordships to even
26 contemplate interference with.

27 Now, there was a point of view expressed that Article 25 protects the individual's Fundamental
28 Right to religious freedom and 26 protects the denominational right. I would slightly, with
29 respect, differ from that. My submission is, and that is supported by previous authority, that
30 Article 25 is the source of the entirety of the Fundamental Right to freedom of religion,
31 whether individual or collective. Because ultimately, an individual can worship on his own, in

1 the solitary, or he can go collectively to a temple or to a mosque and worship collectively. That's
2 still part of his Article 25 right to freedom of religion. And both ***Shirur Mutt*** and ***Ratilal***
3 ***Gandhi*** have held that. I've quoted them at paragraph 7, I've quoted the passages. And
4 ***Ismail Faruqui's*** case also says, "That Article 25 guarantees equality in the matter of
5 religion to all individuals and groups." So, it's not that 25 is only individual, 26 is collective. In
6 fact, there'll be several anomalies if that approach is adopted, which I have covered. Take for
7 example, 25(2)(b). It protects laws made for social reform or throwing open places of worship
8 of Hindu religious institutions. If 25(1) did not cover institutions at all, then 25(2)(b) would
9 make no sense. Even more, the right to freely profess, practice and propagate religion is only
10 in Article 25. Is it to be suggested that only an individual has that right, and not a
11 denomination? Because if 26 applies to denominational rights and 25 to individual, that would
12 be the *sequitur*, but not so, because collective rights are also protected by Article 25. So, 26 is
13 really like a subset or a manifestation of an Article 25 right. Consider a situation where you
14 had only Article 25. Article 26 was not in the Constitution at all. Could it ever be argued that
15 individuals could not band together in groups or collections or denominations and exercise a
16 right collectively? That would surely be within an Article 25 right. But if you take it the other
17 way round, only Article 26, no Article 25, because if 26 is the source of all denominational
18 rights, then it should be standalone. But if you take that, then could it be suggested that a
19 religious denomination has no right to freely practice, profess or propagate religion? Which is
20 not there in 26. So, it can never be that two are a compact, they have to be read together and
21 the source of the right in my respectful submission is Article 25. It covers individual and
22 collective rights.

23 Now, there will be a consequence to that, because the right of freedom of religion, if it is
24 sourced to Article 25, then it comes with the limitations of Article 25. In other words, health,
25 public order, morality, and subject to other provisions of this part. Could it be suggested that
26 whereas the right to individual religion is subject to other provisions of this part, the right to
27 denominational religion is not? I'm aware that 26 does not have that express language. But it
28 doesn't have that express language precisely because it is sourced in 25. It's a compact. We
29 have to read both together. It's the same right of religion. It's not a different right of religion
30 that a denomination can manage. It's the same religion. And in fact Mr. Subramaniam actually
31 put it beautifully in his submissions. If I may be permitted to read from his submissions; he
32 expressed what Article 25 was all about. And I'll just read that from his submissions. Para 53
33 of his submissions, I'll read it out. He explains Article 25(1) in beautiful terms. He says, "It is
34 respectfully submitted that this was to enable a mutual respect for the fundamental rights of
35 others in the matter of exercise of the right to religious freedom, practice and propagation. In
36 other words, the fundamental rights of other citizens must not be injured. For instance, in
37 exercising individual rights of religion, there must be forbearance from making defamatory

1 expressions against other individuals or from attempting to undertake exclusionary practices
2 on grounds of caste. That is why, the expression "subject to the other provisions of this part"
3 is included in Article 25(1). Thus it is clear that for the purposes of Article 25(1) the principle
4 of the right to exercise religious freedom as an individual entails peaceful coexistence and
5 recognition of the rights of all other individuals in society." In other words, 25(1) is a repository
6 of, what I would think, are ancient civilizational values of India of tolerance, peaceful
7 coexistence, and plurality. I may believe in one faith, but my belief and practice of that faith
8 should not interfere with the belief and practice of another person who may believe in another
9 faith. It's a very wise... it's a repository of a very ancient principle. As I said, we as a community
10 are a fantastic example of that. We would not have survived in any other country. It is because
11 of the tolerance and acceptance by Hinduism that we have survived for 1200 years. And 25(1)
12 reflects that. But to restrict it only to individual practice of religion and to say somehow
13 denominations are free from this, would do great violence to the structure of 25 and 26.
14 Because the denominational right ultimately is an individual's right. There's no separate entity
15 that stands above an individual called a religious denomination, that even where an individual
16 may not have the right, the denomination may have it. There's no hierarchy. None is found
17 between 25, 26, 27, 28, these are the whole compact of protections.

18 **JUSTICE B.V. NAGARATHNA:** So, one other way of looking at it is, 25(1) is subject to
19 other provisions of this part...

20 **DARIUS KHAMBATA:** Yes.

21 **JUSTICE B.V. NAGARATHNA:** ...which will also include 26.

22 **DARIUS KHAMBATA:** It would. But 26 draws its source from 25(1).

23 **JUSTICE B.V. NAGARATHNA:** Yes, you have to...

24 **DARIUS KHAMBATA:** 26 without 25(1) is a meaningless right.

25 **JUSTICE M.M. SUNDRESH:** The problem which they are trying to put through it to
26 everybody is that, you are trying to, trying to create a dead to 26. 26 is nothing but an
27 exemption of 25 in the sense you practice, propagate. 26, it is only meant for that purpose, that
28 is why 26 as an individual.

29 **DARIUS KHAMBATA:** I am obliged.

30 **JUSTICE M.M. SUNDRESH:** As rightly said, it can't be negative equality. You can't say it,
31 right is available 26, is not available, 25(2)(b) is not applicable to their argument is some other
32 argument, is that applicable to 26, but then applicable to the Board members who are
33 individuals. Then if we, what if we don't have a religious denomination, it will be applicable.

1 If you form a denomination, if the argument is accepted it may not be applicable. It can't be
2 there that way.

3 **DARIUS KHAMBATA:** My Lord is right. I couldn't have put it better. It's not a binary and
4 why put 25 and 26?

5 **JUSTICE M.M. SUNDRESH:** 25 and 26 operates on a very limited scope. It's very... see,
6 it's administered and managed, to that extent the rights, certain rights are independently given
7 there, that those cannot be factored into 25.

8 **DARIUS KHAMBATA:** But...

9 **JUSTICE M.M. SUNDRESH:** Otherwise 25 is common for everybody.

10 **DARIUS KHAMBATA:** But why for example 26(b)? Why is a religious denomination given
11 the right in matters of religion to manage its own affairs? It's because its members have the
12 right to freely practice, profess and propagate religion.

13 **JUSTICE M.M. SUNDRESH:** The difficulty is that when we started with *Shirur Mutt*,
14 this... an attempt was made to synchronize both.

15 **DARIUS KHAMBATA:** Yes.

16 **JUSTICE M.M. SUNDRESH:** If the argument was to the effect, no, no, no, this ultimately
17 it is, it is only a, it is only a framework. 26 set a framework, or a structure given under 25.

18 **DARIUS KHAMBATA:** Correct.

19 **JUSTICE M.M. SUNDRESH:** The common belief is you put it there.

20 **DARIUS KHAMBATA:** My Lord is right.

21 **JUSTICE M.M. SUNDRESH:** Then construct it like a building, then make it function, there
22 is no difficulty. If you differentiate them, then your mind will be there to find something which
23 is not there, and then connect it there, and then to make 26(2)(b) to be workable.

24 **DARIUS KHAMBATA:** Correct. In fact the test is, see 25(1) on its own. It can survive. But
25 see 26 on its own, can it survive without 25(1)?

26 **JUSTICE B.V. NAGARATHNA:** Even without 26, it can survive, denominations can
27 survive.

28 **DARIUS KHAMBATA:** Yes. Under 25(1), Your Ladyship is absolutely correct.

29 **JUSTICE B.V. NAGARATHNA:** The framers of the Constitution were conscious of the fact.
30 Even if you see Justice Mukherjea's judgment.

- 1 **DARIUS KHAMBATA:** Yes.
- 2 **JUSTICE B.V. NAGARATHNA:** He refers to the four *Mutts* established by Adi
3 Shankaracharya, Ramanujacharya, Madhvacharya...
- 4 **DARIUS KHAMBATA:** Yes, correct. Madhvacharya.
- 5 **JUSTICE B.V. NAGARATHNA:** See, they were conscious of how religion was being
6 practised in India through the *Mutts* denominations. That is why they brought about, being
7 conscious of that, they have added that as 26.
- 8 **DARIUS KHAMBATA:** Your Ladyship is absolutely right.
- 9 **JUSTICE B.V. NAGARATHNA:** It is to that extent.
- 10 **DARIUS KHAMBATA:** The great Adi Shankaracharya who institutionalised *Mutts* as a
11 denomination.
- 12 **JUSTICE B.V. NAGARATHNA:** Yes.
- 13 **DARIUS KHAMBATA:** What is very important is, a *Mutt* and a temple must not be
14 confused. A temple is an institution which may be set up by a *Mutt*.
- 15 **JUSTICE B.V. NAGARATHNA:** Yes.
- 16 **DARIUS KHAMBATA:** But it is not the same thing. A *Mutt* is a religious denomination.
- 17 **JUSTICE B.V. NAGARATHNA:** Yes.
- 18 **DARIUS KHAMBATA:** A temple on its own may not be. I'm saying may not be, because it
19 depends from case to case. I don't want to get into any specific case, it may or may not be. But
20 certainly *ipso facto* a temple is not a religious denomination; it has to be shown to be a
21 denomination where all the factors are.
- 22 **JUSTICE B.V. NAGARATHNA:** It is more for what you call organised religion.
- 23 **DARIUS KHAMBATA:** Yes.
- 24 **JUSTICE B.V. NAGARATHNA:** Organised means where they propagate. Propagation
25 takes place through what? Propagation takes place through *Mutts*.
- 26 **DARIUS KHAMBATA:** That is right.
- 27 **JUSTICE B.V. NAGARATHNA:** And temples are also attached to *Mutts*.
- 28 **DARIUS KHAMBATA:** Correct.

1 **JUSTICE B.V. NAGARATHNA:** It is in having regard to that aspect, this 26 has come
2 about.

3 **DARIUS KHAMBATA:** I am obliged because, in fact, that's a very good example. If *Mutts*
4 propagate and they have set up for propagation, they can only source that right in 25(1), there
5 is no independent right in 26. The moment you divorce the two...

6 **JUSTICE M.M. SUNDRESH:** To put it differently, you can, for the moment, we can forget
7 about the *Mutt*. You can say that propagation is nothing but the propagation of the collective
8 belief of the individuals and 25. It is, when you speak about religious denomination may be
9 *Mutt* or anything else, it is nothing but the collective individuals. Another way to put it, even
10 to take a very different proposition, the *Mutt* cannot act and go beyond the common belief, the
11 collective faith, because, the very creation of *Mutt*, *Mutt* is nothing but whatever the religious
12 denomination is, a creation of 25, common belief; and with that common belief you propagate
13 through someone, through some mechanism, it's an instrument to give effect to that belief.

14 **DARIUS KHAMBATA:** My Lord, precisely put. May I adopt that as my submission?

15 **JUSTICE M.M. SUNDRESH:** Only putting it there.

16 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Khambata?

17 **DARIUS KHAMBATA:** Yes.

18 **JUSTICE AHSANUDDIN AMANULLAH:** There may be a slight nuance to that. It may
19 not be that simple as you are projecting, because a denomination itself, by its own, may also
20 have a different right than an individual. A denomination may be composed of individuals
21 practicing a common, minimum common belief, but then it may have a special different right
22 than compared to individual also. In that matter, every denominational right does not mean
23 that it has to stem from 25, there is a finer nuance.

24 **DARIUS KHAMBATA:** Let us test that. Your Lordship is right. "A religious denomination
25 has the right in under (a), 26(a), to establish and maintain institutions".

26 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.

27 **DARIUS KHAMBATA:** "(b) to manage its own affairs and matters of religion, (c) to own
28 and acquire movable, immovable property and (d) to administer such property", but that's in
29 accordance with law. Now, Your Lordship is right, that these are specific to religious
30 denominations or sections thereof, no question about that. But, the foundation of these rights
31 has to be the right found in Article 25, because if there was no right to freely practice, propagate
32 and profess a religion, then 26 would be utterly meaningless.

1 **JUSTICE AHSANUDDIN AMANULLAH:** You are right; there is a continuity, but then
2 there is also a disconnect. For that, I'll give you a simple example. I am a believer in a particular
3 deity or a God. Individually, I practice my religion as per my wishes. I may pray in my house
4 or wherever, as for how I desire, but then, when we become a denomination, basic common
5 belief is similar, deity is similar, fundamentals are similar. But then, when a denomination is
6 a denomination, will say no, now if you have to come and practice in this denominational
7 temple, or, then this it may vary. I cannot say that because I have a right to practice religion
8 *per se*, I also have the right to practice in the way I as an individual will do that. That is a
9 dichotomy also.

10 **DARIUS KHAMBATA:** I agree with that. May I explain what I'm saying? Denominations
11 have some uniqueness or difference in character. In fact, Black's Law Dictionary says, they are
12 within a religion but some different aspect.

13 **JUSTICE B.V. NAGARATHNA:** They have a commonality.

14 **DARIUS KHAMBATA:** They have within themselves the commonality, but there's a
15 difference between how other sections or denominations of the same religion worship or
16 practice. No doubt about it. I belong to a particular religious denomination which has a
17 particular practice which is different from how other members of the religion worship. But
18 there are two points really to answer that. One is of course, that if that religious denomination
19 sets up an institution, it may be a temple, it may be a place of worship, Tower of Silence
20 whatever it is. If that setting up is a under a document, a Trust Deed, then that Trust Deed has
21 to be followed, because specially in the Parsi community most temples have been set up
22 because someone has passed away, left a grant, an endowment and that is in the form of a
23 public charitable trust. So, that denomination cannot say, that though I am set up under a
24 public charitable trust, the particular beliefs of the then current Administrators or Trustees
25 may be something else so we can exclude, because they are as bound by their Trust Deed as
26 anybody else, that is Point number 1. Point number 2, is that even a religious denomination
27 will have to establish that that practice is part of the... sincerely part of the doctrines of that
28 religion. So, I am assuming if it's proven to be part of the doctrines of that religion, it's a
29 different matter. And I also accept that where it is proven that this is part of the religious
30 doctrine, at least for this section of the argument, a court may be very deferential to what the
31 religion itself says is the religion. Of course, there are exceptions. For example, if there are,
32 there is not sufficient evidence or if there are doctrinal differences within the denomination,
33 that can also happen, then a review is required. But if there is a unanimity and it is proven to
34 be established beyond doubt that this is what the religion requires, then My Lord is absolutely
35 right. If it is part of that religious denomination. If the institution or the temple is set up only
36 for that denomination and not generally for all members of the religion, then it's in a given

1 case it may be possible to say that if you want to come in, you come in as per the denominations
2 practices. So, My Lord is not wrong, but those are restricted cases. Most of the cases one will
3 find are where the institution or temple is set up for the general benefit of the entire religion,
4 not set up only for a specific denomination, and it's not proven as to what the exclusionary
5 practices of that denomination are. Most cases are this grey area, which is why judicial review
6 is an imperative.

7 **JUSTICE AHSANUDDIN AMANULLAH:** No. That is why the words used are customs
8 and practices also.

9 **DARIUS KHAMBATA:** Correct.

10 **JUSTICE AHSANUDDIN AMANULLAH:** Every word has a meaning.

11 **DARIUS KHAMBATA:** But see my case.

12 **JUSTICE AHSANUDDIN AMANULLAH:** It doesn't keep itself only to doctrine.

13 **DARIUS KHAMBATA:** See my case. Far from establishing a practice, the overwhelming
14 evidence shows there is no practice.

15 **JUSTICE AHSANUDDIN AMANULLAH:** No, because you said it as bi-diametrical and
16 that is why...

17 **DARIUS KHAMBATA:** Yes, that's it.

18 **JUSTICE AHSANUDDIN AMANULLAH:** But in your particular case it may be very
19 different.

20 **DARIUS KHAMBATA:** But in a given case I accept.

21 **JUSTICE AHSANUDDIN AMANULLAH:** But because you already took the picture that
22 it is a wider paradigm.

23 **DARIUS KHAMBATA:** My Lord is right.

24 **JUSTICE AHSANUDDIN AMANULLAH:** That is why the question was in the general
25 perspective.

26 **DARIUS KHAMBATA:** In a given case... if a religion is able to establish this is my religious
27 practice.

28 **JUSTICE AHSANUDDIN AMANULLAH:** Or custom also.

29 **DARIUS KHAMBATA:** Or custom. Practice or custom. It is proven to the satisfaction of a
30 court that it is and it is not for a court to sit in judgment over that. I accept that. There is no

1 difficulty on that, but there has to be because that's the balancing, but until one reaches that
2 stage.

3 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, but even that will be subject to
4 something which is not abhorrent like Justice Nariman has used...

5 **DARIUS KHAMBATA:** Of course.

6 **JUSTICE AHSANUDDIN AMANULLAH:** ...to the conscience.

7 **DARIUS KHAMBATA:** Subject to...

8 **JUSTICE AHSANUDDIN AMANULLAH:** It cannot be to that level.

9 **DARIUS KHAMBATA:** Public order, health or morality.

10 **JUSTICE AHSANUDDIN AMANULLAH:** Whether it has been, subject to on whether...

11 **DARIUS KHAMBATA:** My submissions also are there is now a fourth component, which is
12 what I would call the **RC Cooper** line, which is that Fundamental Rights don't operate in a
13 silo, so there may be competing Fundamental Rights under 14, 21, 15, which will have to be
14 balanced even against such a proven practice. That's a secondary stage. Today I am at the stage
15 where to even reach the threshold where one can claim a deference, the judicial review pulls
16 back. Of course, no one is saying judicial review is ever excluded, that Your Lordships will
17 always have, but...

18 **JUSTICE JOYMALYA BAGCHI:** In fact what you are saying...

19 **DARIUS KHAMBATA:** Yes.

20 **JUSTICE JOYMALYA BAGCHI:** ...is what's the ratio in **Devaru**.

21 **DARIUS KHAMBATA:** My Lord, pleases.

22 **JUSTICE JOYMALYA BAGCHI:** The ratio of **Devaru** that there should be an
23 harmonising...

24 **DARIUS KHAMBATA:** An harmonising.

25 **JUSTICE JOYMALYA BAGCHI:** ...of 26 as **Devaru** did with 25(2), it should be with 14,
26 19, 20.

27 **DARIUS KHAMBATA:** Yes, My Lord, in fact that was an outlier very early judgment where
28 this principle of balancing and proportionality was first gone into before **RC Cooper** even.
29 Even before **RC Cooper**.

30 **JUSTICE JOYMALYA BAGCHI:** In that it is indicated.

- 1 **DARIUS KHAMBATA:** Correct. My Lord is absolutely right. So, that thought has always
2 been there in 25, 26, *RC Cooper* widened it to other Fundamental Rights also.
- 3 **JUSTICE B.V. NAGARATHNA:** So in other words, it can also be said, 25(2)(b) will apply,
4 (2)(b)...
- 5 **DARIUS KHAMBATA:** (2)(b), correct.
- 6 **JUSTICE B.V. NAGARATHNA:** 25(2)(b) will apply, so long as there is no breach of Article
7 25(1).
- 8 **DARIUS KHAMBATA:** Yes, My Lord. Your Ladyship is absolutely correct.
- 9 **JUSTICE B.V. NAGARATHNA:** If there is no breach of 25(1), 25(2)(b) can apply.
- 10 **DARIUS KHAMBATA:** Yes, yes.
- 11 **JUSTICE B.V. NAGARATHNA:** And 25(1) will take within its fold 26(b) also.
- 12 **DARIUS KHAMBATA:** Yes, absolutely, absolutely.
- 13 **JUSTICE B.V. NAGARATHNA:** When it comes to a denomination.
- 14 **DARIUS KHAMBATA:** When it comes to a...
- 15 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Khambata, on a lighter vein, perhaps all
16 the Counsel have assisted us with regard to 25, 26 interplay there were. But the summing up
17 submission is, Your Lordships will have to balance, we need to, have to balance.
- 18 **DARIUS KHAMBATA:** I've tried to do that.
- 19 **JUSTICE AHSANUDDIN AMANULLAH:** That you have not given.
- 20 **DARIUS KHAMBATA:** I've tried exactly to do that in my submission.
- 21 **JUSTICE AHSANUDDIN AMANULLAH:** And with everything that Your Lordships have
22 to balance. How to balance, that everybody knows that this is interplay between 25 and 26.
- 23 **DARIUS KHAMBATA:** I've spent a lot of time on that in my submissions.
- 24 **JUSTICE AHSANUDDIN AMANULLAH:** So be more focused on that.
- 25 **DARIUS KHAMBATA:** I'll be coming to that, it's in my submissions, I'll be taking you'll all
26 through it.
- 27 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.

1 **DARIUS KHAMBATA:** Because there's a theory of proportionality, double proportionality,
2 how do you balance rights. There can't be a complete solution because ultimately it will be
3 case-to-case.

4 **JUSTICE AHSANUDDIN AMANULLAH:** No, ultimately it has to be some facts.

5 **DARIUS KHAMBATA:** But there are mechanisms by which Your Lordships have devised.

6 **JUSTICE AHSANUDDIN AMANULLAH:** Some broader objective parameters.

7 **DARIUS KHAMBATA:** I have covered that in my submissions, because My Lord is right,
8 even I kept on hearing this, you must harmonise, you must balance. But that leaves Your
9 Lordships in a bit of a quandary. There are guidance. Of course, Your Lordships will think of
10 something else even, but today we already have some paths that guidance

11 If My Lords come back now to another point at... starting from para 11 of my submissions,
12 there's another point which I want to make here. 25(1) itself speaks of an equality. Even apart
13 from 14. All persons are equally entitled. Now that would mean that equality is textually
14 embedded in 25(1) itself; you don't even need to go to 14. Now what is that equality? The
15 learned Solicitor suggested it was to be restricted, but in my respectful submission, that
16 equality can be of various types, and one cannot restrict the categories, but just what I've been
17 able to think of, I've put in para 14. Equality between individuals and other individuals. Gender
18 equality, There's no reason why that shouldn't come in equality. Equality between religions.
19 Equality between religious denominations and sections. Equality within a religion or within a
20 denomination or section.

21 **JUSTICE JOYMALYA BAGCHI:** But would you extend it to equality between individual
22 and the denomination?

23 **DARIUS KHAMBATA:** There's no reason why not. There's no reason why not. I accept that.

24 **JUSTICE JOYMALYA BAGCHI:** But won't we do violence to the provision of the words of
25 25 which says, "Subject to other provisions of this Part"?

26 **DARIUS KHAMBATA:** In fact, I think what is happening is, that has been the peg on which
27 most of my learned friends have said, therefore 26 must have primacy. But that is not so. If
28 one reads 25(1) and 26 together, if they are a compact, then one will not give primacy to one
29 or the other. It has to be read together. And that is probably why the Constitution didn't again
30 repeat the same words in 26. For example, they don't repeat the words, that the denomination
31 has the right to freely profess, practice and propagate the religion. But does that mean a
32 denomination does not? Of course it has that right. They don't have to, and therefore, the
33 words 'subject to other provisions of this part' are also not repeated in 26. It's the same

1 principle. Therefore you read them separately, there are all sorts of problems. But harmonize
2 them and read them together, because, the religion that is spoken about in 25(1) is the same
3 religion that 26(b) speaks of. Matters of that same religion. Not some religion outside 25(1).
4 It's the same 25(1) religion. Otherwise, the argument would have to be that, no, 26 is a
5 standalone, it's an island, it speaks of some higher religious right. And our Constitution
6 decided to give a denomination a higher right than any other group, or individual, or anyone,
7 as far as religion is concerned. I don't think that would be a fair reading of the two provisions.
8 They have to be read together.

9 **JUSTICE B.V. NAGARATHNA:** In order to see whether there is a breach of Article 25(1),
10 what is stated in Article 26 would be of assistance. It is a route to...

11 **DARIUS KHAMBATA:** Yes. It's one of the branches.

12 **JUSTICE B.V. NAGARATHNA:** ...for the court to see whether there is a breach or not.

13 **DARIUS KHAMBATA:** It sets out with some specificism.

14 **JUSTICE B.V. NAGARATHNA:** "They have a right to maintain, to have their own, manage
15 their own affairs in matters of religion".

16 **DARIUS KHAMBATA:** In matters of religion. Which religion? The same one is referred to
17 in 25(1). Not a different one. Not a wider one or a narrower one. It's the same one. Take another
18 example from...

19 **JUSTICE B.V. NAGARATHNA:** That is why, in one of the judgments, the author has said,
20 "nothing more, nothing less".

21 **DARIUS KHAMBATA:** Nothing more, nothing less. It's the same.

22 **JUSTICE B.V. NAGARATHNA:** Nothing more, nothing less is written.

23 **DARIUS KHAMBATA:** It's the balance. Now, let's take another example. Article 21 and 22.
24 21, is wide and all-encompassing. Your Lordships have held, so much comes in life and liberty,
25 and can be denied only by procedure, in accordance with law. 22 specifically talks about
26 protection against arrest without being told the charges, access to a lawyer, being produced
27 before a magistrate. If 22 was not there, 21 would still cover it.

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

29 **DARIUS KHAMBATA:** It's not that you didn't have it. But 22 just makes that clearer. It's a
30 manifestation.

31 **JUSTICE JOYMALYA BAGCHI:** It lays down the procedure referred in 21.

- 1 **DARIUS KHAMBATA:** Procedure... 21. Therefore...
- 2 **JUSTICE JOYMALYA BAGCHI:** But we see a significant departure in the words, when we
3 read 25(1) and 26. A significant departure is what you said. The subjugation of 25(1) when it
4 is individual or group, and a special status to denomination when it comes to denominational
5 right: establish, maintain and manage its religious affairs.
- 6 **DARIUS KHAMBATA:** That is why, My Lord is right.
- 7 **JUSTICE JOYMALYA BAGCHI:** Some degree of meaning to this dichotomy or apparent
8 status difference, although all fundamental rights are equal but some rights are more equal
9 than others.
- 10 **DARIUS KHAMBATA:** I'm leaving aside even the *RC Cooper* line. I'll come to that later.
11 Only on 25, 26.
- 12 **JUSTICE JOYMALYA BAGCHI:** The Golden... the Triangular Right. 14, 19, 21.
- 13 **DARIUS KHAMBATA:** Let us see... I'll come to that later as a separate compartment.
- 14 **JUSTICE JOYMALYA BAGCHI:** Compelling rights. Would you put 25(1), even the
15 freedom of conscience, at that level, when it is subject to other provisions of this part? But
16 when it elevates itself to a denominational right to manage and maintain its religious
17 institutions, its religious affairs.
- 18 **DARIUS KHAMBATA:** May I respond to that?
- 19 **JUSTICE JOYMALYA BAGCHI:** Crystallizes into something as co-equal, so we do the
20 harmonizing test...
- 21 **DARIUS KHAMBATA:** Yes.
- 22 **JUSTICE JOYMALYA BAGCHI:** Of co-equal rights.
- 23 **DARIUS KHAMBATA:** May I answer that on two planes?
- 24 **JUSTICE JOYMALYA BAGCHI:** Yes.
- 25 **DARIUS KHAMBATA:** The second answer will be the *RC Cooper* line, 14, I'll come to that
26 later. Let us assume we only have 25 and 26.
- 27 **JUSTICE JOYMALYA BAGCHI:** Mr. Khambata, now you are trying to persuade us, is to
28 go beyond *Devaru* and say, that, 25, 26 on the same plane, and therefore, 25 rights also have
29 the pre-eminence as 26 right.
- 30 **DARIUS KHAMBATA:** May I put it a little differently?

1 **JUSTICE B.V. NAGARATHNA:** If 26 is an articulation, or a species of what is stated in, or
2 encompassed under 25(1)?

3 **DARIUS KHAMBATA:** That is correct. And 26, if it is read as not in any way fettered by
4 25(1), because of the absence of specific language, it may not be fettered; if that view was taken,
5 but then, it also doesn't have the content of 25(1). Because the question that immediately arises
6 is, if 26...

7 **JUSTICE JOYMALYA BAGCHI:** That will only come, as you rightly said, in very rare cases.

8 **DARIUS KHAMBATA:** No, My Lord. I'm not. No.

9 **JUSTICE JOYMALYA BAGCHI:** Individual 21 right of conscience of practicing religion
10 comes in conflict.

11 **DARIUS KHAMBATA:** With respect, no. Let's take a case where a religious denomination
12 goes out and tries to propagate a religion. I don't want to mention certain institutions which
13 do that. Now, can it be said that, that is not a right available to the religious denomination,
14 because it's not there in 26?

15 **JUSTICE JOYMALYA BAGCHI:** Again it is exercising 25(1) rights, it is not exercising 26
16 rights.

17 **DARIUS KHAMBATA:** That's right. I'm obliged. Therefore...

18 **JUSTICE JOYMALYA BAGCHI:** So, when you see 26 rights, it is restricted by its words,
19 not in respect of its reference to 25(1). 26 rights say establish and maintain institution, and
20 manage its affairs, religious affairs. Now if the institution, in its management of religious
21 affairs, require a propagation on particular days or particular religious festivals, it can do it,
22 and any hindrance to that will be protected on co-equality with other fundamental rights.
23 When an individual chooses to do it, which is not an institution, then we have to have the
24 differential...

25 **DARIUS KHAMBATA:** May I break up my answer My Lord, step-by-step? First is, the word
26 'persons' in 25(1) includes individuals and collectivities and groups of persons as well, it can't
27 be restricted only to the individual. So, a collectivity of persons who have similar beliefs can
28 come together and say, we want to establish an institution so that we can collectively worship
29 in that institution. Now, that right they have even under 25(1) itself. They can do it so long as
30 they do not infringe the rights of any other group of believers or individuals to profess their
31 religion. That fetter is there. It cannot be suggested, with due respect, that that fetter is
32 removed only because now they call themselves a religious denomination and they say under
33 26(b) there is no fetter of other provisions of this part. Because if they... if they seek to source

1 their right from 25(1) to freely profess, practice and propagate, they take the right as it is under
2 25(1), not some different right. So, if a religious denomination exercises collectively 25(1)
3 rights, then those rights are subject to all the extensions and fetters that 25(1) gives to protect.

4 **JUSTICE ARAVIND KUMAR:** Then they come under that umbrella of denominational
5 right. Whether individual part of that denominational right, can he say I have a right of
6 freedom under 25(1), I will not be bound by the right of...?

7 **DARIUS KHAMBATA:** No, no, that's not my argument, that's not my argument.

8 **JUSTICE ARAVIND KUMAR:** That is what...

9 **DARIUS KHAMBATA:** No, no, that is what is troubling Your Lordships, I understand that,
10 but let me try and...

11 **JUSTICE JOYMALYA BAGCHI:** There will be an interface between...

12 **DARIUS KHAMBATA:** Yes, there will be, there will be.

13 **JUSTICE JOYMALYA BAGCHI:** ...an individual with freedom of conscience and his right
14 to profess...

15 **DARIUS KHAMBATA:** There will be.

16 **JUSTICE JOYMALYA BAGCHI:** ...and propagate that conscience.

17 **DARIUS KHAMBATA:** So, may I...

18 **JUSTICE JOYMALYA BAGCHI:** It's a denominational right, the denominational right has
19 to be given its due.

20 **DARIUS KHAMBATA:** Correct. Yes, undoubtedly, but to reach that conclusion a number
21 of steps have to first be travelled.

22 **JUSTICE M.M. SUNDRESH:** Well, can you just expand this what may be?

23 **DARIUS KHAMBATA:** Of course.

24 **JUSTICE M.M. SUNDRESH:** Can be a member of a denomination question the religious
25 practice which affects it, despite them? In that case will he be termed as, continue to be a
26 member of the denomination, or if he automatically goes out because he questions the practice
27 and then belief, that it said...

28 **DARIUS KHAMBATA:** Yes, I understand.

29 **JUSTICE M.M. SUNDRESH:** ...though primarily he may agree. If he does it as my brother
30 said, can he trace it under 25(1) his right, or could it be a common remedy? Number 2. Number

1 3 - What is the judicial review available? Number 3. Number 4 - What could be the forum?
2 You may have attempted your case, put your case in that light.

3 **DARIUS KHAMBATA:** That's right, let me, let me...

4 **JUSTICE M.M. SUNDRESH:** Yes.

5 **DARIUS KHAMBATA:** Let me try and frame it. First, to give any play to the 26(b) right, as
6 well-settled and I have covered this in my submissions, it must be proven that that is a *bona*
7 *fide* and sincere custom or practice that the community or the denomination follows. That's
8 not always easy. We just... we are skipping those steps and we just go to the third step...

9 **JUSTICE M.M. SUNDRESH:** No, first...

10 **DARIUS KHAMBATA:** But that's the first step.

11 **JUSTICE M.M. SUNDRESH:** For the moment, let us forget about 26.

12 **DARIUS KHAMBATA:** Yes.

13 **JUSTICE M.M. SUNDRESH:** We take it that as you rightly said, they are a common belief.
14 They also again raised it under 25(1).

15 **DARIUS KHAMBATA:** Absolutely correct.

16 **JUSTICE M.M. SUNDRESH:** They raised it under 25(1), there is... take your own case, no,
17 25(1)...

18 **DARIUS KHAMBATA:** Yes.

19 **JUSTICE M.M. SUNDRESH:** ...they say. 25(1) they said, it may be right or wrong, we will
20 not go into it, only our testing it, testing it as a proportion. Now, as an individual you are
21 questioning it which means...

22 **DARIUS KHAMBATA:** May I assist?

23 **JUSTICE M.M. SUNDRESH:** ...they institute the religious denomination, which we
24 presume that it reflects the common belief or common practice.

25 **DARIUS KHAMBATA:** No, sure, yes. If we presume that is... that satisfies the test of
26 *Ratilal Gandhi* and that early case of *Jamshedji v. Soonabai*, genuinely held. Two, we
27 presume that within the denomination there is no conflicting doctrine. It is established this is
28 the only doctrine. Let's... if those two are out of the way, then yes, if an individual gets up and
29 says, "I say that this practice is wrong, I don't wish to follow it," then the only recourse that
30 individual has he has a twofold recourse. One is, he must establish the practice is contrary to
31 public order, health or morality. Or, he must set up a right under 14, 15, 21; to say it conflicts

1 with my right, at which point the balancing exercise of proportionality comes into play. That's
2 how I would play. But if he is not able to do that, or if she is not able to do that, then My Lord
3 is absolutely right; you can't walk into a temple or a place of worship and say, I refuse, provided
4 that it is established as a matter of doctrine that is part of the religion. But that's a very, very
5 important step which protects against 26(b), which is really a protective... it protects against
6 the State.

7 **JUSTICE M.M. SUNDRESH:** That is what is the difficulty comes with it Mr. Khambata.

8 **JUSTICE B.V. NAGARATHNA:** This the case law... is this against the State law?

9 **JUSTICE M.M. SUNDRESH:** It's a practice. Because there is a religion.

10 **DARIUS KHAMBATA:** Because that is the protection against the State, it's not meant to be
11 an instrument of domination over some individual's rights under 25(1). That's not the
12 intention.

13 **JUSTICE B.V. NAGARATHNA:** All these case law are with regard to State law...

14 **DARIUS KHAMBATA:** Precisely.

15 **JUSTICE B.V. NAGARATHNA:** ...where they are asserting their rights.

16 **DARIUS KHAMBATA:** The State says this is secular, we want to regulate it.

17 **JUSTICE B.V. NAGARATHNA:** Therefore, 25(2)(b) law is questioned. It is basically a
18 violation, on the basis of a violation of Article 25(1).

19 **DARIUS KHAMBATA:** Yes.

20 **JUSTICE B.V. NAGARATHNA:** Incidentally, read with the assistance of 26(b)...

21 **DARIUS KHAMBATA:** I'm obliged.

22 **JUSTICE B.V. NAGARATHNA:** ...if they are a denomination.

23 **DARIUS KHAMBATA:** And that is...

24 **JUSTICE B.V. NAGARATHNA:** If they are not a denomination, 25(1), if it is violated also,
25 they can question.

26 **DARIUS KHAMBATA:** And that is why I say...

27 **JUSTICE M.M. SUNDRESH:** How we will test your case now?

28 **JUSTICE B.V. NAGARATHNA:** A temple need not be belonging to any denomination.

29 **DARIUS KHAMBATA:** Yes.

1 **JUSTICE B.V. NAGARATHNA:** It can be a standalone temple.

2 **DARIUS KHAMBATA:** Precisely.

3 **JUSTICE B.V. NAGARATHNA:** Can we say that they have no rights then?

4 **DARIUS KHAMBATA:** For example, in my case, the Trust Deed says it's for all
5 Zoroastrians. It doesn't say it's for only those who have not inter-married, or only men can
6 inter-marry, can come in; it has no such restrictions. It's for all Zoroastrians. So, it can't be
7 said, by the present... and this practice has changed over the years; it can't be that the current
8 set of Trustees or Administrators impose their own personal view on somebody. It can't be.
9 So, there's no practice there, there's no practice.

10 **JUSTICE M.M. SUNDRESH:** We take it, if you are questioning the decision being contrary
11 to the practice, that's a different thing. If you are questioning the practice itself, then can we
12 place it under 25(1)?

13 **DARIUS KHAMBATA:** I am questioning that there is a practice.

14 **JUSTICE M.M. SUNDRESH:** That's why...

15 **DARIUS KHAMBATA:** It's a proven practice.

16 **JUSTICE M.M. SUNDRESH:** Then the next question will be, what is the extent of our
17 judicial review and which forum you can go?

18 **DARIUS KHAMBATA:** Correct. In fact, towards the end of my submissions, I have chosen
19 to try and suggest which are the areas of judicial review and which are not. I have, I have...

20 **JUSTICE M.M. SUNDRESH:** Your argument is that there is no practice at all, it is only a
21 decision made by them.

22 **DARIUS KHAMBATA:** Correct. And if that is so that it can't be that they say, that because...

23 **JUSTICE M.M. SUNDRESH:** To that extent [UNCLEAR].

24 **DARIUS KHAMBATA:** We the current administrator say it's a practice, that the court backs
25 off. It can't be. Court has to exercise judicial review. Or if they are not able to show religious
26 doctrine, that here it is, in fact, in this case all the religious doctrine is to the contrary, in my
27 respectful submission. I may be wrong. That's a matter for the court ultimately to decide. In
28 fact, we've carried out the exercise, there are some five verses that are relied on. *Ex facie* each
29 of them don't bear out what they say they do in the submissions, *ex facie*, so easy. But that's
30 not for Your Lordship, that's, but that element of judicial review has to be retained. Otherwise,
31 people will misuse the protection given under 26(b) to turn it into some instrument of
32 domination or supremacy over 25(1), which is not the intention under the Constitution. The

1 words "subject to other provisions of this part" does not entitle 26(b) to be elevated into some
2 pedestal, that is not the intention of the framers.

3 **JUSTICE B.V. NAGARATHNA:** That is why in *Venkataramana Devaru* they said that
4 harmonising [UNCLEAR] has to be there.

5 **DARIUS KHAMBATA:** Harmonising it has to be there. In fact, one way or the other, giving
6 supremacy will be the annihilation of religion. If one is given such supremacy over the other,
7 in fact, one of my learned friend has used very strong language; maximal effect, disciplining,
8 these sort of words are not what 26(b) is all about. 26(b) is to prevent State interference. You
9 manage your own.

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

11 **DARIUS KHAMBATA:** Not to use it as an instrument against your own denomination
12 members.

13 **JUSTICE M.M. SUNDRESH:** To my knowledge, the word "religious affair" would only
14 mean, with respect to, there are two roles which religious denomination should follow. One is
15 with its activities other than the members of the denomination. The other is with respect to
16 how to regulate it within the denomination. It has got, insofar as religious practice, *per se* is
17 concerned, it by itself, it cannot evolve.

18 **DARIUS KHAMBATA:** Take another issue.

19 **JUSTICE M.M. SUNDRESH:** It cannot create one, it can only be by the common belief.

20 **DARIUS KHAMBATA:** Correct. Take another issue. Equality is embedded in 25(1). Now
21 that could be, as My Lord Justice said, an equality between an individual and a denomination
22 also. I'm not precluding any such so-called contests. That's right, therefore,...

23 **JUSTICE M.M. SUNDRESH:** You see that is unnecessary even if you take it between one
24 individual and the group of individuals.

25 **DARIUS KHAMBATA:** And the group of individuals.

26 **JUSTICE M.M. SUNDRESH:** You can name a denomination...

27 **DARIUS KHAMBATA:** Each one will have to be balanced.

28 **JUSTICE M.M. SUNDRESH:** Whatever the name.

29 **DARIUS KHAMBATA:** If for example the group of the denomination insists on what
30 appears to be a trivial practice which is not doctrinally established and there is a total exclusion
31 of the believer. On basis of that a court might say no, because you're obliterating the 25(1) right

1 on something that's really a matter of religion. In that connection I must tell Your Lordships
2 that do I agree that essentiality test has caused problems. But when it comes to balancing...

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

4 **DARIUS KHAMBATA:** ...and proportionately there is no other way. At least I've not been
5 able to think of any, I'll show that when I come to that section. One will have to see what is
6 integral or essential otherwise it is impossible to balance.

7 **JUSTICE B.V. NAGARATHNA:** If not be a test, it can be an aid.

8 **DARIUS KHAMBATA:** It can be an aid. Now, even morality, I'm not...this phrase
9 'constitutional morality'. I'm leaving aside that's not appropriate. Morality, what is morality
10 mean the morals of the day.

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

12 **DARIUS KHAMBATA:** But the morals of the day in a constitutional democracy one of the
13 factors will be the Constitution. For example, can one not say that casteism is immoral or
14 treating a woman as a chattel of her husband is immoral? That will also arise. We don't have
15 to go to 14, 21 to even get there. So, morality has a broader meaning. It may not be this
16 constitutional morality concept. I with due respect I have not understood.

17 **JUSTICE M.M. SUNDRESH:** Correct. They also argued. It's a combination of...

18 **DARIUS KHAMBATA:** It has to be.

19 **JUSTICE M.M. SUNDRESH:** ... various parts under the Constitution. Yes, that's all.

20 **DARIUS KHAMBATA:** And equality is built in to 25(1). It cannot be taken away by 26(b)
21 saying, but you are subject to me. Because equally you're subject to 14. So, how will that
22 balancing take place? So, equality is embedded in 25(1) it can be rewritten out of 25(1) merely
23 by saying, because it's subject to other provisions of this part.

24 Now that brings me to a smaller area, which is what is a denomination? And my learned friends
25 have addressed at great length. There are various meanings, I have covered them from paras
26 16 onwards in my note. I'm not going to read all of those, but broadly speaking, if view was
27 evinced that the **S. P. Mittal** test may be too restrictive because **S. P. Mittal** as Your
28 Lordships recall there has to be a collectivity of faith or belief. There has to be a distinctive
29 name and there has to be a common organization and it was felt a common organization is too
30 restrictive various examples were given. Now, I don't think we should be so pedantic about
31 this. An organisation is some form of togetherness, structure or administration. It doesn't have
32 to have an office, with a registered office, it need not be that. As long as there's some

1 commonality of structure or administration that would suffice to say that's the organisation
2 and that's a more expansive and a better way of seeing it rather than...

3 **JUSTICE M.M. SUNDRESH:** Say *S. P. Mittal* is only illustrative.

4 **DARIUS KHAMBATA:** It's only illustrative. Therefore, the three fold test in *S. P. Mittal* I
5 don't think is something that ...it is I think a salutary test, but I would actually add a fourth
6 criteria, which may be *sub silentio* is there, but we don't say it, which is that that religious
7 denomination must have some uniqueness about it. If that denomination is not unique, then
8 it's as good as any other part of the religion. How does it become a religious denomination?
9 And clearly an entire religion cannot be a religious denomination because otherwise why does
10 the Constitution use two separate words, 'religious denomination'? So the whole religion can't
11 be a religious denomination. In fact, that would lead again to innumerable problems.

12 **JUSTICE M.M. SUNDRESH:** What you are saying also lead to a lot of problems. How do
13 you define unique? Uniqueness...

14 **DARIUS KHAMBATA:** A different practice.

15 **JUSTICE M.M. SUNDRESH:** In Hinduism there is... it is possible to create a uniqueness
16 there.

17 **DARIUS KHAMBATA:** In fact, as well as the learned Solicitor said Hinduism is far from
18 being homogeneous. It's got so many different facets and...

19 **JUSTICE M.M. SUNDRESH:** It will have a bearing on your arguments on 25 also.

20 **DARIUS KHAMBATA:** Yes.

21 **JUSTICE M.M. SUNDRESH:** If you say the object is to give effect to 25 and 26 nothing but
22 25, then if you say 'uniqueness' then it will give a problem.

23 **DARIUS KHAMBATA:** Within denomination.

24 **JUSTICE M.M. SUNDRESH:** I'll tell you why. When people, common belief they can form
25 a denomination, another 10 they can have common belief more or less same belief they can
26 form a denomination, is it possible or not? See, who are we to say? Who are you to define and
27 say about the denomination because it is object is to give effect to Article 25(1) which... What
28 is... So long as the common belief is there and they do it for the purpose of... to practice and
29 propagate. This sort of a definition, then either adding or subtracting will be sometimes
30 disastrous.

31 **DARIUS KHAMBATA:** May I...? I understand, I understand what falls from Your Lordship.
32 May I endeavour to meet that. We are not talking about private temples, even private from a

1 group, a group can set up a private temple. We are not talking about those, we are talking about
2 public places.

3 **JUSTICE B.V. NAGARATHNA:** Character. That's correct.

4 **DARIUS KHAMBATA:** Now a public character...

5 **JUSTICE M.M. SUNDRESH:** The only thing is it becomes amenable only becomes a public
6 character that we agree with you, no problem.

7 **DARIUS KHAMBATA:** If you have a religious denomination with a public character temple
8 open to all Hindus, then there is no specific unique denomination to which entry to that temple
9 is restricted. But I entirely accept that a denomination may have a unique practice, a different
10 practice. Then if that practice is proven established, of course, it gets some protection; no
11 question about that. Specially from State action, unless the State has to resort to social reform,
12 that's a different aspect or to public order, health, morality, but otherwise yes. So, you can have
13 different denominations, but provided there is some uniqueness about them; otherwise, they
14 are not a denomination; they are the same as anyone else. And then what you're really doing
15 is fragmenting, because then every individual can be a denomination. That is not the intention.
16 So, a collectivity can get together and say we believe in this form of practice or worship. This
17 is us as a denomination and we establish it from the scriptures, from the ancient texts of Sages,
18 here it is, it's always been done, it is established. That is correct. That will be protected under
19 26(b). But an entire religion can't be, because that is... the whole purpose of 26(b) goes. Then
20 you are setting up a religion against an individual who believes in that religion.

21 **JUSTICE B.V. NAGARATHNA:** Only it is important in the context of propagation...

22 **JUSTICE M.M. SUNDRESH:** Correct.

23 **JUSTICE B.V. NAGARATHNA:** ... and how propagation of religion was done in India?

24 **DARIUS KHAMBATA:** Yes.

25 **JUSTICE B.V. NAGARATHNA:** We can say to some extent it was done through the *Mutts*.

26 **DARIUS KHAMBATA:** Through the *Mutts*.

27 **JUSTICE B.V. NAGARATHNA:** Through the *Mutts*.

28 **JUSTICE M.M. SUNDRESH:** We'll be citing...

29 **DARIUS KHAMBATA:** That is how Adi Shankaracharya actually...

30 **JUSTICE B.V. NAGARATHNA:** It was protected.

31 **JUSTICE M.M. SUNDRESH:** We'll be citing some precedent.

- 1 **DARIUS KHAMBATA:** India was heavily Buddhist...
- 2 **JUSTICE M.M. SUNDRESH:** Citing some precedent...
- 3 **JUSTICE B.V. NAGARATHNA:** See the mandate is...
- 4 **DARIUS KHAMBATA:** He came in that was an ancient religion.
- 5 **JUSTICE B.V. NAGARATHNA:** The matters of religion means propagation of religion...
- 6 **DARIUS KHAMBATA:** Correct.
- 7 **JUSTICE B.V. NAGARATHNA:** You can do through these organisations.
- 8 **DARIUS KHAMBATA:** And that is protected.
- 9 **JUSTICE B.V. NAGARATHNA:** That is protected.
- 10 **DARIUS KHAMBATA:** And that is protected, no question.
- 11 **JUSTICE B.V. NAGARATHNA:** Practice.
- 12 **DARIUS KHAMBATA:** And no court can sit in judgment.
- 13 **JUSTICE B.V. NAGARATHNA:** Yes.
- 14 **DARIUS KHAMBATA:** Over that established proven practice. I accept that. But it's a... it's
15 some way to say it's an established, proven part of the religion.
- 16 **JUSTICE M.M. SUNDRESH:** We are only, we are only telling you our anxiety is that,
17 whether it is a religious denomination or not, to what extent should the court go into that? Or
18 that whether in terms of Article 25 and 26, whether it is exclusive decision of the believers,
19 common belief? If so, what is the test?
- 20 **DARIUS KHAMBATA:** Yes, that is also, My Lord is right.
- 21 **JUSTICE M.M. SUNDRESH:** Absolutely I want to believe, we should leave it to the
22 believers themselves.
- 23 **DARIUS KHAMBATA:** Yes, of course. Provided?
- 24 **JUSTICE M.M. SUNDRESH:** We have no role in this.
- 25 **DARIUS KHAMBATA:** No, no, absolutely. My Lord is absolutely right, but there are two
26 important caveats I would add to that.
- 27 **JUSTICE B.V. NAGARATHNA:** Right.
- 28 **JUSTICE M.M. SUNDRESH:** Yes.

1 **DARIUS KHAMBATA:** If the believers can show that uniformly or by and large that has
2 been the conscious, sincere belief of that denomination and supported by the religious
3 doctrine. It can't be that those who are in control of an institution of the denomination for the
4 moment suddenly decide that this is the religious doctrine. Then the court is entitled to see, is
5 it part of the religious doctrine.

6 **CJI SURYA KANT:** This part...

7 **DARIUS KHAMBATA:** Is it supported? If yes, then we will not sit in judgment.

8 **CJI SURYA KANT:** We understood that.

9 **JUSTICE B.V. NAGARATHNA:** Is it religion or not?

10 **DARIUS KHAMBATA:** Correct.

11 **JUSTICE M.M. SUNDRESH:** That's correct.

12 **DARIUS KHAMBATA:** Yes

13 **JUSTICE B.V. NAGARATHNA:** Or it is something which can be severed?

14 **DARIUS KHAMBATA:** Can be severed. Now in *Devaru's* case there was a balancing
15 between 25(2)(b) and 26. And that was the first time that this this balancing had happened
16 and that case turned on the fact that there was a partial exclusion, not a complete exclusion.
17 That was the balancing done, that you are not totally excluding the rights of worshippers, they
18 are not entitled to attend certain ceremonies

19 **JUSTICE JOYMALYA BAGCHI:** In fact I would read *Devaru* as showing the distinction
20 between 26 and 25.

21 **DARIUS KHAMBATA:** Yes.

22 **JUSTICE JOYMALYA BAGCHI:** If it were a mirror of 25, then *Devaru* would not have
23 gone for harmonizing, but say, that the State has all rights to override matters of religion.

24 **DARIUS KHAMBATA:** I'm sorry, I didn't make myself clear. I didn't mean 25(2). 25(1),
25 25(1) and 26 are a compact. I should make that 25(2) stands on its own, My Lord is absolutely
26 correct. Therefore it was required in this.

27 **JUSTICE JOYMALYA BAGCHI:** That is why the harmonizing.

28 **DARIUS KHAMBATA:** That is right, therefore the harmonization. But 25(1), is the source
29 of 26. It can be dichotomized or divorced from it, and it and a river cannot rise higher than its
30 source. So, 26 right cannot be, cannot rise higher than a 25(1) right. That's all I'm saying, that's
31 all. Now...

1 **JUSTICE B.V. NAGARATHNA:** Rather 26 right is there because of 25(1).

2 **DARIUS KHAMBATA:** 25. It can't it can acquire supremacy over 25(1). And certainly as
3 cannot be given maximal effect and a right to discipline 25(1). These are some of the layers,
4 some of the words laid in.

5 **CJI SURYA KANT:** Let's see the next point on 25(1).

6 **DARIUS KHAMBATA:** Yes, I'll go to the next. Now, My Lord, one small point which I won't
7 go into it, just a correction Mr. Subramaniam had argued that *Ratilal Gandhi's* case held
8 that the Parsi community constitutes a religious denomination.

9 **COUNSEL:** No.

10 **DARIUS KHAMBATA:** That's not what it holds. It speaks of the Parsi religion that's a loose
11 term, as I've explained, Parsi is not a religion at all, it's a race or a community. So, it meant the
12 Zoroastrian religion. That's all it meant. It didn't mean to hold that Parsi Zoroastrians are a
13 religion, I just wanted to correct that, I put that in my note, that's a small point.

14 Now, if 26 is dependent on 25, and I've set out all the cases and passage from Seervai, for
15 example. My Lords would kindly turn to para 36 of my submissions, just above para 37, it's an
16 instructive passage from Seervai. It's at internal page 10 of my submissions. Seervai says,
17 12.100, "It is obvious that religion has both a personal and an institutional side. No doubt, men
18 can pray in their homes and hit heaven with their prayers, but throughout the ages, men have
19 worshipped in temples, churches, mosques and the like. In practice, the personal right is
20 inseparable from the institutional, and a person would justly complain that he had been denied
21 the freedom of religion, if the right of private worship was conceded, but the right of public
22 worship was denied to him. Articles 25 to 28 recognized this two-fold aspect of religion.
23 Subject to public order, morality and health; 25(1) confers on every person, the right to freely
24 profess, practice and propagate religion, but 25(2) expressly refers to the throwing open of
25 Hindu religious institutions, etcetera."

26 And then 12.93 at the bottom. "Article 25 protects freedom of religion opinion as well as acts
27 done in pursuance of religious beliefs. Ritual ceremonies and religious practices according to
28 the religious tenets of a denomination are matters of religion within the meaning of 26(b)."
29 So, he also recognizes that the right to freedom of religion as a personal side inseparable from
30 the institution. So, you can't separate 26, and say, somehow that is higher than the personal.

31 Now both the learned Solicitor and the learned Additional Solicitor put it very nicely in their
32 submissions; and I have quoted them on the next page. My I just read out these two passages?
33 Because I think that really puts it very nicely. Firstly, learned Solicitor in para 72 of his
34 submission says, "In India Articles 25 and 26 exist in a relationship of constitutional

1 equilibrium. Article 25 protects individual freedom of conscience and religious practice.
2 Article 26 protects the collective autonomy of religious denominations to manage their
3 internal affairs. The Framers gave both provisions the status of fundamental rights, and did
4 not say that Article 25 overrides 26; or that individual rights take precedent over collective
5 rights. They said that both must be protected and the constitutional task is one of harmonious
6 reconciliation, not hierarchical priority." And the learned Additional Solicitor General, "An
7 individual rights dominate approach may dilute denominational autonomy, reducing Article
8 26 to a residual guarantee. A denominational autonomy dominant approach may suppress
9 individual freedoms within religious communities, or under undermining Article 25. Any
10 interpretation that puts one right over the other, risks constitutional imbalance. The
11 Constitution does not contemplate such a binary; instead it envisages co-existence through
12 calibrated reconciliation. In other words, the rights of individual freedom of conscience and
13 religious practice under Article 25; and the collective autonomy of religious denominations
14 under 26, are two sides of the same coin, bound by the concept of religion. As such, the two
15 Articles cannot be read in isolation, but have to be read together to give meaning and effect to
16 the protection guarantee." This is the balance that we are seeking, and it's not an easy balance.
17 I accept that, but we're trying to assist Your Lordships in coming to this balance.

18 Now if Your Lordships, paras 40, 41, I have argued that if you take out Article 25, nothing is
19 left in 26; but if you take out 26, 25 will still cover most of the rights in 26. Now, even assuming
20 that 26 is some separate right, clearly in the scheme it is complementary to 25, at very least,
21 even if the source is not 25(1) it's complementary to, it cannot operate in conflict with 25. And
22 therefore, the right to religion, I come back to this, is 25(1). 26 cannot be read as a higher right
23 to religion or a lower right to religion; it's the same right to religion.

24 **CJI SURYA KANT:** These are two independent rights.

25 **DARIUS KHAMBATA:** They are complementary and therefore there is no hierarchy. Now,
26 at page 13, internal page 13, I've cited some submissions made by one of my learned friends,
27 which I believe are a bit extreme and will completely alter this balance. At para 45, I've set out
28 the submissions which say, "That a religious denomination or institution of a public character
29 stands for a collective representation of believers. Once a person is a member of a
30 denomination, the individual right under 25(1) is manifested by a member of the organisation
31 being a believer in the denominational creed, it follows that the person would be subject to the
32 discipline and tenets, as well as any supervision or oversight exercised by authorities chosen
33 in that denomination. Both 26(a) and 26(b) being untrammelled by any further limitations are
34 entitled to be given maximum freedom and respect." With respect, no. 25 and 26 are a
35 compact. They are equilibrium between them. The right to freedom of religion in 25(1). 26(a)
36 and (b) cannot be given this sort of overriding effect over 25(1) because they're the *raison*

1 *d'etre* of 26 is 25(1). You take away 25(1) there's no meaning to 26 even if it's complementary
2 and standalone. Therefore, this sort of hierarchical priority in my respectful submission is not
3 the correct way to go; it will lead to major problems.

4 Now, why is this submission incorrect, with respect for my learned friend who I have the
5 greatest respect for, but it's incorrect for this reason. First, Your Lordships have heard these
6 principles of harmonisation and balancing constantly... most of my learned friends have
7 spoken about that. Indeed, my learned senior who made these submissions also in his same
8 set of submissions said in this sense, "A harmonious reading of 25 and 26 would entail
9 preserving denominational autonomy in matters of religion while giving effect to Article
10 25(2)(b) where exclusion from public temples is sought to be removed. Harmonisation is not
11 the subordination of Article 26 to 25, but a reconciliation of two co-equal guarantees to give
12 effect to both." I am not able to harmonise his earlier submission with this one; I accept, I
13 support the second submission of reconciliation of two co-equal guarantees and give effect to
14 both.

15 And then para 53 of his submission which I read out, that the purpose of 25(1) is to enable a
16 mutual respect. Is it to even be suggested that this mutual respect and balance is given a go by
17 to once you are dealing with a religious denomination that they have absolute untrammelled
18 powers, whereas as individuals you have to give a mutual respect? It can't be. The source is
19 25(1). In fact, to give such primacy to 26(b) will be to annihilate the right to freedom of religion,
20 because then a group of people, temporarily or in control of certain institutions will exercise a
21 dominance which is not the constitutional framework at all. It's a balancing. That group can
22 enforce religious doctrine if they establish it. They can enforce it if the community sincerely
23 believes in that religious doctrine and it's an unbroken practice. But they cannot just impose
24 based on what they perceive to be some religious doctrine or practice, suddenly impose some
25 an exclusionary principle. That they would have to go to a civil court and establish before they
26 can exclude. Therefore, in my respectful submission, this is the balance between 25 and 26.

27 Now, page 18, internal page 15, I come to a different aspect of my argument. This is now not
28 only a balancing between 25 and 26 that Your Lordships will be required to do on a case-to-
29 case basis. There is now also a balancing between 25, 26 and other Fundamental Rights, 14,
30 21, etc., 15. And that of course, is the famous decision in **R.C. Cooper's** case which says Part
31 III weaves a pattern of guarantees. You can't just say one is higher than the other or... it's a
32 pattern; they all have to be interpreted. The passages from **Maneka Gandhi** which explain
33 **RC Cooper** are also very instructive, which I've set out in para 51. And may I just read from
34 the bottom of page internal page 15? "Articles dealing..."

35 **JUSTICE M.M. SUNDRESH:** Paragraph?

1 **DARIUS KHAMBATA:** Para 51 of my submissions at internal page 15.

2 **JUSTICE M.M. SUNDRESH:** Yes, please.

3 **DARIUS KHAMBATA:** It's actually running page 18 in the Volume.

4 **JUSTICE M.M. SUNDRESH:** Yes.

5 **DARIUS KHAMBATA:** The bottom passage from *Maneka Gandhi*. "Articles dealing with
6 different Fundamental Rights contained in Part III of the Constitution do not represent
7 entirely separate streams of rights which do not mingle at many points. They are all parts of
8 an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow
9 of unimpeded and impartial justice; social, economic and political freedom, not only of
10 thought, expression, belief, faith and worship but also of association, movement etc." And then
11 page over, "... of equality and of fraternity. Isolation of various aspects of human freedom for
12 the purpose of their protection is neither realistic nor beneficial, but would defeat the very
13 objects of such protection." So isolating 26, in fact, the learned Solicitor also said it's not an
14 island, it's not standalone. Isolating it, and worse, giving it some supremacy which the
15 Constitution doesn't give, will ride a ride a coach and four through the whole balance and
16 equilibrium of 25 and 26. And then of course, this was followed also in the privacy case in
17 *Puttaswamy*. And where it was held no element can be read in a manner disjunctive from
18 the composite whole.

19 (iv), page 16, I have cited from *Adi Saiva's* judgment where Your Lordships held, "The
20 freedom of religion being subject to other provisions of Part III undoubtedly 25 and 26 of the
21 Constitution has to be harmoniously construed with the other provisions contained in Part
22 III." And even Seervai says, "That it's part of a scheme which embodies valuable human rights
23 broadly called civil liberties conferred by 14, 17, 19 to 22, 23, 25 to 28 religious freedom, etc."
24 So, even when you take this line, balancing with other rights in Part III, *R.C. Cooper* did not
25 require an express provision to say subject to other provisions in Part III. You take 26 alone.
26 It is subject to a balancing with competing or conflicting fundamental rights under 14, 15, 21.
27 You don't need the words because *R.C. Cooper*, *Maneka Gandhi* and *Puttaswamy* have
28 said that that balancing has to take place in any case. And we must keep in our minds that
29 26(b) is really a protection against State action.

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

31 **DARIUS KHAMBATA:** It's not meant to then lord it over your members. That's not the idea
32 of 26(b). And learned Solicitor has also said 26(b) cannot be read as an independent silo and
33 25 and 26 must exist in a state of constitutional equilibrium.

1 Now, Your Lordships, rightly put to me we are being told this how do we, how do we balance?
2 The learned Solicitor and I haven't put this in my note, but I'll just give the relevant para
3 numbers. At para 134(d) of his submissions, Volume 1.5 at page 39 has said this, "If competing
4 constitutional rights are invoked through State action, resolve the conflict through a
5 structured optimisation exercise including proportionality, and not by presuming that one
6 right extinguishes the other."

7 **JUSTICE M.M. SUNDRESH:** Where is it?

8 **DARIUS KHAMBATA:** So, he had said this in para 134(d), Volume 1.5 of his written
9 submissions. Volume 1.5, page 39. That's right, I agree with this, but I'm going to explore this
10 further, how is it actually done in practice, what is the way to do it. Now, let's first see what are
11 the other fundamental rights that we are talking about. What do we have to balance? If My
12 Lords, kindly turn to internal page 18 of my submissions. First, I set out and held by the
13 judgment in *Joseph Shine's* case which laid out the fundamental principle that today
14 marriage is a partnership of equals. A wife is no longer a husband's chattel. And treating a
15 woman as chattel is manifestly arbitrary, interjected by Article 14 and amounts to
16 discrimination under Article 15. And marriage, whether it is a sacrament or a Contract does
17 not result in ceding of the autonomy of one's spouse to another. So, in a marriage, a man and
18 a woman have to be treated with equality. Marriage doesn't alter that. That old notion of
19 treating a woman as chattel is immoral. But, it would go even on that ground apart from being
20 in complete violation of 14 and 21.

21 Para 57 of my submissions, I refer to the judgment which Your Ladyship mentioned in
22 *Association of Old Settlers of Sikkim* where under the Income Tax Act, the income
23 derived by a Sikkimese individual from any source within Sikkim was exempted, but that
24 exemption was given only to a Sikkimese man, not to a Sikkimese woman who married a non-
25 Sikkimese. That was struck down rightly by Your Lordships as being completely violative of
26 14, 15 and 21 and completely discriminatory.

27 Now therefore, I'm not saying, that if some religion manages to prove to the hilt with doctrine,
28 that some aspect of it is completely discriminatory, then Your Lordships will review that
29 discrimination, but Your Lordships can certainly and must balance that religious practice,
30 must see whether it is an integral part of that religion, as against the rights that it takes away
31 under 14, 15 and 21. That is an exercise a court has to do. It can't be that a religion says, even
32 a proven practice, because this doesn't apply in my case, but I'm saying assuming it's a proven
33 practice, it's part of our religion and never mind 14, 15, 21. It can't be. And I dare say, I'm not
34 an expert on religion, but I dare say, I am not familiar with any religion, that as an integral
35 part of the religion, subjugates women or treats them as chattel. As an integral part. It may

1 have been some practices evolved over time, but it's not an integral part of any religion today.
2 So, the resistance to review of what is an integral part, an essential part of a religion perhaps
3 stems from the fact, that most of these practices which are pernicious and immoral under our
4 Constitution, would not fall within the integral part of any religion. I'm not on any specific
5 case. I'm not on the *Sabarimala* case, I'm not on any, I'm just generally saying.

6 **JUSTICE M.M. SUNDRESH:** So, you are saying that your religious practice will have to be
7 tested through a secular eye?

8 **DARIUS KHAMBATA:** It will have to be tested under our Constitution. Is it moral under
9 our Constitution? For example, what if a religious practice is casteist? Will it not have to be
10 tested? Exclusion based on caste. Now there I know, we are covered by a specific provision of
11 the Constitution, but assuming that was not...

12 **JUSTICE B.V. NAGARATHNA:** It is not just practice at all.

13 **DARIUS KHAMBATA:** Yes.

14 **JUSTICE B.V. NAGARATHNA:** See religion...

15 **DARIUS KHAMBATA:** Correct

16 **JUSTICE B.V. NAGARATHNA:** Religious practice will not extend to exclusion of certain
17 castes. That is not religion, neither is it religious practice.

18 **DARIUS KHAMBATA:** That is the only exercise.

19 **JUSTICE B.V. NAGARATHNA:** Article 14 clearly does not enter the space of Article 25(1).
20 The reason being, Article 14 says, the State shall not deny any person equality before the law,
21 or equal protection of the law. That is, the State should... here Article 25(1), it's not really
22 against the State, it is recognizing an inalienable right of freedom of conscience, but subject to
23 these riders.

24 **DARIUS KHAMBATA:** Yes.

25 **JUSTICE B.V. NAGARATHNA:** Because, we have a written Constitution, we are in the
26 1950s, we have a written Constitution; therefore, it says. Therefore, 14 principle does not really
27 enter 25(1) at all.

28 **DARIUS KHAMBATA:** Correct. 25(1) itself refers to equality, it doesn't need 14.

29 **JUSTICE B.V. NAGARATHNA:** It refers. Particular quality principle in itself.

30 **DARIUS KHAMBATA:** In itself. I'm obliged.

1 **JUSTICE B.V. NAGARATHNA:** So, when, if there is any religious practice which excludes
2 a class or a section, then in that context, 25, Article 25(2)(b) will enable the State to make a
3 law. So, that is why we said essential religious practice is only an aid.

4 **DARIUS KHAMBATA:** It is an aid.

5 **JUSTICE ARAVIND KUMAR:** Even in a case like there are two... Guruvayur Temple.

6 **DARIUS KHAMBATA:** Yes.

7 **JUSTICE ARAVIND KUMAR:** They closed the temple for 4 or 5 times, there'll be heavy
8 rush. It is a controlled by the State. Can they say no, no, you stop these religious practices
9 because we are bringing in judicial rider?

10 **DARIUS KHAMBATA:** That is right, that is a good example, because that doesn't totally
11 exclude the right of the worshippers. It's a partial exclusion like *Devaru's* case. Therefore,
12 you can balance.

13 **JUSTICE ARAVIND KUMAR:** Partial exclusion. That partial exclusion is permissible even
14 according to you?

15 **DARIUS KHAMBATA:** That can be balanced.

16 **JUSTICE ARAVIND KUMAR:** If restriction is permissible?

17 **JUSTICE ARAVIND KUMAR:** If it is part an integral part of the religion, yes. If it is an
18 integral part. That's a big...

19 **JUSTICE B.V. NAGARATHNA:** If it is a part of religious practice, let us say. Let us not...

20 **DARIUS KHAMBATA:** Proven doctrinal religious practice.

21 **JUSTICE B.V. NAGARATHNA:** Proven or [UNCLEAR] It is a part of religious practice.

22 **JUSTICE M.M. SUNDRESH:** Integral, it has never been mentioned in the Constitution yet.
23 How do we use the word which is not available in Article...?

24 **DARIUS KHAMBATA:** I'll come to that. I'll come to that tomorrow, because that is part of
25 proportionality. Without seeing what is the core interest of every fundamental right you
26 cannot balance.

27 **JUSTICE B.V. NAGARATHNA:** Of course we'll give a very stark example. If they say at the
28 time, in a temple, at the time of *bhog* or offering, persons belonging to depressed classes
29 cannot be present, that can be resisted, State can bring a law. That is social exclusion. But if
30 they say when there is an offering of *bhog* or the food to the Lord, the curtain will be closed or

1 the door will be closed and nobody should see it, that is part of religious practice. There is a
2 vital difference between the two.

3 **DARIUS KHAMBATA:** Therefore, it's a case by case assessment. It has to be.

4 **JUSTICE B.V. NAGARATHNA:** You can't say it's a religious practice, I will exclude certain
5 section of Hindus, or certain...

6 **DARIUS KHAMBATA:** For example in Zoroastrianism...

7 **JUSTICE B.V. NAGARATHNA:** In *Venkataramana Devaru*, they balanced it.

8 **DARIUS KHAMBATA:** In Zoroastrianism, neither men nor women, nobody can enter the
9 sanctum sanctorum; only priests.

10 **JUSTICE B.V. NAGARATHNA:** To practice we have to first identify...

11 **DARIUS KHAMBATA:** Nobody can enter.

12 **JUSTICE B.V. NAGARATHNA:** ...and the court or the State cannot say this is not a
13 religious practice if it is intimately connected with that doctrine.

14 **DARIUS KHAMBATA:** Yes.

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

16 **DARIUS KHAMBATA:** I'm obliged My Lord. May I continue tomorrow. I won't take long.

17 **CJI SURYA KANT:** Approximately how much time?

18 **DARIUS KHAMBATA:** I think I have about...

19 **CJI SURYA KANT:** Of course, without interruption.

20 **DARIUS KHAMBATA:** No, no, with that. About half an hour to 45 minutes, I think I'll go
21 along.

22

23

24

25

26

END OF DAY'S PROCEEDINGS