

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)

TRANSCRIPT OF HEARING

08-April-2026

Document Control

Document Name & Date	Transcript R.P. (C) No. 3358/2018 In W.P. (C) No. 373/2006 Hearing dated 08.04.2026
Status	Released
Version	1.0
Last Update	08.04.2026
Nature of Update	Original version
Release Date	08.04.2026
Document Owner	Supreme Court of India

10:30 AM IST

- 1 **TUSHAR MEHTA:** There is a beautiful statement by Einstein.
- 2 **CJI SURYA KANT:** 64 of your compilation to...
- 3 **TUSHAR MEHTA:** 64. But before that, and this has no relevance with... it is... any
4 resemblance is purely coincidental. When Mahatma Gandhi died, Einstein said, it's...
- 5 **JUSTICE M.M. SUNDRESH:** Human flesh and blood.
- 6 **TUSHAR MEHTA:** It's too bad to be too good. Now, please come to page 64. What I have
7 done during yesterday, My Lord, I have curtailed my submissions and I have ensured...
- 8 **CJI SURYA KANT:** You can translate, retranslate it. It is too good to be very good.
- 9 **TUSHAR MEHTA:** I was referring to... anyway.
- 10 **MR. VAIDYANATHAN:** I know it applies to me, but I'm raised like that, My Lord. I can't
11 say...
- 12 **JUSTICE M.M. SUNDRESH:** No, no, he was messing with you.
- 13 **TUSHAR MEHTA:** Mr. Giri also. Mr. Gopal Subramaniam, Gopal Sankaranarayanan.
- 14 **V. GIRI:** I will bow to Your Lordships. Very well.
- 15 **TUSHAR MEHTA:** Anyway, let's not go into it. My Lord, what I have done is, in the first
16 section which is judgments, My Lord, the journey from *Shirur Mutt* to this, I have in my
17 own way curtailed which judgments I will not cite. Only one line I will say, this is the ratio.
18 And in other judgments, I will only read few paragraphs. And thereafter, I'll come to my
19 submissions, My Lord, because submissions I have not started. Even in submissions as My
20 Lord, the Honourable Chief Justice of India has said, that I'll give the proposition first and
21 read two or three paragraphs. I'll not read the entire thing. That's where we will have to
22 coordinate. We do not have My Lord, that capacity to use our road rollers, and therefore My
23 Lord, please come to page 64. Now My Lord, three things first of all. My Lord, It is I.4. My
24 Lord, Your Lordships...
- 25 **JUSTICE ARAVIND KUMAR:** 64 of which?
- 26 **TUSHAR MEHTA:** My Lord, 64 of Volume I.4. Roman one.
- 27 **JUSTICE ARAVIND KUMAR:** 64 of the compilation?

1 **TUSHAR MEHTA:** Compilation. There is judgment compilation. My Lord, only one thing I
2 must at the outset point out... written submission. Written submission.

3 **JUSTICE ARAVIND KUMAR:** PDF page?

4 **TUSHAR MEHTA:** PDF would be My Lord, 67. Three pages, My Lord is the difference. My
5 Lord, one more aspect Your Lordships may notice... it's not on the merits. Page 67.

6 **JUSTICE PRASANNA B. VARALE:** 52 para is there, 1.4 Volume.

7 **TUSHAR MEHTA:** Yes, yes. Yes, yes. Durgah Committee. My Lord, I read three judgments
8 *Shirur Mutt, Ratilal Panachand Gandhi* and *Devaru*. All three judgments have one
9 common factor. The person who was affected filed the petitions, right? Now My Lord, kindly
10 see Durgah Committee takes a completely different route. My Lord, what happened here was
11 that the government took over the administration of Khwaja Moinuddin Chishti's Dargah,
12 and the Durgah Committee itself, the affected party, approached this Honourable Court
13 challenging... I'm sorry, My Lord, My Justice Amanullah has some problem.

14 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.

15 **TUSHAR MEHTA:** Your Lordships, get. My Lord, Durgah Committee challenged that
16 order... the act of the State Government whereby they took over the management. And
17 Article 25 and 26 came in for consideration. Now what happens for the first time, My Lord,
18 in this journey, in this judgement of Justice Gajendragadkar... My Lord, I'm mentioning the
19 name because in subsequent judgement the courts have said *obiter* of Justice
20 Gajendragadkar. Therefore, I am just naming the judge, normally we don't. My Lord, kindly
21 see now page 66, only the highlighted bold part. Rest Your Lordship may read and I have
22 no...

23 **CJI SURYA KANT:** Highlighted portion of paragraph 53...

24 **TUSHAR MEHTA:** Yes.

25 **CJI SURYA KANT:** ...starts from page 65.

26 **TUSHAR MEHTA:** Yes, My Lord, at 66 and I do not doubt that Your Lordships would read
27 it.

28 **CJI SURYA KANT:** Only this... just a second. This paragraph 33 of which judgment?

29 **TUSHAR MEHTA:** Of the judgment of Durgah Committee. My Lord, the judgment is five
30 honourable judges.

31 **CJI SURYA KANT:** Okay. All right.

1 **TUSHAR MEHTA:** 62(1)SCR 383, where it takes a different route than the route taken in
2 *Shirur Mutt, Ratilal Panachand* and *Devaru*. Please have a look at My Lord, the bold
3 part only. My Lord, I'm... I have no manner of doubt that Your Lordships reads everything
4 and Your Lordships will read other parts also. "Whilst we are dealing with this point, it may
5 not be out of place incidentally, to strike a note of caution and observe that in order that the
6 practices in question should be treated as a part of religion, they must be regarded by the
7 said religion as its essential and integral part." This test is never laid down in either *Shirur*
8 *Mutt, Ratilal Panachand* or *Devaru*. *Shirur Mutt* is seven honourable judges. What
9 they say, it should be essentially religious, it should be internal, it should be internally
10 religious. That's what My Lord, the expression used. Now it becomes essential and integral
11 part, "otherwise, even purely secular practices which are not an essential or integral part of
12 religion are apt to be clothed with a religious form and may make a claim for being treated as
13 religious practice within the meaning of Article 26. Similarly, even practices, though
14 religious, may have sprung from mere superstitious beliefs, and may in that sense be
15 extraneous and unessential assertions to religion itself..." I am sorry. "...accretions to religion
16 itself. Unless such practices are found to constitute an essential and integral part of a
17 religion, their claim for protection under Article 26 may have to be carefully scrutinized."
18 Now My Lord may read. "In other words, the protection must be confined to such practices
19 as are an essential and an integral part of it and no other." This test is applied. So the court
20 would sit, the secular court would sit in judicial review over the faith and belief system and
21 decide whether your particular belief that this is an essential part of my religion, is correct or
22 not, and for which the court will have to necessarily examine the scriptures, several other
23 scriptures in case of internal pluralisms, and come to a religious conclusion that this is
24 religious but not essential. Second...

25 **JUSTICE M.M. SUNDRESH:** Mr. Solicitor, your understanding is on the touchstone of
26 Article 25(2)(a). You can't just... see what they say is, religious practice is different and then
27 religious belief is different. And then 23(a), you also read it. There should be some sort of a
28 connection. Mere loose connection will not be there. And subject to whatever he says,
29 political, economical and other factors, and secular. What they are saying is only reiterating
30 in 25(2)(a) in a different way. They don't say anything about belief. Now we are only on
31 practice.

32 **TUSHAR MEHTA:** There are two things, My Lord. Subsequent judgments apply this test
33 and say that no, this is not essentially religious, though, they are religious. For example, the
34 appointment of *Archakas*.

35 **CJI SURYA KANT:** Probably what we want to point out is...

- 1 **TUSHAR MEHTA:** My Lord, can I...?
- 2 **CJI SURYA KANT:** There are two things. One is the expression "essential" which is not,
3 which does not find mention in 25 itself. That expression has been borrowed.
- 4 **TUSHAR MEHTA:** Correct. I'm grateful.
- 5 **CJI SURYA KANT:** And the precondition to religious practice. The religious practice has
6 been now made "essential religious practice".
- 7 **TUSHAR MEHTA:** Yes. My Lord, second point which is really objectionable is that how
8 would... I am posing a question to myself... this court decide what is superstitious practice?
9 That is one. That is on judicial review, but there is more fundamental question. Suppose
10 there is a superstitious practice... I'm sorry, My Lord, Justice...
- 11 **JUSTICE M.M. SUNDRESH:** Yes.
- 12 **TUSHAR MEHTA:** There is a superstitious practice. The answer is not for the court to
13 decide this is superstition. It is under 25(2)(b) for the legislature to say, no, we will reform it.
14 This is only superstition, and I have the list, My Lord, I will just produce of statutes which
15 are passed. Black Magic Act, Prevention of such practices Act, etc., Prevention of Child
16 Marriage Act. Child marriage is a reform, not superstition. But there are several superstition
17 relief... specific statutes. So, it would not be in the judicial review for the court to say that this
18 is superstition, this is religion. If it is religion, it is not essential part of the religion. That is
19 my submission. Now kindly come to, My Lord...
- 20 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Mehta, you have made it too simplistic.
21 The court has the right and the jurisdiction in judicial review to hold whether it is
22 superstitious. What will follow is for the legislature, how to deal with it. But then in the court
23 you can't say that whatever is the last word, the legislature decides. Probably that may not
24 be. You have to address...
- 25 **TUSHAR MEHTA:** I very respectfully, My Lord, have a separate view. The secular court
26 cannot decide a religious practice as a mere superstition because Your Lordships do not have
27 that, My Lord, that... that scholarly competence. Your Lordships are scholars in field of law,
28 not in the field of religion.
- 29 **JUSTICE AHSANUDDIN AMANULLAH:** But we have to classify those things which will
30 have the colour. Because once you come to the court, we can't sit idle and just say no, no,
31 everything is off.
- 32 **CJI SURYA KANT:** There will be practices which can come from north, from
33 [INAUDIBLE.]

1 **TUSHAR MEHTA:** My Lord, something may be religious for me... something may be
2 religious for say, Nagaland, maybe completely superstitious for me. We are in a very, very
3 pluralistic society with variety of people, variety of region... religions, variety of belief
4 systems, and it would be very hazardous for the court to say. The Nagaland... I'm just giving a
5 hypothetical example, any state... Maharashtra has the Black Magic Act. They may say that in
6 our area this is the practice, which is prevalent, which everyone who are representatives of
7 the people agree that this is superstitious and therefore they will prevent it under 25(2)(b).
8 Because somebody can get up and say... My Lord, it is... Assembly or Parliament is my
9 representation. I am present through my representative. So, they would, somebody would
10 get up and say, this is not superstition, this is the logic behind it. Then they would decide
11 whether it's superstition or not. But, My Lord, for few honourable judges who are very
12 learned...

13 **JUSTICE AHSANUDDIN AMANULLAH:** We come back to the basic question that after
14 the law is passed, it is justiciable. You cannot say that we are totally ousted, the legislature
15 has the last word.

16 **JUSTICE JOYMALYA BAGCHI:** Let us take a situation like witchcraft.

17 **TUSHAR MEHTA:** Which?

18 **JUSTICE JOYMALYA BAGCHI:** Witchcraft, witchcraft.

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

20 **JUSTICE JOYMALYA BAGCHI:** If witchcraft is considered as a part of religious practice,
21 would you or would you not describe it as superstition?

22 **TUSHAR MEHTA:** I will. But My Lord, Your Lordships...

23 **JUSTICE JOYMALYA BAGCHI:** Your argument from there taking off will be, it would be
24 up to the legislature to prohibit witchcraft and regulate any practice which promotes
25 witchcraft.

26 **TUSHAR MEHTA:** My Lords are right.

27 **JUSTICE JOYMALYA BAGCHI:** Let us say, the court is approached under Article 32,
28 226 saying see, there is a religious practice of witchcraft, the legislature is silent. Can not the
29 court use the principles of unoccupied field to give directions for prohibiting such a practice,
30 keeping in mind, and I fully understand your arguments, not going into essential religious
31 practice or otherwise, but the beacons of prohibition like health, morality and public order?

1 **TUSHAR MEHTA:** My Lord, it would fall within public order, morality and health, not
2 because it is superstitious. My Lord, there are two answers. Allow me to answer that. My
3 Lord, first of all, when Your Lordships are examining jurisprudential doctrine, Your
4 Lordships would normally not take extreme examples and test it.

5 **JUSTICE JOYMALYA BAGCHI:** That's the part of the... part of the jurisprudential
6 tests...

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

8 **JUSTICE JOYMALYA BAGCHI:** ...to take a proposition to an *absurdum* and see whether
9 it holds or not.

10 **TUSHAR MEHTA:** That may perhaps. My Lord, in my submission...

11 **JUSTICE M.M. SUNDRESH:** What my Brother is saying is this. See it is right for you to
12 say subject to their saying, we can adopt a hands-off approach. But to say that it should be
13 completely embargoed...

14 **TUSHAR MEHTA:** I'm not pitching it that high.

15 **JUSTICE JOYMALYA BAGCHI:** Yes, that is what... We understand your submission.

16 **JUSTICE M.M. SUNDRESH:** As you rightly said, it is testing test.

17 **JUSTICE JOYMALYA BAGCHI:** It is primarily the purpose of the legislature under
18 Clause 2(b) of Article 25, but that does not take away the residual jurisdiction of a court in an
19 appropriate case.

20 **TUSHAR MEHTA:** I never argue, My Lord, because this argument always fails against the
21 jurisdiction of the court. The court is always zealous to protect... protect his jurisdiction and
22 rightly so. My submissions are twofold. (a) if something is there like witchcraft or like
23 cannibalism or something like human sacrifice which shocks the conscience of the court...

24 **JUSTICE M.M. SUNDRESH:** On the face of it, it does not require any adjudication per se.

25 **TUSHAR MEHTA:** Per se.

26 **JUSTICE M.M. SUNDRESH:** That is what your argument says. We cannot replace
27 ourselves with respected expert in that field and theology we can't go...

28 **CJI SURYA KANT:** It's only, only how you bring within the ambit of judicial review. The
29 moment there is this kind of practice, the court will simply say that either it violates the
30 public order or it violates morality...

31 **TUSHAR MEHTA:** Morality or health.

- 1 **CJI SURYA KANT:** Morality or health.
- 2 **JUSTICE M.M. SUNDRESH:** Yes, yes.
- 3 **TUSHAR MEHTA:** Correct, correct.
- 4 **CJI SURYA KANT:** Once the court... because that is what the constitutional principle...
- 5 **TUSHAR MEHTA:** That's the limited point I'm making. I'm not saying that you can't touch
6 it. You can touch it. Your Lordships can even say that we request the Parliament to come out
7 with the law on this point or whatever. The discretion, depending upon the facts. But
8 superstition per se...
- 9 **JUSTICE B.V. NAGARATHNA:** Mr. Solicitor, the approach of the court in such matters
10 also must be to determine the essential religious practice from the lens of the philosophy of
11 that particular religion. You cannot apply some other religion and say this is not an essential
12 religious practice. The approach of the court is to apply the philosophy of that particular
13 religion subject, of course, to if it goes against public order, morality...
- 14 **TUSHAR MEHTA:** Public order, morality and health. Because...
- 15 **JUSTICE B.V. NAGARATHNA:** The court can always strike down that.
- 16 **TUSHAR MEHTA:** Certainly, certainly.
- 17 **JUSTICE B.V. NAGARATHNA:** Court is important rather than saying whether the court
18 has a jurisdiction or no jurisdiction, how the court must view that from the philosophy of
19 that particular religion that may be...
- 20 **TUSHAR MEHTA:** Would the court examine... would the court examine and adjudicate
21 that this is the particular philosophy of this particular religion, that's the question.
- 22 **JUSTICE B.V. NAGARATHNA:** You assisted in saying what it is.
- 23 **JUSTICE M.M. SUNDRESH:** We put it in a lighter vein. It is like the difference between
24 an action which is void and voidable. If it is void, then it requires a declaration. Then to that
25 extent, we can. If we have a very limited role to play, if it is, it is so apparent... So, like the
26 example is given, like [UNCLEAR] something like this, which has been given earlier, if let us
27 say that it has not been occupied by any legislation, the court can indicate to that extent
28 subject to covering it up by, let's say, later part of [UNCLEAR]. While I appreciate your
29 argument, we can't go beyond and take a different role, and which is not been supposed to be
30 assigned to us...
- 31 **TUSHAR MEHTA:** Like examining scriptures and deciding what is the core idea behind
32 this religion, that is something which Your Lordships would not do.

1 **JUSTICE M.M. SUNDRESH:** Because the concept of logic, you can't apply to religion per
2 se. That we can apply [UNCLEAR], we have to be very, very conscious of this.

3 **TUSHAR MEHTA:** It can't be, My Lord. Achieve rationality to faith and belief system.

4 **JUSTICE M.M. SUNDRESH:** That's correct. Yes.

5 **TUSHAR MEHTA:** If I believe something unless it is against public interest, morality or
6 health, there cannot be any merit review or based on My Lord, rationality, science, etc., etc.
7 Now My Lord, this view of My Lord, Justice Gajendragadkar it is criticized by Mr. Seervai.
8 I'm very clear and I'm coming to that. We can cite Mr. Seervai, we can cite Dr. Mulla, we can
9 cite D. D. Basu. We cannot cite any random person, and that's going to be my argument on
10 judicial review also in a limited sense. But please come to page 66... 67. This is what Durgah
11 Committee criticized by Mr. Seervai. That is what I wanted Your Lordships to see. This is
12 Seervai's portion, My Lord, in the book. "It is submitted that the above *obiter* runs directly
13 counter to the judgement of Justice Mukherjea in the ***Shirur Mutt*** case and substitutes the
14 view of the court for the view of the denomination on what is essential a matter of religion.
15 The reference to superstitions/superstitious practices is singularly unfortunate, for what is
16 superstition to one section of the public may be a fundamental religion belief... religious
17 belief to others", as My Lord Chief Justice said.

18 **JUSTICE M.M. SUNDRESH:** That's correct.

19 **TUSHAR MEHTA:** "Thus, for nearly 300 years bequest for masses for the soul of a testator
20 were held void as being for superstitious uses till that view was overruled by the House of
21 Lords in so and so. It is submitted...", My Lord, then I'll go to the last highlighted part, "...the
22 *obiter* of Justice Gajendragadkar in Durgah Committee case is also inconsistent in
23 observations of Justice Mukherjea in ***Ratilal Gandhi's*** case that the decision in
24 ***Jamshedji vs. Soonabai*** afforded an indication of the measure of protection given by
25 Article 26(b)". Then My Lord come ***Syedna Saheb***. This is a subject matter which is
26 specifically kept away. My Lord, Your Lordships are going to examine this again separately.
27 But here My Lord, just to complete the narration of legal journey, I may point out. The
28 question was that Syedna Saheb is the spiritual head of Dawoodi Bohra community called
29 Dai, D-A-I. My Lord, Syedna Saheb or Honourable Dai has the power to excommunicate a
30 person belonging to that religion, which would mean that he would not have any contacts
31 with people from that religion. and he cannot get place in the, for burial etcetera, etcetera.
32 There were several civil rights of which he was deprived of. The Maharashtra government,
33 My Lord, brought an act somewhere in '62 that... I'm sorry, '49. '49. It was challenged in '62,
34 where they raised the contention... My Lord, yeah, this is what my Lord, My Lord Justice
35 Bagchi also may examine. This was purely argument of 26(2) and got accepted that and the

1 result. I'm not going into the merits or rightness or judgment being right or wrong. The
2 minority view of Justice B.P. Sinha said that no, you can't do something under 26(b) as a
3 denomination which completely ousts somebody's civil rights and he becomes a *persona non*
4 *grata*, but the majority view accepted that, no, 26(2)... 26(b) is a standalone provision. It
5 does not say that denomination having right to exercise their religious belief or control their
6 religion would not be exercised in such a way that power of excommunication cannot be
7 exercised. That was the conclusion, because 26(2)(b) was read as an isolation, that it is not
8 governed by any other provisions.

9 **JUSTICE JOYMALYA BAGCHI:** That is what I was telling you yesterday.

10 **TUSHAR MEHTA:** Yes, My Lord. Therefore, I said, My Lord, that kindly see, this may be
11 the result. My Lord, if 26(b) is not read with other fundamental rights, I, as a denomination,
12 my worry is twofold and this is... my worry means the government's worry... government is
13 worried. There can be a denomination which says that we exclude women from all our
14 religious institutions. We are not governed by 25, we are not governed by 14, we are not
15 governed by 15. Whether that would be a position which while interpreting the constitution,
16 Your Lordships would like to do. But even within the community, My Lord, A community... I
17 am belonging to A community, and I am not on Dalits or My Lord, excluded, earlier excluded
18 categories. I belong to one community, my learned friend belongs to another community, my
19 learned friend belongs to another community. My denomination would say, it is a
20 denominational temple, I prohibit his entry. His denomination would say, I prohibit his
21 entry. Do we, My Lord, take a view which in My Lord, which results into fragmentation of the
22 religion, My Lord, on this line? If we read it under with 14 and 15 that no discrimination, and
23 17, then only, possibly the 26(b) can be given its reasonable and purposive meaning. That is
24 my respectful submission.

25 Now please see My Lord the next judgment. My Lord here in *Syedna* case, they struck down
26 the law that 26(b) gives exclusive jurisdiction to denomination to excommunicate anyone.

27 **JUSTICE B.V. NAGARATHNA:** There was a law made under 25(2)(b), is it not?

28 **TUSHAR MEHTA:** My Lord, that was also rejected.

29 **JUSTICE B.V. NAGARATHNA:** Social reform?

30 **TUSHAR MEHTA:** But My Lord kindly see that now, I'm...

31 **JUSTICE B.V. NAGARATHNA:** Excommunication, it is.

32 **TUSHAR MEHTA:** I'm obliged. Please come to page 671.

1 **JUSTICE B.V. NAGARATHNA:** 25(2)(b) and 26(b), ultimately the court said, 26(b) will
2 prevail.

3 **TUSHAR MEHTA:** It will not.

4 **JUSTICE B.V. NAGARATHNA:** They struck it down.

5 **TUSHAR MEHTA:** Kindly...

6 **JUSTICE B.V. NAGARATHNA:** They struck down that act.

7 **TUSHAR MEHTA:** No, they upheld that. They struck down that, upheld the practice.

8 **JUSTICE B.V. NAGARATHNA:** It was an act under 25(2)(b). It was a reform.

9 **CJI SURYA KANT:** It was to prohibit the practice. That act was struck down.

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

11 **TUSHAR MEHTA:** Correct, My Lord. But upholding the excommunication right, but
12 please come to page 71. Since My Ladyship has put this question how the court deals with
13 this 25 issue. "Quite clearly..." My Lord, only bold part. "Quite clearly, the impugned act
14 cannot be regarded as a law regulating or restricting any economic, financial, political or
15 other secular activity. Indeed, that was not even suggested on behalf of the Respondent's
16 state. It was faintly suggested, however, that the act should be considered to be a law
17 providing for social welfare and reform. The mere fact that certain civil rights which might be
18 lost by members of the community as a result of excommunication, even though made on
19 religious grounds and that the act prevents such loss, does not offer sufficient basis for a
20 conclusion that it is a law providing for social welfare and reform." Your Ladyship's
21 observations were right. It could have been sustained as a principle of reform and social
22 welfare. But it was said that it is not a reform. "The barring of excommunication on grounds
23 other than religious grounds, say on the breach of some obnoxious social rule or practice
24 might be a measure of social reform, and a law which bars such excommunication merely
25 might conceivably come within the saving provisions of Clause (b) of Article 25. But barring
26 of excommunication on religious grounds pure and simple cannot, however, be considered to
27 promote social welfare and reforms. And consequently, the law insofar as it invalidates
28 excommunication on religious grounds and takes away Dai's power to impose such
29 excommunication cannot reasonably be considered to be a measure of social welfare and
30 reform." This is for... what they say. Now, My Lord...

31 **JUSTICE B.V. NAGARATHNA:** They've saved it under 26(b)?

32 **TUSHAR MEHTA:** (b). Yes, My Lord.

- 1 **JUSTICE B.V. NAGARATHNA:** Justice B.P. Sinha, he struck it down.
- 2 **TUSHAR MEHTA:** Yes, minority struck. He is minority, he's minority. Now, the next
3 judgment is, My Lord, **Govindlalji Maharaj**, that is, My Lord again... Only one thing I'll
4 say, this was filed by the *tilkayat*, the pujari of Vaishnavite temple. I'm not reading it, but the
5 affected party approached the court. One of the questions which is there My Lord, at page 76,
6 the court again examines whether it is an essential religious practice or not. That's the
7 reason, My Lord, this judgement is placed.
- 8 **CJI SURYA KANT:** Paragraph 57, are you referring to?
- 9 **TUSHAR MEHTA:** Yes, My Lord, 57 and they rely on **Durgah Committee** and say that
10 this particular practice, we examine and say that it's not an essential religious practice. That's
11 all. I am not reading it, but **Durgah Committee** is followed My Lord, that is all I wanted to
12 show. Now, My Lord, next judgement is page 78.
- 13 **CJI SURYA KANT:** 70?
- 14 **TUSHAR MEHTA:** 8. 78.
- 15 **CJI SURYA KANT:** **Raja Birakishore.**
- 16 **TUSHAR MEHTA:** Yes, Raja... My Lord, this was regarding Jagannath temple. Lord
17 Jagannath temple, Puri, where again, My Lord, the King, who was the affected party because
18 the management was taken over from him and was entrusted to a separate statutory body,
19 My Lord, came to... before this honourable court which came to be challenged. My Lord
20 again, the same law is applied and, therefore, I have put it My Lord, I am not reading it.
- 21 Then My Lord next judgement also, I am not reading except to say, this is **Digyadarsan**
22 **Rajendra Ramdassjivaru vs. State of Andhra Pradesh.** This is My Lord, now
23 Justice Grover, Justice V. Ramaswami and A. N. Grover. My Lord please come to page 81.
- 24 **CJI SURYA KANT:** Yes.
- 25 **TUSHAR MEHTA:** Para 10, only the bold part. "The attack on the ground of violation of
26 Article 25(1) can be disposed of quite briefly. It has nowhere been established that the
27 petitioner has been prohibited or debarred from professing, practicing..." That was, My Lord,
28 something on a totally different plank which will not assist Your Lordships.
- 29 Now please come to the most important judgement which is **Seshammal** which is at page
30 81 at the foot. This is according to me most important judgement for this reason.
- 31 **CJI SURYA KANT:** Which one Mr. Solicitor?

1 **TUSHAR MEHTA:** 82. 81, it starts at 81. My Lord it is *Seshammal and Others vs.*
2 *State of Tamil Nadu.*

3 **CJI SURYA KANT:** Yes.

4 **TUSHAR MEHTA:** My Lord, here... There are, in all religions this practice is existing,
5 succession by the *ustad* to the *shagird*, *guru* to the *shishya*. The mode of succession is
6 prescribed. This was a Tamil Nadu temple and there is a position of *Archaka*. *Archaka*, in
7 our parlance is My Lord, other than Tamil Nadu would mean pujaris. Pujaris who would go
8 to the *sanctum sanctorum*. They would deal with the deity, they would give bathing to the
9 deity, they would change the clothes, they would do everything My Lord. And there was a
10 provision in the belief system, faith system, and in the religious practice that *Archaka* would
11 be hereditary. Because one *Archaka* would teach the particular teaching of how to pray and
12 worship the deities and how to perform the rituals to his son etc., etc. My Lord because
13 precise mantras will have to be recited at particular times of the day, at particular events like,
14 for example, when the deity is taking food, when deity is sleeping etc., etc. So, this goes from
15 generation to generations. Now these are not abstract propositions. *Agamas* provide for the
16 detailed procedures which will be taught to his successor. My Lord, this is called the mode of
17 succession. Now the Tamil Nadu Government enacted the law saying that, no, we will
18 appoint the *Archakas*. Because appointment of *Archaka* is a secular activity though he might
19 be conducting religious activities. Now please see, My Lord, how the court deals with it.

20 My Lord, please come to page 85. Mr. Palkhivala appeared My Lord, and I have read all his
21 submissions. Obviously, I need not say My Lord, beautifully put. But this is how the court is
22 pleased to record. It is a correct recording of fact. I am told that Mr. Gopal Subramaniam's
23 father also appeared in this matter. My Lord, Mr. Palkhivala... para 20, Your Lordships
24 would get at page 85.

25 **CJI SURYA KANT:** There is some highlighted portion before paragraph 20 also.

26 **TUSHAR MEHTA:** Yes, I'll read that first, My Lord, then...

27 **CJI SURYA KANT:** "It is therefore manifest..."

28 **TUSHAR MEHTA:** Yes. "It is therefore manifest that *Archakas* of such temples besides
29 being proficient in the rituals appropriate to the worship of the particular deity must also
30 belong according to *Agamas* to a particular denomination. An *Archaka* of a different
31 denomination is supposed to defile the image by his touch..." My Lord, this is not Dalit. This
32 is not the practice of Dalit. Anyone else, My Lord. Other than the person who is *Archaka*. He
33 can be a Brahmin also, but not this category of Brahmin. "...defile the image by his touch and
34 since it is of the essence of religious faith of all worshippers that there should be no pollution

1 or defilement of the image under any circumstances, the *Archaka* undoubtedly occupies an
 2 important place in the matter of temple worship. Any state action which permits defilement
 3 or pollution of the image by the touch of an *Archaka* not authorised by the *Agamas* would
 4 violently interfere with the religious faith and practices of the Hindu worshipper in a vital
 5 respect, and would, therefore, would be *prima facie* invalid and under Article 25... invalid
 6 under Article 25(1). Mr. Palkhivala, on behalf of the petitioners insisted that the appointment
 7 of a person to a religious office in accordance with the hereditary principle is itself a religious
 8 usage and amounted to a vital religious practice and, hence, falls within Article 25 and 26. In
 9 his submission, priests who are to perform religious ceremonies may be chosen by a temple
 10 on such basis as the temple chooses to adopt. It may be election, selection, competition,
 11 nomination or hereditary succession." Maybe My Lord, some qualified people are called,
 12 interviewed and they are appointed, but it is a religious... part of the religion and should be
 13 left to the denomination, that was My Lord, the argument. "He, therefore, contended that
 14 any law which interferes with the aforesaid basis of appointment would violate religious
 15 freedom guaranteed by Article 25 and 26 of the constitution. In his submission, the right to
 16 select a priest has an immediate bearing on religious practice and the right of a
 17 denomination to manage its own affairs in matters of religion. The priest is more important
 18 than the ritual, and nothing could be more vital than choosing the priest. Under the pretext
 19 of social reform, he contended the state cannot reform a religion out of existence." Please
 20 mark this. This is beautifully put. You cannot have a reform which puts the religion out of it.
 21 "Cannot reform a religion out of existence, and if any denomination has accepted the
 22 hereditary principle for choosing its priest, that would be a religious practice vital to the
 23 religious faith and cannot be changed on the ground that it leads to social reform. Mere
 24 substitution of one method of appointment of the priest by another was, in his submission,
 25 no social reform." Then My Lord, next page, the bold part.

26 **JUSTICE B.V. NAGARATHNA:** In the name of social reform, the religion cannot lose its
 27 identity.

28 **TUSHAR MEHTA:** Identity. You cannot... Yes, My Lord, that's exactly he says that you
 29 cannot... you cannot remove the existence of the basic core of the religion. My Lord, now,
 30 page 72. I'm grateful to my learned friend. This is the expression used by Justice Iyengar at
 31 page 72. Only three lines, My Lord.

32 **CJI SURYA KANT:** Page?

33 **TUSHAR MEHTA:** 72. 75 in the PDF. This is *Syedna* case.

34 **CJI SURYA KANT:** This is borrowed from Iyengar.

1 **TUSHAR MEHTA:** Yes, yes. My Lord, Mr. Palkhivala's expression, "the religious can...
 2 religion cannot be reformed out of existence" is borrowed from Justice Iyengar. In my view,
 3 by the phrase, "law providing for social welfare and reform," it was not intended to enable
 4 the legislature, to reform a religion out of existence or identity.

5 **JUSTICE B.V. NAGARATHNA:** Cannot hollow it out.

6 **TUSHAR MEHTA:** Yes. Now, My Lord in *Seshammal* or *Seshmal*, My Lord.

7 **JUSTICE JOYMALYA BAGCHI:** *Seshammal*.

8 **TUSHAR MEHTA:** It's *Seshammal*. I stand corrected. How... this is how the Honourable
 9 Court deals with. Para 21. "It is true that a priest or an *Archaka* when appointed has to
 10 perform some religious functions..." Not some, the essential religious function of deity...
 11 "...functions, but the question is whether the appointment of a priest is by itself a secular
 12 function or a religious practice? Mr. Palkhivala gave the illustration of the spiritual head of a
 13 Mutt belonging to a denomination of a Hindu sect like Shankaracharya, and expressed
 14 horror at the idea that such a spiritual head could be chosen by a method recommended by
 15 the state, though in conflict with the usage and the traditions of the particular institution,
 16 where, for example, a successor of a *Mathadhipati* is chosen by the *Mathadhipati* by giving
 17 him *mantra diksha* or where the *Mathadhipati* is chosen by his immediate disciples, it
 18 would be, he contended, extraordinary for the state to interfere and direct that some other
 19 mode of appointment should be followed on the ground of social reform. Indeed, this may
 20 strike one as intrusion in the matter of religion. But we are afraid such an illustration is inept
 21 when we are considering appointment of *Archaka* of a temple. The *Archaka* has never been
 22 regarded as spiritual head of any institution." My Lord, but he has more things to do with the
 23 deity than even spiritual head. "He may be an accomplished person, well-versed in the
 24 *Agamas* and rituals necessary to be performed in a temple, but he does not have the status of
 25 a spiritual head." These are wrong doctrine which is used. Wrong... "Then again, the
 26 assumption made that the *Archakas* may be chosen in a variety of ways is incorrect. The
 27 *Dharam-karta* or the *Shebait* makes the appointment and the *Archaka* is a servant of the
 28 temple. It has been held in so-and-so versus so-and-so that even the position of the
 29 hereditary *Archaka* of a temple is that of a servant subject to the disciplinary power of the
 30 trustee. The trustee can enquire into the conduct of such a servant and dismiss him for
 31 misconduct. As a servant he is subject to the discipline and control of the trustees as
 32 recognised by the unamended Section 56 of the Principal Act which provides 'all office-
 33 holders and servants attached to a religious institution or in receipt of any emolument or
 34 perquisite therefrom shall, whether the office or service is hereditary or not, be controlled by
 35 the trustee and the trustee may, after following the prescribed procedure, if any, fine,

1 suspend, so-and-so." Now My Lord, the bold part. " That being the position of an *Archaka*,
2 the act of his appointment by the trustee is essentially secular." So, the denomination cannot
3 decide, that may not be hereditary, we will prescribe certain qualifications requiring him to
4 have knowledge of certain rituals and thereafter, we will have a transparent procedure of
5 selecting the best. So, it's a secular activity. Your *pujari*...

6 **JUSTICE M.M. SUNDRESH:** Difficulty there is that they are not denominational
7 temples. They're all public temples there.

8 **TUSHAR MEHTA:** That's not the ground with the court has...

9 **JUSTICE M.M. SUNDRESH:** I am telling you because...

10 **TUSHAR MEHTA:** Your Lordship knows, but the ratio is...

11 **JUSTICE M.M. SUNDRESH:** Who used to appoint them, except that they complied by,
12 generation they come there.

13 **TUSHAR MEHTA:** Even, even in a public temple, appointment of a *pujari* who requires
14 certain expertise, qualifications and knowledge of *Agamas* can never be left to the
15 government, My Lord. A government of non-believers, for example, or a government of even
16 believers cannot substitute. My Lord, this tradition, it's a matter of faith and belief that this is
17 how the, our religion has progressed and we would trust only a particular person having a
18 particular qualification and expertise to touch our deity.

19 **JUSTICE B.V. NAGARATHNA:** But it need not be hereditary.

20 **TUSHAR MEHTA:** It need not be. Mr. Palkhivala says that it need not be hereditary. It
21 may be counterproductive. My Lord, I'm not taking an extreme stand. It can be by selection,
22 that these are the qualifications. You must have undergone, My Lord. There are courses for
23 *Karma Kanda* rituals.

24 **JUSTICE M.M. SUNDRESH:** Right. In *Seshammal* issue was that they should be
25 continued on a hereditary basis.

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

27 **JUSTICE M.M. SUNDRESH:** That was the issue there.

28 **TUSHAR MEHTA:** Correct, My Lord. I am not defending hereditary.

29 **JUSTICE B.V. NAGARATHNA:** It cannot be hereditary; that was the judgement there.

30 **TUSHAR MEHTA:** I straight away concede.

1 **JUSTICE B.V. NAGARATHNA:** While saying that, of course, they also said that it is a
2 secular function and not a religious one.

3 **TUSHAR MEHTA:** That is where the problem is. Another thing, even being a hereditary
4 *Archaka*, we may not like as secular people at with the level at which Your Lordships'
5 brilliance are examining, but it will have to be understood from the point of view and
6 thinking process of those who believe the adherence that my deity cannot be touched by
7 anyone unless he is qualified.

8 **JUSTICE B.V. NAGARATHNA:** Anybody who is well versed in the *Agamas* can be
9 selected, is what the judgement says.

10 **TUSHAR MEHTA:** The denomination can say that we...

11 **JUSTICE M.M. SUNDRESH:** There is no denomination there. That's the difficulty.

12 **TUSHAR MEHTA:** My Lord, let us not go by that particular temple. I am on principle.

13 **JUSTICE M.M. SUNDRESH:** See, we are agree with you. As my Sister put it, whether
14 your *Agama* should be followed in which way they have to, these are all things we cannot go
15 into. Only to the extent that it cannot be a hereditary succession that's... to that extent, if we
16 have to go by *prima facie* we have [UNCLEAR]. They cannot go to the other extent of saying,
17 we will prescribe the *Agama*, how to do it.

18 **TUSHAR MEHTA:** The real problem is not hereditary. The real problem is selection of
19 *pujari* is a secular activity; that is the problem. Suppose the act would have said that no, we
20 don't accept hereditary, but you provide for a transparent procedure for selection of *Agamas*,
21 provide for the qualification.

22 **JUSTICE R. MAHADEVAN:** This is been answered in the case of *Adi Saiva*
23 *Sivachariyargal N. Sangam* by this court in an elaborate manner. We discussed each
24 and every aspect. It will not be gone in too much.

25 **TUSHAR MEHTA:** No, My Lord, I... And the last judgement in this series is *Adi Saiva*.

26 **JUSTICE R. MAHADEVAN:** Use that. Each and every aspect discussed in that
27 judgement.

28 **TUSHAR MEHTA:** Your Lordships are right, I'm grateful. Then last. "Thus, the
29 appointment of an *Archaka* is a secular act, and the fact that in some temples the heredity
30 principle was followed in making the appointment would not make the successive
31 appointment anything but secular. It would only mean that in making the appointment the
32 trustee is limited in respect... source of recruitment. Instead of casting his net wide for

1 selecting a proper candidate, he appoints the next heir of the last holder of the office. That
2 after his appointment of *Archaka* performs worship is no ground for holding that the
3 appointment is either religious practice..." This is my problem. And this may not be or may
4 be true about that particular temple, but this is a law applicable throughout the country that
5 *pujaris* which require special qualification, would now be appointed by the state
6 government. You can have a law that follow this procedure, have the qualifications,
7 transparency, everyone would, should participate. But to say that no, we will make
8 appointments. Because appointment is not a secular activity. My Lord, this applies to even
9 *Mahant*. The court is wrong in saying that position of *Mahant* is different. If *Archaka's*
10 appointment is a secular activity, appointment of a *Mahant* is also a secular activity.

11 **JUSTICE B.V. NAGARATHNA:** That we can't say. Appointment of a *Mathadhipati* or
12 *Mahant*... *Mathadhipati*, that is not secular.

13 **TUSHAR MEHTA:** Justice Ramaswami, I'll show My Lord, that period of '96, '97 has said
14 it is also a secular part.

15 **JUSTICE B.V. NAGARATHNA:** No, that is why the mutts are excluded from the
16 Religious Endowments Act. The mutts are...

17 **TUSHAR MEHTA:** Wherever there is an act... My Lord, we are taking all India thing. My
18 Lord, some states have religious endowments.

19 **JUSTICE B.V. NAGARATHNA:** Where the mutts are excluded from the...

20 **TUSHAR MEHTA:** Wherever there is a state law. All states do not have the law, and we are
21 based more on principle. Now please come to **S.P. Mittal**. My Lord, based... I'm sorry. My
22 Lord, even Justice Ramaswami has been pleased to go to the extent of saying... My Lord,
23 Justice Ramaswami, I'll show that, has gone to the extent of saying relying upon this, that
24 even *Mahant* or *Mathadhipati* is also under the administrative control. He can be
25 disciplinary... he can be disciplinary... there can be disciplinary proceedings, he can be
26 punished, he can even be removed. That's the problem. Therefore, I am starting with
27 **Sheshammal**, and this would apply to all religious denominations.

28 **CJI SURYA KANT:** Can also be removed provided that such process of removal takes place
29 within the sect itself.

30 **TUSHAR MEHTA:** Then denomination, yes, yes, yes.

31 **CJI SURYA KANT:** Nothing like that is misconduct is about law.

32 **TUSHAR MEHTA:** No, no, no, no, cannot be. My Lord, it cannot be done under an act or
33 by the state some... Tomorrow My Lord, by this very logic, I'm sorry to give this example

1 *Shankaracharya* can be removed by the state, some archbishop can be removed by the state.
 2 These kinds of things will have to emanate from the religion itself, from the society itself,
 3 from the denomination itself. It cannot be state-controlled. That is the real secularism, that
 4 state will not enter into... if we do not want religion to interfere with state, state also will not
 5 interfere with the religion. Yes. So, this is the danger. Your Lordships are in a nine-judge
 6 combination, and the question is, My Lord, would Your Lordships read 25 and 26, the way in
 7 which it is read in *Sheshammal*? Now next judgment is page 89, that is My Lord, **S.P.**
 8 **Mittal vs. Union of India**. Again, an affected party came challenging an act of the state.
 9 This was a case... I'm sorry. My Lord, page 89. This was a case of followers of Aurobindo. It is
 10 Auroville case, Aurobindo case, but it is known as **S.P. Mittal** vs so-and-so. The affected
 11 party was here, and the question was, which in my respectful submission, and I am not
 12 making it any complicated, it is a wrong law which is decided.

13 The court decided what is the meaning and tried to define what is the definition as per the
 14 court of denomination. That My Lord, Your Lordships would find at page... Justice
 15 Chinnappa Reddy dissented partly and concurred partly. Please see My Lord Justice
 16 Chinnappa Reddy's part dissent at page 91, only the bold part. "If the followers..." Your
 17 Lordship gets? "If the followers of Sri Aurobindo constitute a religious denomination as to
 18 my mind, they undoubtedly do, the members of Sri Aurobindo Society are certainly a distinct
 19 and identifiable section." Please mark this. This is the correct interpretation. "Denomination
 20 or a section thereof, section of the religious denomination, the members of the society are
 21 followers and disciples of Sri Aurobindo." Now My Lord, majority is authored by Justice, My
 22 Lord, Justice R.N. Mishra and My Lord... I am sorry, I stand corrected. It is My Lord, Justice
 23 R.B. Mishra. I'm thankful to Mr. Gopal Subramaniam. My Lord, page 92, para 80. This is the
 24 definition which is followed in *Sabarimala* case. And in my respectful submission,
 25 irrespective of whether it is followed or not, this definition is an incorrect definition of
 26 denomination, and I will show how. "The words 'religious denomination' in Article 26 of the
 27 Constitution must take their colour from the word 'religion', and if this be so, the expression
 28 'religious denomination' must also satisfy these three conditions." So "must" and "all three"
 29 will have to be satisfied. "First, it must be a collection of individuals who have a system of
 30 beliefs or doctrines which they regard as conducive to their spiritual well-being, i.e., common
 31 faith." Correct? This is the first definition.

32 "Common organization. And third, designation by a distinctive name." So, the denomination
 33 must have a distinctive name. Now I want to give three examples, My Lord, how this
 34 definition is wrong. My Lord, take Durgah of Khwaja Moinuddin Chishti or Durgah of
 35 Nizamuddin Auliya. People of all religions go. They go with reverence. It will not fulfil the
 36 first condition that "we all believe in that doctrine for fulfilment of our spiritual

1 enlightenment". We go because we trust, we go because we have faith. Now second. My Lord,
 2 kindly bear also two other examples in mind. Shirdi, Sai Baba, all communities go, all
 3 religious people go. It's not clear whether Baba was belonging to Muslim or a Hindu religion,
 4 but every community goes with reverence. We all go. But we do not have a collection of...
 5 "We are not collection of individuals who have a system of beliefs or doctrine which they
 6 regard as conducive to their spiritual well-being i.e. common faith." There is no common
 7 faith. My faith is Hinduism, my faith is Shaivism, my faith is Vaishnavism, my faith is
 8 Nastika, my faith is Shakti worship, but I go there. Third, common organisation. There is no
 9 common organisation either in Durgah, Khwaja Moinuddin Chishti Durgah or for that
 10 matter, My Lord, Balaji. My Lord, Vaishnavites go, Shaivites go, Shakti worshippers go and I
 11 have given several subjects, everyone go. My Lord, they have no common faith. But they go,
 12 they worship. There is no common organisation. There is nothing like, My Lord, Sai Baba-ist
 13 organisation or Tirupati Balaji organisation or something. There is no central organisation.
 14 And designation by a distinctive name. Those who believe, those who go, those who pray,
 15 those who trust and those whom revere either Khwaja Moinuddin Chishti or Saint Peter in
 16 the church or for that matter Shirdi or Tirupati Balaji, there is no name of that organisation.
 17 Would we not be a part of a section of denomination?

18 **JUSTICE B.V. NAGARATHNA:** Mr. Solicitor, it is not denomination per se. It is religious
 19 denomination. How does it become religious denomination in the context of Aurobindo's
 20 philosophy? That is the question.

21 **TUSHAR MEHTA:** Then, the question is can you... can... My Lord, I am putting a question
 22 to myself.

23 **JUSTICE B.V. NAGARATHNA:** Aurobindo philosophy whether it is a religious
 24 denomination, does it plead to that?

25 **TUSHAR MEHTA:** It is a religious...

26 **JUSTICE B.V. NAGARATHNA:** It is not denomination per se. Aurobindo philosophy is
 27 not a religion.

28 **TUSHAR MEHTA:** We are not on that distinction. I am not on that distinction. It is
 29 religious. My Lord, we go to... as a Hindu when I go to the Khwaja Moinuddin Chishti...

30 **JUSTICE B.V. NAGARATHNA:** Please keep the... Sorry, please keep the, with respect,
 31 the illustration separate.

32 **TUSHAR MEHTA:** Okay.

1 **JUSTICE B.V. NAGARATHNA:** Let us see Auroville. Aurobindo. Is that philosophy a
2 religious denomination? It may be a denomination, but it can't be religious. Aurobindo
3 philosophy, is it religion?

4 **TUSHAR MEHTA:** Yes. It is religion and, again, My Lord, I'm... kindly pardon me for
5 saying this. This may be Your Ladyship's honest and informed view, but what is relevant is
6 my view as a follower.

7 **CJI SURYA KANT:** Follower...

8 **TUSHAR MEHTA:** Whether I believe that to be a religion. That is where the judiciary... My
9 Lord, Savitri is written by Aurobindo.

10 **CJI SURYA KANT:** We appreciate. Your argument is that because the Aurobindo's
11 followers believe that they are a... that the view which they follow is a religious view or it
12 carries the, all the ingredients or the components of a religion, therefore, they themselves
13 carve out to be an exception or a separate religious denomination.

14 **TUSHAR MEHTA:** Or a section thereof. Or a section thereof.

15 **CJI SURYA KANT:** And, therefore, the others cannot impose on them that no, no, no, you
16 are not a religious.

17 **TUSHAR MEHTA:** You are not a denomination.

18 **CJI SURYA KANT:** Aurobindo, I follow in my... right from the morning I get up till I sleep,
19 I follow his ideas, his philosophy, his guidance and whatever. I treat him as my everything,
20 including the Supreme will. Therefore, who are you to tell me that I should not follow
21 Aurobindo. This is what the kind of...

22 **JUSTICE B.V. NAGARATHNA:** See, it can come under the freedom of conscience, but it
23 cannot come under a religious denomination.

24 **TUSHAR MEHTA:** It would be a religious denomination, My Lord, because otherwise
25 under 26(b), My Lord, there can be a restriction imposed that for this particular followers
26 this thing will not be permitted, the state can say. And therefore, the question is not question
27 of ego, question is of fundamental rights.

28 **JUSTICE B.V. NAGARATHNA:** [NO AUDIO] Religious denomination is the question.

29 **TUSHAR MEHTA:** My Lord, religious denomination would mean...

30 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, perhaps you are applying the tests to the
31 wrong group. You are applying the tests to the persons who are visiting the organisational
32 temple or institution as a mutt. But where the test is to be applied as per this ratio is the

- 1 organisation of the group of persons who are managing the temple or managing the mutt,
2 whether they have a common faith, whether they have a common organisation.
- 3 **CJI SURYA KANT:** So, if they have been elected by the followers of the mutt and they
4 themselves are follower, they are bound to be. That is what probably the viewpoint is.
- 5 **TUSHAR MEHTA:** My Lord, what is the problem is this, I'll tell straightaway come the...
6 come to the problem.
- 7 **JUSTICE JOYMALYA BAGCHI:** See, why the test should apply to the management of
8 the persons organizing it, that is where the answer of common organization will come. And
9 anyone who is coming to the temple is a part of the common faith that if...
- 10 **TUSHAR MEHTA:** Need not be. My Lord, I would respectfully disagree to this.
- 11 **JUSTICE JOYMALYA BAGCHI:** I'm just clarifying that to you; it may be a part of the
12 common faith that other believers may also come to our institution. It can also be a part of
13 the common faith that apart from my believers, nobody will come to the organization.
- 14 **TUSHAR MEHTA:** No, My Lord, I'm...
- 15 **JUSTICE JOYMALYA BAGCHI:** But this is not religious denomination in Auroville was
16 not decided primarily on the lack of uniqueness or commonality. It was decided on the
17 widest berth of the definition of what Hinduism is, and that is where you have made out a
18 case that the courts should not go into the question of what Hinduism is.
- 19 **TUSHAR MEHTA:** My Lord, what Hinduism is...
- 20 **JUSTICE JOYMALYA BAGCHI:** But there has been a series of judgments.
- 21 **TUSHAR MEHTA:** My Lord, I have to answer this.
- 22 **JUSTICE JOYMALYA BAGCHI:** It has been considered to be of such wide plank that any
23 interpretative or even reformist philosophies have fallen within the fold of Hinduism and
24 therefore, not being treated as a part of [UNCLEAR]
- 25 **TUSHAR MEHTA:** My Lord, the first question, and kindly pardon for this question.
- 26 **JUSTICE JOYMALYA BAGCHI:** It starts from Auroville. It starts from
27 *Swaminarayan* case. In *Swaminarayan* case, that *Yugpurush*...
- 28 **TUSHAR MEHTA:** Yes, in *Swaminarayan* case, that is not considered [UNCLEAR].
- 29 **JUSTICE JOYMALYA BAGCHI:** [UNCLEAR].
- 30 **TUSHAR MEHTA:** My Lord, can I answer now? Can I answer?

1 **JUSTICE JOYMALYA BAGCHI:** Swaminarayan and they, unlike Auroville to the best of
2 my knowledge, Aurobindo is never worshipped as God, but...

3 **TUSHAR MEHTA:** My Lord, that is Your Lordship's view, I am on the view of the
4 followers.

5 **JUSTICE JOYMALYA BAGCHI:** Nowhere in Savitri or any of his writings does
6 Aurobindo define or propose to his followers as God. What distinction I'm trying to make is
7 in Swaminarayan the followers consider Swaminarayan as God. Still then Justice
8 Gajendragadkar does not hold this as [UNCLEAR]

9 **TUSHAR MEHTA:** It is understood. We are not saying, nobody says that Aurobindo or
10 Swaminarayan for that matter is a religion, it is a denomination which is a section of this

11 **JUSTICE JOYMALYA BAGCHI:** Right.

12 **TUSHAR MEHTA:** My Lord, second. Another thing. Your Lordships' understanding of
13 religion with Your Lordships scholarship of law and religion in some cases maybe that and
14 may even be correct, would it be a correct test to be applied for my fundamental rights? Your
15 Lordships' level of intellectual scholarship may be different. Your Lordships' knowledge and
16 reading of Savitri may be different. It is my understanding as a follower, will be the real test
17 to decide whether we fall within a section of the denomination, 'we' means I'm just giving
18 you, my example. I'm... And My Lord, some say Savitri is a philosophical document, some
19 say it is for spiritual and, My Lord enlightenment, and some say it is My Lord just preaching
20 and not... Nobody has elevated themselves to the level of God. Krishna never said that I am
21 the God and worship me. We worship the Lord Krishna. Aurobindo would never say that
22 please worship me. Sai Baba never said that please worship me.

23 **JUSTICE JOYMALYA BAGCHI:** You don't have an idol of Aurobindo in all of it. You
24 have an idol of Swaminarayan in Swaminarayan temple.

25 **TUSHAR MEHTA:** My Lord, I understand.

26 **JUSTICE JOYMALYA BAGCHI:** That is the distinction.

27 **TUSHAR MEHTA:** I understand, but in my respectful submission...

28 **CJI SURYA KANT:** There is no need of an idol to follow. The point is that probably 25, 26
29 are to be examined in the light of the Constitution granting constitutional protection to
30 religion, to religious bodies or religious denominations.

31 **TUSHAR MEHTA:** Or a section.

1 **CJI SURYA KANT:** And that protection has to be seen from the angle that if there is a
2 aggression or action by the state to intervene in that, then how to protect these categories?

3 **TUSHAR MEHTA:** My Lord, only one more examples, kindly allow me to give. Arya Samaj
4 and Brahmo Samaj, there are never any idols. They are against idol worship. There is a
5 separate theory, they are against Vedas also. They are a denomination. There is no common
6 faith or belief because they are against faith and belief. They are against faith and belief, that
7 is their faith or that is their belief and there is no common organization or common name. I
8 can be an Arya Samaji without being a member of Arya Samaj. People who believe staunchly
9 in Hinduism go and perform religious rituals as per Arya Samaj rituals, which is very, very
10 small and ritualistic. So, these are the issues. The question is, would the court go into and
11 define in such a way which is we are trying to define undefinable. We are trying to define
12 religion, we are trying to define denomination and then we are trying to define what is
13 religious denomination, and if it doesn't fall within these three tests...

14 **JUSTICE M.M. SUNDRESH:** It doesn't say this. [UNCLEAR] says this is one of the, one
15 of the few conditions required when you interpret the definition, when you give definition of
16 religious denomination, what is given a wider import, whether they will get the benefit of
17 Article 25 and 26 is what... That's a correct view.

18 **TUSHAR MEHTA:** The difficulty...

19 **JUSTICE M.M. SUNDRESH:** It is rightly said, 26(a) says six thereof. So, like, you may be
20 a believer in Lord Vishnu, you can, you can go to Tirupathi, you can go to other temples,
21 there also you can have different, different sects there. There may be Devasthanam will
22 be there, the other sects will be there. Each one will constitute a religious denomination,
23 therefore, their entity were protected. That's what he is saying. That you have a very
24 restrictive meaning on this.

25 **CJI SURYA KANT:** Basically, and having majoritarian...

26 **JUSTICE M.M. SUNDRESH:** In any identifiable group, having the common faith will
27 have the protection.

28 **CJI SURYA KANT:** It will have a procedural make 25, 26. That's all.

29 **TUSHAR MEHTA:** Yes, that's... I, I leave it at that.

30 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Mehta, you just quoted Ajmer Durgah
31 Sharif. It is a denomination. It is a part of a section of religion because basically it's Islam, it's
32 a Sufi thought and they practice. How do you say it comes out? It gets the protection.

33 **TUSHAR MEHTA:** I'm... My Lord, I'm sorry.

- 1 **JUSTICE AHSANUDDIN AMANULLAH:** You said it was outside, it was... Anybody can
2 go. Doesn't mean that it goes outside the purview of a broad denomination of a religion.
- 3 **TUSHAR MEHTA:** I could not make it clear to Your Lordships. Kindly see the definition,
4 this straitjacket definition in the context of Ajmer... I'm not saying it's not a... it is a
5 denomination, it is my case. It is not fulfilling this straitjacket test.
- 6 **JUSTICE M.M. SUNDRESH:** We take it that it should be read down to mean the other
7 factors also.
- 8 **TUSHAR MEHTA:** Yes, My Lord.
- 9 **JUSTICE M.M. SUNDRESH:** Please, no problem.
- 10 **TUSHAR MEHTA:** For example, for example, take page 92.
- 11 **JUSTICE M.M. SUNDRESH:** Yes.
- 12 **TUSHAR MEHTA:** It is my case that it is denomination.
- 13 **JUSTICE M.M. SUNDRESH:** Yes.
- 14 **TUSHAR MEHTA:** But it will not fulfil this test because the test is wrong.
- 15 **JUSTICE M.M. SUNDRESH:** You can quote it.
- 16 **TUSHAR MEHTA:** Kindly see, what is the test.
- 17 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Mehta, again, a doubt has arisen in mind.
18 Kindly all of you will clear it. Why are we trying to interpret Article 25, 26 where the
19 language is very clear, unless a particular all these cases related when a fact came before
20 whether that fact would be covered by 25, 26? *Per se* there is no dispute.
- 21 **TUSHAR MEHTA:** I'll give you the answer.
- 22 **JUSTICE AHSANUDDIN AMANULLAH:** What is the level of protection, to what extent
23 and in what nature of activity? Unless they have that in focus, I think there is no dispute of
24 anybody either this side or that side.
- 25 **TUSHAR MEHTA:** There is a dispute and I'll tell, I'll tell Your Lordship.
- 26 **JUSTICE AHSANUDDIN AMANULLAH:** We are not able to make out what that,
27 without...
- 28 **TUSHAR MEHTA:** I'll just point out.
- 29 **JUSTICE AHSANUDDIN AMANULLAH:** What will be that...

- 1 **TUSHAR MEHTA:** I'll just point out.
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** What will be the dispute?
- 3 **TUSHAR MEHTA:** I'll just point out why this has emanated. It's not just in an academic
4 sphere that we are arguing. In *Sabarimala* judgment, the court has examined this
5 definition and said that those who go to Ayyappa temple do not fulfil these three tests and
6 therefore, it is not a denomination. Therefore, this question has arisen.
- 7 **JUSTICE AHSANUDDIN AMANULLAH:** You're right. Then we have to deal specifically
8 with regard to the Ayyappa Temple. Ayyappa Temple. Just general, the law is there.
- 9 **TUSHAR MEHTA:** He's given a definition for everyone to follow.
- 10 **JUSTICE M.M. SUNDRESH:** [UNCLEAR]
- 11 **JUSTICE AHSANUDDIN AMANULLAH:** That is abstract.
- 12 **TUSHAR MEHTA:** Yes, yes. My Lord, then Your Lordships may kindly come to... I'm not
13 reading it, page 93. The first *Anand Marga* case, that may not have much, My Lord, for
14 Your Lordship's assistance. Then, My Lord, *Bijoe Emmanuel* case. There Your Lordships
15 may come...
- 16 **CJI SURYA KANT:** *Anand Marga* only para 11 is relevant, page 95, that's all.
- 17 **TUSHAR MEHTA:** Yes, Your Lordship is right.
- 18 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, *Ananda Marga* case is very interesting
19 because while in Auroville, they hold it's not a religious denomination. In *Ananda Marga*
20 they hold it is a religious.
- 21 **TUSHAR MEHTA:** Exactly. And Swaminarayan...
- 22 **JUSTICE JOYMALYA BAGCHI:** That's where the dichotomy comes.
- 23 **TUSHAR MEHTA:** Dichotomy comes. and it should be...
- 24 **JUSTICE JOYMALYA BAGCHI:** Because if you hold *Ananda Marga* case is correctly
25 decided, then Auroville requires to be...
- 26 **TUSHAR MEHTA:** To be overruled. In *Ananda*, in this *Ananda Marga* case, they hold
27 that it's not a separate religion, but it is a denomination. So, completely a contrary view.
- 28 **CJI SURYA KANT:** Satisfies all the three conditions, therefore, they say it here.
- 29 **TUSHAR MEHTA:** *Ananda Marga* para 11 at page 95. *Ananda Marga* appears to
30 satisfy all the three conditions. So now My Lord, we are in the zone of three straitjacket

1 conditions. You have to follow one, two and three. If you do not follow, you are out. Now My
2 Lords, second is **Bijoe Emmanuel** case. My Lord, this was singing the national anthem by
3 those who believed in Jehovah's Witnesses; the originalist view of Bible, that is, Jehovah's
4 Witnesses, that Bible should be read as it is. When national song was being played, those
5 who believed as Jehovah's Witnesses, they say we will not stand because as per our
6 understanding of our scripture, that is prohibited. Now please see page 97, the bold part.

7 **JUSTICE B.V. NAGARATHNA:** National anthem?

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

9 **JUSTICE B.V. NAGARATHNA:** National anthem, you are saying. Not national song.

10 **TUSHAR MEHTA:** "We do not endorse the view suggested..."

11 **CJI SURYA KANT:** "We do endorse." 'Not' is not there.

12 **TUSHAR MEHTA:** "We do endorse." I'm sorry. "We do endorse the view suggested by
13 Davar J's observation that the question is not whether a particular religious belief or practice
14 appeals to our reason..." That is the judge's reason. "... or sentiment, but whether the belief is
15 genuinely and conscientiously held as part of the profession or practice of religion. Our
16 personal views and reactions are irrelevant. If the belief is genuinely and conscientiously
17 held, it attracts the provisions... protection of Article 25 but subject, of course, to the
18 inhibitions contained therein." This is the correct statement of law in my respectful
19 submission.

20 Then next page. This sentence... then it refers to the earlier judgment and says that very
21 politely, because they were lesser strength. Numerical strength was less.

22 **CJI SURYA KANT:** Two judge bench.

23 **TUSHAR MEHTA:** Two judge. Therefore, they do not say that five judge is wrong. "This
24 sentence appears to have crept into the judgement by some slip. It is not a *sequitur* to the
25 reasoning of the court on any of the issues. In fact, in the subsequent paragraphs, the court
26 has expressly proceeded to consider the claim of **Ananda Marga** to perform *Tandava*
27 dance in public streets pursuant to the rights claimed by them under Article 25(1)."

28 My Lord, then comes era of Justice K. Ramaswamy. The third era, which I have said; starting
29 from Justice B.K. Mukherjea, then Justice Gajendragadkar. Now this is the third era. My
30 Lord, my learned friend, I discussed with him, so that I can skip it. He is going to show this;
31 therefore, I am not relying upon it. But all four judgments... all five judgments, my
32 submission is, are wrong and not as per either **Shirur Mutt** or based upon true
33 construction of Article 25 and 26, and all are benches of lesser numerical strength. Two

1 judges or three honourable judges. My Lord, my... the learned *amicus* is going to place it, so
2 my Lord, I'm saving my time.

3 Kindly come to 117. My Lord, this is a judgment... Now, second Jagannath temple case.
4 Again, the person aggrieved. The Jagannath Temple Puri management came. My Lord, I am
5 not reading. My Lord, it is substantially on the same wrong line. That's all I would say. Now
6 directly come to page 121, **John Vallamattom** case. Honourable three judges. I'll read only
7 just above para 41. "The petitioner...", Your Lordship gets, My Lord? Page...

8 **CJI SURYA KANT:** Yes.

9 **TUSHAR MEHTA:** 122. "The petitioner has not been able to place any material to show
10 that disposition of property for religious and charitable purposes is an integral part of
11 Christian religious faith." Disposition of property may perhaps not be. 42. "Article 25 merely
12 protects the freedom to practice rituals and ceremonies etcetera, which are only the integral
13 parts of the religion. Article 25 of the Constitution will, therefore, not have any application in
14 the instant case." My Lord thereafter, Nellore **Martyrdom** case, I'm not reading it. My
15 question was whether a temple is a denomination or not. Nothing may further assist, Your
16 Lordships. Then comes My Lord, second **Ananda Marga's** case and My Lord, I would like
17 Your Lordships to consider the minority view of Justice Lakshmanan.

18 **JUSTICE B.V. NAGARATHNA:** Which page, Mr. Solicitor?

19 **TUSHAR MEHTA:** My Lord, page 124.

20 **CJI SURYA KANT:** The second **Ananda Marga**?

21 **TUSHAR MEHTA:** Second **Ananda Marga** case at page 125. 128 for the PDF pagination.
22 My Lord, this is... I must repeat it at the cost of repetition say, I'm reading the minority view
23 first. But before a nine-judge that makes no difference. Para 55. "I shall now consider
24 whether Ananda Margis have the fundamental right under Article 25 and 26 of the
25 Constitution." Page 125, para 55. Minority view of My Lord, Justice Lakshmanan.

26 **CJI SURYA KANT:** Yes.

27 **TUSHAR MEHTA:** Para 55, Your Lordship gets? "I shall now consider whether Ananda
28 Margis have the fundamental right under Article 25 and 26 of the Constitution. Ananda
29 Margis are a religious denomination and as such are entitled to the protection under Article
30 25 and 26(b) of the Constitution for their beliefs and practices including their practice of
31 *Tandav* dance in procession or public place. This is because, as held by this court in several
32 cases, religious practices or performances of acts in pursuance of religious beliefs are as
33 much a part of religion as faith or belief in particular doctrines. No outside authority has any

1 right to say that these are not essential parts of religion, and it is not open to the secular
2 authority of the state to restrict or prohibit them in any manner." Then in the bottom, the
3 bold part. "Further, in exercise of the power to regulate, the authorities cannot sit in
4 judgment over the professed views of adherence of the religion and to determine whether the
5 practice is warranted by the religion or not." Even state cannot do that. 10 religions and sub-
6 religions, sub-denominations, whether it is Hindu, Christian, Muslim, Judaism, whatever.

7 **JUSTICE AUGUSTINE GEORGE MASIH:** Subject to three areas, public, morality...

8 **TUSHAR MEHTA:** Of course, they... Yes, yes if it is against public... that is of course. Then
9 para 60. And this is important because this would have a bearing on one of the questions
10 framed by Your Lordships what is the meaning of morality under Article 25? Whether it is
11 societal morality or a vague and wrongly applied definition of constitutional morality? Please
12 see, My Lord, para 60. "Moreover, public order has a larger connotation than law and order.
13 Contravention of law to affect public order must affect the community or the public at large.
14 A mere disturbance of law and order leading to disorder is not one which affects public
15 order." I'll show the judgment which says that public order, morality and health is
16 understood to mean public order, public morality, public health. It cannot be some vague
17 concept of constitutional morality.

18 **JUSTICE JOYMALYA BAGCHI:** You can make... you cannot make public here. It has to
19 be individual.

20 **TUSHAR MEHTA:** That can... individual. But it cannot be only individual, it cannot be
21 only individual.

22 **JUSTICE JOYMALYA BAGCHI:** We understand your borrowing public for morality.

23 **JUSTICE B.V. NAGARATHNA:** Under Article 19(2), it is decency or morality.

24 **TUSHAR MEHTA:** (2) and (4). (2) and (4). 19(2), 19(4). And I have cited judgments.
25 Therefore, I'm quickly going through this, My Lord.

26 **JUSTICE B.V. NAGARATHNA:** Broader than constitutional morality.

27 **TUSHAR MEHTA:** Exactly. Constitutional morality can neither be restricted or broader
28 because it has no existence under the constitutional scheme. Constitutional morality, I'll
29 come to that as a separate chapter, is a doctrine of political science how functionaries are to
30 function. Whether a person who is facing a serious criminal charge should step down or not?
31 These are constitutional conventions which are described as constitutional morality. It is not
32 one of the grounds to exercise judicial review. Judicial review will have to be exercised as per
33 Constitution. If it is public order, morality and health, you have to go by only public order,

1 public morality and public health or individual health. But the... **Sabarimala** says that we
2 will not go by the societal values and societal morality because that is mob morality, and we
3 will go by the constitutional morality. So, if I say something that this is my faith, this is my
4 belief and...

5 **JUSTICE B.V. NAGARATHNA:** The point of view...

6 **TUSHAR MEHTA:** This is my faith, this is my belief and this is not harming the society.
7 None of them have any objection, they would merely be a mob. The court would decide
8 whether it is a constitutional morality or not. I'm putting it little My Lord, in a harder way,
9 but it's that My Lord, respectfully absurd. Now, para 65. This...

10 **JUSTICE B.V. NAGARATHNA:** Public morality is from the point of view of the followers.

11 **TUSHAR MEHTA:** Followers, yes.

12 **JUSTICE B.V. NAGARATHNA:** In this case, followers of that.

13 **TUSHAR MEHTA:** Yes, but it may be public at large.

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

15 **TUSHAR MEHTA:** Maybe public at large.

16 **JUSTICE B.V. NAGARATHNA:** Constitutional morality is constitutional *dharma*.

17 **TUSHAR MEHTA:** That's the word. That constitutional *dharma* of functionaries, how
18 government should function, how functionaries should function. If there is absence of
19 constitutional provision, what are the conventions, constitutional conventions? But...

20 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, you are perhaps saying that constitutional
21 morality governs secular life and the capsule of religious rights have to be on the basis of
22 understood morality of society *vis-a-vis* the religious tenets followed by a particular
23 denomination also.

24 **TUSHAR MEHTA:** I'm grateful, that is what I am saying.

25 **JUSTICE JOYMALYA BAGCHI:** The secular character of the citizen and the religious
26 belief of the citizen cannot be merged in a secular democracy.

27 **TUSHAR MEHTA:** Or tested based on one condition i.e. constitutional morality if,
28 otherwise, it is socially moral and acceptable to cultural ethos of this nation.

29 **JUSTICE JOYMALYA BAGCHI:** Which you say as societal morality.

30 **TUSHAR MEHTA:** Societal morality.

1 **JUSTICE M.M. SUNDRESH:** Differently public order, morality or health maybe a species
2 of the genus of constitution morality. But you cannot consider constitutional morality as
3 such, which is so high.

4 **TUSHAR MEHTA:** I am...

5 **JUSTICE M.M. SUNDRESH:** It can be... it can be fitted into that.

6 **TUSHAR MEHTA:** Your Lordships are right. For my purpose, that's enough. But I am
7 going to My Lord, before a nine-judge bench suggest that constitutional morality is never a
8 ground of judicial review. And My Lord I can quote my... our former Attorney General who is
9 a jurist in his own right. He has delivered a lecture that constitutional morality is an
10 unfortunate thing. Better it dies sooner.

11 **JUSTICE JOYMALYA BAGCHI:** That's a very [UNCLEAR] statement.

12 **TUSHAR MEHTA:** Anyway, My Lord, page... para 65.

13 **JUSTICE B.V. NAGARATHNA:** Sometimes it is very subjective, that's why.

14 **TUSHAR MEHTA:** Very subjective. My Lord, something which is as per constitutional
15 morality for one honourable judge may not be constitutional morality. So therefore, you can't
16 exercise judicial review on vague terms.

17 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, the word of Article 25(1) is 'conscience.'

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

19 **JUSTICE JOYMALYA BAGCHI:** So, if it's the conscience of a particular section of citizen
20 to be governed by constitutional morality, so be it. But that does not mean that section of
21 citizen is going to have its imprint over the conscience of another groups and sections of
22 citizen whose morality may be of different standards, but within the expansive elastic idea of
23 the society of the day.

24 **TUSHAR MEHTA:** Yes. My Lord now, what is the... what... page... para 65. "This court has
25 explained in a number of decisions that what constitutes an essential part of a religion is
26 primarily to be ascertained with reference to the doctrine of that religion itself, and the court
27 cannot say that a belief or practice is not part of the religion. The proposition was
28 authoritatively laid down by the constitution bench of this court, seven-judges in *Shirur*
29 *Mutt* as extracted in paras *supra*. This is the most essential part of fundamental rights of
30 freedom." Now My Lords may kindly come to para 80 on the next page. This is My Lord
31 Justice Lakshmanan quotes, Justice Lakshmanan... Justice Gajendragadkar *Bijoe*
32 *Emmanuel* case and this is his critique, if I may use the word. Para 80. "Here the court has

1 assumed the role of a theologian after making a roving inquiry. While the decision is
2 criticised on the ground that once this door is opened, there is no limit to which the court
3 cannot go. The answer is that the power of judicial review as a part of the basic structure is
4 vested with the court and if someone has to be trusted, let it be the courts even in matters of
5 faith. This court, as stated earlier, considered the question whether performance of *Tandava*
6 dance is a religious right or practice essential to the tenets of the religious faith of the
7 Ananda Margis. The court while upholding..." Thereafter, I'm not much saying. Then
8 **Subramanian Swamy** case. My Lord, I'm not taking Your Lordship through. Then **Adi**
9 **Saiva** case. My Lord, as My Lord Justice Mahadevan... This is the last in line. My Lord, **Adi**
10 **Saiva** was authored by Justice Gogoi. Why I am saying, thereafter Justice Gogoi was
11 confronted with this review in **Sabarimala** and Justice Gogoi was aware that right from
12 **Shirur Mutt** till date, there are several judgments which are taking some views here, some
13 views there and therefore, in the reference His Lordship uses that there has to be evolution
14 of a judicial policy how would we deal with 25 and 26. Kindly have a look My Lord, para 30...

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

16 **TUSHAR MEHTA:** My Lord, page 132, para 38. All these previous judgments are
17 considered, sighted, opined. "The ecclesiastical jurisprudence in India, sans any specific
18 ecclesiastical jurisdiction revolves around the exposition of the constitutional guarantees
19 under Articles 25 and 26 as made from time to time. The development of this branch of
20 jurisprudence primarily arises out of Claimant's claimed rights of religious groups and
21 denominations to complete autonomy and the prerogative of exclusive determination of
22 essential religious practices and principles on the bedrock of constitutional guarantees under
23 Articles 25 and 26 of the Constitution and the judicial understanding of the interplay
24 between Article 25(2)(b) and 26(b) of the Constitution in the context of such claims." Then
25 the court quotes **Shirur Mutt**.

26 And kindly now come to... this is the last judgment I am reading on this, then I'll come to
27 **Sabarimala** at a relevant point of time after answering the questions or while answering
28 the questions. 44. This is for the first time this honourable court has examined in neither in
29 **Shirur Mutt** till date Article 16, Sub-article (5) was taken note of or was argued, was not
30 even argued. That's what His Lordship says. "Article 16(5) which has virtually gone
31 unnoticed till date and therefore, may now be seen is in the following terms. Nothing in this
32 article shall affect the operation of any law which provides that the incumbent of an office in
33 connection with affairs of any religious or denominational institution or any member of
34 governing body thereof shall be a person professing a particular religion or belonging to a
35 particular denomination." My Lord, none of the judgments takes note of this. "A plain
36 reading..."

1 **JUSTICE B.V. NAGARATHNA:** It came in effect only in 2000. It was amended. Article
2 16 was amended in the year 2000.

3 **TUSHAR MEHTA:** No, My Lord, I think it was there. It was an original provision. It's an
4 original provision subject to My Lord, they... It is an original provision. It, My Lords...

5 **CJI SURYA KANT:** But it was amended in only 6...

6 **TUSHAR MEHTA:** 4A, 4B was introduced.

7 **MR. VENUGOPAL:** 16(6) were...

8 **TUSHAR MEHTA:** The number changed, My Lord, the number changed.

9 **CJI SURYA KANT:** 5? 5 remains the... 5 is the original one.

10 **TUSHAR MEHTA:** No, I'm sorry. 5 has remained the same. Even number has not
11 changed.

12 **CJI SURYA KANT:** It's the original one.

13 **TUSHAR MEHTA:** 6 is new addition. 6 is... Your Ladyship's impression is about 6. 4A, 4B
14 and 6. 15 has always been there. So, it is missed. It's responsibility on our side. We may not
15 have... outside of the bar... We may not have pointed it out. "A plain reading of the aforesaid
16 provision, that is Article 16(5), fortified by the debates that held that had taken place in the
17 Constituent Assembly according to us, protects the appointment of *Archakas* from a
18 particular denomination, if so required to be made by the *Agamas* holding the field. The
19 debates in the Constituent Assembly referred to disclose..." that is on 16(5) which I have not
20 read, but we can go by the formulation of His Lordship, "...should be restricted to
21 appointment in offices connected with administration of a religious institution was negative.
22 The exception in Article 16(5), therefore, would cover an office in a temple which also
23 requires performance of religious functions. In fact, the above thought not expressly stated
24 above... though not expressly stated, could be one of the bases for the views expressed by the
25 constitution bench in *Seshammal*." What was My Lord, in a combination of lesser
26 numerical strength.

27 **JUSTICE JOYMALYA BAGCHI:** But we are actually militating against your argument.
28 Justice Gogoi using Article 16, Clause 5 to imprint on the constitutional *imprimatur* of the
29 secular character of religion...

30 **TUSHAR MEHTA:** Please read further, My Lord. Please read further, My Lord, para 47.
31 "The issue of untouchability raised on the anvil of Article 17 of the Constitution stands at the
32 extreme opposite end of the pendulum. Article 17 of the Constitution strikes at the caste-

1 based practices built on superstitions and beliefs that have no rationale or logic." My Lord,
2 we fully agree with this. "The exposition of the *Agamas* made a century back by the Madras
3 High Court in ***Gopala Mooponar...***" My Lord, yesterday My Lord Justice Sundaresh
4 asked. I said this is the judgment, My Lord. But I'm not reading it My Lord, it would become
5 very long. "...*Agamas* made by so and so that exclusion from the *sanctum sanctorum* and
6 duties of performance of pujas extends even to Brahmins is significant. The prescription with
7 regard to the exclusion of Brahmins in ***Gopala Mooponar*** so-and-so, so-and-so has been
8 echoed in the opinion of Sri Parthasarathi Bhattacharyya as noticed by the Constitution
9 Bench by in ***Seshammal***. Such exclusion is not on the basis of caste, birth or pedigree. The
10 provision of Article 17 and Protection of Civil Rights Act, therefore, would be of no much
11 significance for the present case." Then 49. "The difficulty lies not in understanding or
12 restating the constitutional values. There is not an iota of doubt on what they are, but to
13 determine whether a claim of state action in furtherance thereof overrides the constitutional
14 guarantees under Article 25 and 26 may often involve what has already been referred to as a
15 delicate and unenviable task of identifying essential religious beliefs and practices *sans*
16 which the religion itself does not survive. It is the performance of this task that the absence
17 of any exclusive ecclesiastical jurisdiction of this court, if not other shortcomings and
18 inadequacies, that can be felt." That this is not possible for this court because we are not
19 having that jurisdiction and we do not possess. Sometimes even we believe we possess. We
20 do not possess the knowledge of religion. All of us, My Lord, with a varying degree, we have
21 the knowledge of religion which is only maybe 1% of what actually the religion is.

22 Anyway, My Lord, then the last highlighted part. "The exclusion of all outside authorities
23 from deciding what is an essential religious practice must be viewed in the context of the
24 limited role of the state in matters relating to religious freedom as envisaged by Article 25
25 and 26 itself and not of the courts as the arbiter of constitutional rights and principles." Then
26 My Lord last, "In this regard it will be necessary to re-emphasize what has been already
27 stated with regard to the purpose and effect of Article 16(5) of the Constitution, namely, the
28 exclusion of some and inclusion of a particular segment or denomination for appointment as
29 *Archakas* would not violate Article 14, so long as such inclusion or exclusion is not based on
30 the criteria of caste, birth or any other constitutionally unacceptable parameter." This, I have
31 a reservation, My Lord, partly, partly. Now I'll come to My Lord, my submissions.

32 **JUSTICE AHSANUDDIN AMANULLAH:** You have reservations on other
33 constitutionally unacceptable parameters?

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

35 **JUSTICE AHSANUDDIN AMANULLAH:** That is probably the portion which we have.

1 **TUSHAR MEHTA:** 25 has its own parameters on which, anvil of which, you will judge the
2 fundamental rights. Now, My Lord, I'll come to the submissions, and I'll take interplay
3 between 25 and 26 last because otherwise I'll not be able to complete other, because there
4 would be some assistance called for by the court. So, I'll start with another. We have already
5 submitted. It is already filed but the copy is My Lord, I can hand over. And Your Lordships
6 can rest assured I'm not going to read every part of it. I have marked yesterday what is to be
7 skipped and what is to be there. I'll just give the flavour.

8 **JUSTICE AHSANUDDIN AMANULLAH:** Volume?

9 **TUSHAR MEHTA:** This is I.5. My Lord, please come to page 40 first. 25, 26 I'll be doing
10 last. I have substantially answered, but there might be some assistance which Your
11 Lordships may... more assistance required. Therefore, I'll start from page 40.

12 **CJI SURYA KANT:** Question number 4.

13 **TUSHAR MEHTA:** Yes. Questions of the court, My Lord. "What is the scope and extent of
14 the word 'morality' under Articles 25 and 26 of the Constitution of India and whether it is
15 meant to include constitutional morality?" Now, My Lord, there is an intrinsic guidance in
16 the Constituent Assembly debates as to how the expression 'morality'... I'm sorry. My Lord,
17 it's question whether it's constitutional... its morality means constitutional morality or public
18 morality or societal morality? My Lord, there is an intrinsic guidance in the debates of the
19 Constituent Assembly, how the framers framed this particular clause that is at page 41. Mr.
20 Z.H. Lari. "I would like to point out in this connection the various security acts which have
21 been passed by various legislatures, particularly the Safety Act in one province which even
22 excluded the right to move the High Court under section so-and-so. The second admission
23 that he made is constitutional morality is not a natural sentiment, it has to be cultivated. We
24 must realize that our people have yet to learn it." My Lord, the detailed debate says that
25 constitutional morality means constitutional conventions, how constitutional functionaries
26 would behave. And Dr. Ambedkar said that we are a new nation, we have just been born, this
27 will have to be cultivated amongst the people that how they would act as citizens, how
28 functionaries would discharge their functions, etc. "I say not only the people, but even the
29 governments have to learn it. To prove this I will cite only two instances. The House will
30 remember that in Calcutta, in Bengal, the High Court was seized of a case and had appointed
31 a full bench to decide as to what is the effect of the word 'reasonable' in an enactment dealing
32 with government's power to arrest and detain. The bench was to meet only next day, but the
33 government came out with an ordinance laying down that the word 'reasonable' shall be held
34 to have been deleted. No doubt, as the High Court remarked in that case, His Excellency the
35 Governor of the Province was fully within his rights to enact an ordinance, but it was against

1 constitutional morality." This is the meaning of constitutional morality. How constitutional
2 functionaries deal with other constitutional functionaries or citizens or other statutory
3 authorities when a democracy, a republic is born. My Lord, then I'll not...

4 Now come to para 141. "It is submitted that a closer look at Constituent Assembly debates
5 makes it clear that the word 'morality' in Article 25 was envisaged to be public morality by
6 the framers." Why I am taking a little time, **Sabarimala** continuously proceeds on the
7 ground that morality does not mean social morality. Social morality is only mob. Mob. What
8 is necessary is constitutional morality. And therefore, I am emphasising, as understood by
9 the framers of the Constitution, morality is societal morality, something which is acceptable
10 to cultural ethos of the country. "The Honourable Shri Santhanam, Mr. Vice President, sir, I
11 stand here to support this article." My Lord, this is Article 25. "This Article has to be read
12 with Article 13. Article 13 has already assured freedom of speech..." My Lord, 13 means
13 present 19. "...freedom of speech and expression and the right to form association or unions.
14 The above rights include the right of religious speech and expression and the right to form
15 religious association or unions. Therefore, Article 19 is really not so much an article on
16 religious freedom, but an article on what I may call religious toleration. It is not so much the
17 words 'all persons are equally entitled to freedom of conscience and the right freely to
18 profess, practice and propagate religion' that are important. What are important are the
19 governing words with which the article begins i.e. 'subject to public order, morality and
20 health'. Hitherto it was... it was thought in this country that anything in the name of religion
21 must have the right to unrestricted practice and propagation. But we are now in the new
22 Constitution, restricting the right only to the right, which is consistent with public order,
23 morality and health. The full implication of this qualification are not easy to discover.
24 Naturally, they will grow with the growing social and moral conscience of the people. For
25 instance, I do not know if for a considerable period of time the people of India will think that
26 '*pardah*' is consistent with the health of the people. Similarly, there are many institutions of
27 Hindu religion which the future conscience of the Hindu community will consider as
28 inconsistent with morality." Morality is understood in the context of societal morality, that
29 society will evolve and the concepts of morality will change with evolution of each
30 generation. My Lord, that is the expectation.

31 Now My Lord, how My Lord, the word 'morality', as Your Ladyship pointed out, is used in
32 Article 19? Please come to My Lord **Kesavananda Bharati**. This is how the word
33 'morality' is used even by 13 judge bench which is not referred to in **Sabarimala**. But My
34 Lord please see Justice Palekar's view in what he understood, His Lordship understood to be
35 public order and public morality. Please see the highlighted part. "Even the rights conferred
36 are not in absolute terms, they are hedged in and restricted in the interest of general public,

1 public order, public morality, security of the state and likes..." They were discussing 19, and
2 therefore, My Lord, "...public morality, security of the state and the likes, which shows that
3 social and political considerations are more important in an organised society." So, when the
4 word 'morality' is used in Article 19, it is understood as public morality by a 13-judge bench.

5 My Lord, kindly now see ***K.A. Abbas vs. Union of India***. The relevant part at page 44,
6 para 39. "It is... It, therefore, follows that the American and British precedents cannot be
7 decisive and certainly not the minority view by some of the judges of the Supreme Court of
8 the former..." Please mark this. I would show something very relevant, very important and a
9 part of the question which is posed by a... framed by Your Lordships. Minority... First of all,
10 foreign judgments can never influence our adjudication, but relying upon minority view of
11 foreign judgment is frowned upon. "...a former. The American Constitution stated the
12 guarantee in absolute terms without any qualification. The judges try to give full effect to the
13 guarantee by every argument they can validly use, but the strongest proponent of the
14 freedom, Justice Douglas himself recognized in ***Kingsley*** case that there must be a vital
15 difference in approach." My Lord, Justice Douglas quotes our Constitution. Now we have the
16 era where we are relying upon very reverentially the foreign jurisprudence. Please see what
17 Justice Douglas says, "If we had a provision in our Constitution for reasonable regulation of
18 the press such as India has included in hers, there would be a room for argument that
19 censorship in the interest of morality would be permissible." This was the era where we were
20 being cited by other jurisdictions. "It would appear from this that censorship of films, their
21 classification according to age groups and their suitable for unrestricted exhibition with or
22 without excisions is regarded as a valid exercise of power in the interest of public morality,
23 decency etcetera. This is not to be construed as necessarily offending the freedom of speech
24 and expression. This has however, happened in the United States and, therefore, decisions as
25 Justice Douglas said in Tagore Law Lectures have the flavour of due process..." That is their
26 equivalent of Article 14, "...rather than what was conceived as the purpose of the First
27 Amendment. This is because social interest of the people overrides individual freedom."
28 ***Sabarimala*** says exactly contrary to this, that individual freedom/dignity will take
29 precedence over social interest because what is societal morality is merely mob morality.

30 Then last My Lord, highlighted part. "The larger interest of the community require the
31 formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and
32 other things of immoral tendency and things which affect the security of the state, et cetera."
33 So, what was considered was immoral society deciding whether it is socially immoral or
34 cultural ethos permit it or not. Then My Lord, ***Murlidhar Agarwal*** para 32, "the judges
35 are to base their decisions on the opinions of men of the world as distinguished from opinion
36 based on legal learning. In other words, the judges will have to look beyond the

1 jurisprudence and that is, and that in so doing they must consult...", please mark, "...not their
2 own personal standards or predilections but those of the dominant opinion at a given
3 moment or what has been termed customary morality. It's not individualistic subjective
4 morality and constitutional morality by definition. Inevitably, is subjective morality." Then
5 similar is in ***State of Maharashtra vs. Indian Hotel and Restaurants Association***.
6 But please see page 148. My Lord, I'm not reading page 14... para 147, the judgment of Your
7 Lordships, My Lord, where again morality is used as societal morality. But please see
8 ***Indian Hotel and Restaurant Owners Association*** para 79. "It needs to be borne in
9 mind that there may be certain activities with the society perceives as immoral *per se*. It may
10 include gambling though that is also becoming a debatable issue now, prostitution et cetera.
11 On the other hand...", I'm reading at the bottom, "...obscenity is treated as immoral.
12 Therefore, obscene dance performance may not be acceptable, and the state can pass a law
13 prohibiting obscene dances. However, a practice which may not be immoral by social
14 standards cannot be thrust upon the society as immoral by the state with its own notion of
15 morality and therefore, exercise social control. Furthermore, and in any case, the legislation
16 of this nature has to pass the muster of constitutional provision, etc., My Lord, to which I
17 have no difficulty. I have given judgments on morality which I am not repeating. But can I
18 start?

19 **JUSTICE AHSANUDDIN AMANULLAH:** Whatever has been said has been diluted by
20 these last two lines. "Furthermore, in any case, any legislation of this has to pass the muster
21 constitutional provisions as well." Does it not dilute whatever has been said earlier?

22 **TUSHAR MEHTA:** I am on the point that morality is social morality. I am not whether
23 state can impose A or B. Every law, whether on morality or not, will have to pass
24 constitutional muster. There, you need not, you don't need a judgement for that proposition.
25 My Lord, may I start, My Lord?

26 **JUSTICE B.V. NAGARATHNA:** With the passage of time in Indian society, what was
27 considered to be immoral or obscene, no longer considered immoral or obscene. That is the
28 problem of India now.

29 **TUSHAR MEHTA:** My Lord, I am going to read one judgement.

30 **JUSTICE B.V. NAGARATHNA:** This is the problem in India.

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

32 **JUSTICE B.V. NAGARATHNA:** You see, the standards which were there in the 50s are
33 not the standards there.

1 **TUSHAR MEHTA:** Correct. I respectfully, fully respectfully agree. And I am going to read
2 one My Lord judgment, while answering the question of judicial review.

3 **JUSTICE B.V. NAGARATHNA:** You said that the standards of 1950s is narrow
4 mindedness. That is not.

5 **TUSHAR MEHTA:** It's not. No, no and this is not open-mindedness.

6 **JUSTICE B.V. NAGARATHNA:** Narrow-mindedness cannot be the criticism for what
7 was in the...

8 **TUSHAR MEHTA:** No, no, absolutely right. Absolutely right. And what is happening today
9 is not open-mindedness.

10 **JUSTICE B.V. NAGARATHNA:** Criticism now is that it is narrow-mindedness, myopic,
11 old fashioned, etc. This is the problem of Indian society today.

12 **TUSHAR MEHTA:** Correct. And...

13 **CJI SURYA KANT:** It is the problem of an evolving society.

14 **JUSTICE B.V. NAGARATHNA:** Yes. Of course, without evolving.

15 **TUSHAR MEHTA:** That is transformative constitutionalism which I have not been able to
16 understand what it means. But I have been listening to this since last few years,
17 transformative constitutionalism. But with my limited understanding, I could not
18 understand.

19 **JUSTICE B.V. NAGARATHNA:** No, no, we are not on transformative constitutionalism;
20 that is a good thing for the Constitution. We are on the fact that you said, 'public morality'.
21 Public morality is also not static, that is what I tried to say.

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

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

24 **CJI SURYA KANT:** 2 o'clock.

25 **TUSHAR MEHTA:** Right.

26 **CJI SURYA KANT:** Thank you.

27 <<<LUNCH BREAK>>>

28 **TUSHAR MEHTA:** Now I am on the constitutional morality. That is one of the very, very
29 important question which is framed because that is now started being used as a tool for
30 judicial review; so, whether jurisprudentially that is permissible or not. My Lord, 49, I will

1 not read, but this has come from Dicey and every judgment refers to, but Dicey says that
2 these are "constitutional conventions". That is how the origin of the concept started.
3 Thereafter, History of Greece, I'll leave. Please come to page 50. This concept has been
4 understood correctly by our court also, the way it was floated, as a political theory, of good
5 governance, not as a tool for judicial review. And that is, first judgment is **B. R. Kapoor**.
6 Please only have a look at the bold part at page 51. I will not repeat other judgments, but one
7 judgment is enough. "But the constitutional limits bind both the federal and the state organs
8 of the government, which limits our enforceable as a matter of law. Many important rules of
9 constitutional behaviour which are observed by the Prime Minister and Ministers, Members
10 of Legislature, judges and civil servants are contained neither in Acts nor in judicial
11 decisions, but such rules have been nomenclatured by the constitutional writers to be the
12 rules of the positive morality of the Constitution, and sometimes the authors provide the
13 name to be unwritten maxims of the Constitution. Rules of constitutional behaviour which
14 are considered to be binding by and upon those who operate the Constitution but which are
15 not enforced by the law courts nor by the presiding officers in the House of Parliament, etc.,
16 etc." Similar, My Lord is in the case of **Government of NCT of Delhi vs. Union of**
17 **India** correctly understood. Everything now thereafter, all judgments refer to Dr.
18 Ambedkar's speech on 4th November to trace constitutional morality as a part of
19 Constitution of India, which it is. I'm not disputing. The only dispute is whether it is a test for
20 either examining validity of a statute or examination of validity of any executive action. This
21 I may be permitted to read because this is thereafter, wrongly construed. "As to accusation
22 that the Draft Constitution... " Your Lordships get My Lord? My Lord the Chief Justice?

23 **CJI SURYA KANT:** Yes.

24 **TUSHAR MEHTA:** My Lord, this is 4th November, '48, Dr. Ambedkar. "As the accusation
25 that the draft Constitution has produced a good part of provisions of the Government of
26 India Act, I make no apologies. There is nothing to be ashamed of it in borrowing. It involves
27 no plagiarism. Nobody holds any patent right in the fundamental ideas of Constitution. What
28 I'm sorry about is that the provisions taken from the Government of India Act relate mostly
29 to details of administration. I agree that administrative details should have no place in the
30 Constitution. I wish very much that the Drafting Committee could see its way to avoid their
31 inclusion in the Constitution, but this is to be said on the necessity which justifies their
32 inclusion." Then Grote which is subsequently also quoted by judgments. Then I skip that
33 quotation. "By constitutional morality, Grote meant a paramount relevance for the forms of
34 the Constitution... ", I am sorry, " ...reverence to the forms of the Constitution, enforcing
35 obedience to authority acting under and within these forms, yet combined with the habit of
36 open speech of action subject only to define legal control and unrestrained censure of those

1 very authorities as to all their public acts combined too with a perfect confidence in the
2 bosom of every citizen amidst the bitterness of party contest that the forms of the
3 Constitution will not be lost." My Lord, at the end, the bold part. "It follows that it is only
4 where people are saturated with the constitutional morality, such as the one described by
5 Grote, the historian, that one can take the risk of omitting from the Constitution, details of
6 administration and leaving it for the Legislature to prescribe them. Thus, the question is, can
7 we presume such a diffusion of constitutional morality? Constitutional morality is not a
8 natural sentiment; it is a sentiment, ultimately. It has to be cultivated. We must realise that
9 our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil
10 which is essentially undemocratic. In these circumstances, it is wiser not to trust the
11 Legislature to prescribe forms of administration. This is the justification for incorporating in
12 the Constitution." He said, My Lord, that why there is a long Constitution? Because people
13 are not yet ready for the constitutional morality which Grote was talking about. The
14 reverence to institutions etc., etc. It was never a doctrine based upon which a legislation can
15 be tested.

16 Now, Your Lordships may come to next page. **Kesavananda Bharati**, My Lord,
17 understands or refers to the term "constitutional morality" and this would be very, very
18 important because large number of decisions are coming from High Courts and this
19 Honourable Court, where says, this provision is violative of constitutional morality. A
20 completely subjective term. That's the problem. And I'm not taking sides on this. Something
21 which can be constitutional morality in a particular provision for one honourable judge, may
22 perhaps not be so in another judge. Therefore, Your Lordships would never test either a
23 legislative enactment or an administrative act, based on vague concepts which are capable of
24 an elastic interpretation which is subjective and individualistic.

25 Now, My Lord, how constitutional morality is understood in **Kesavananda Bharati**, page
26 55. I have quoted Justice Jagmohan Reddy's view at page 55. This... Your Lordship gets, My
27 Lord? "This situation could not have been unknown to the framers, can be gathered from the
28 speech of Dr. Ambedkar who said constitutional morality...", My Lord, I'll skip, because I
29 have read that skipped. Then kindly see Justice Khanna, only the highlighted part. "This
30 would be a flagrant abuse of the power of amendment and I refuse to believe that public
31 opinion in our country would reach such an abysmal depth and the standard of political and
32 constitutional morality would sink so low that such an amendment would ever be passed."
33 So, constitutional morality means the morality which the Parliament will examine, the
34 Parliament will adopt, the Parliament will ultimately revere. Then similar, **S. P. Gupta**,
35 again a Constitution bench. "A convention is a rule of constitutional practice which is neither
36 enacted by Parliament as a formal legislation nor enforced by court, yet, its violation is

1 considered to be a serious breach of constitutional morality, leading to grave political
2 consequences to those who have indulged in such violations." My Lord, this is how the term
3 "constitutional morality" has been understood.

4 Now Your Lordships may kindly see at page 58, another judgment which is... It is a three
5 honourable judges, My Lord.

6 **CJI SURYA KANT: *Ashwini Upadhyay*?**

7 **TUSHAR MEHTA:** No, My Lord. ***Sriman Balasaheb Patil vs. Karnataka***
8 ***Assembly***, page 58. Part 3.

9 **CJI SURYA KANT:** 173?

10 **TUSHAR MEHTA:** Chapter... Disqualification, My Lord. Schedule 10.

11 **CJI SURYA KANT:** You are referring to para 173.

12 **TUSHAR MEHTA:** Yes. 149 and... Yes, yes, 173, yes, yes. My Lord, kindly see only para 150
13 of that judgment at page 59. "Before parting, having ascertained the ambit of the Speaker's
14 power, the only regret this bench has is with respect to the conduct and the manner in which
15 all constitutional functionaries have acted in the current scenario. Being a constitutional
16 functionary, the Constitution requires them and their actions to uphold constitutionalism
17 and constitutional morality." My Lord, this is how the term is understood and used, and that
18 is a very salutary term, that every constitutional functionaries, here it was Chief Minister,
19 Speaker, Leader of Opposition, Governor; so, the court said that everybody has forgotten
20 what the constitutional morality is.

21 Now, My Lord, starts emergence of a new trend which I have pointed out at page 61. Page 61.
22 My Lord, I have given other judgements also. I am not repeating, but it takes the term
23 "constitutional morality", the same way My Lord, as I have referred to other judgements.
24 Now My Lord, a new trend starts, which is Delhi High Court judgement, ***Naz Foundation***
25 ***vs. Government of NCT of Delhi***. This is the judgement of Delhi High Court which was
26 ultimately affirmed in ***Navtej Johar***, sodomy. "Thus, popular morality or public
27 disapproval of certain acts is not a valid justification for restriction of fundamental rights
28 under Article 21. Popular morality as distinct from a constitutional morality derived from
29 constitutional values is based on shifting and subjecting notions of right and wrong. If there
30 is any type of morality that can pass the test of compelling state interest, it must be
31 constitutional morality and not public morality." Then, My Lord, kindly see the bold part at
32 para 86 of the judgment. "In our scheme of things...", Your Lordship gets? "In our scheme of
33 things, constitutional morality must outweigh the argument of public morality, even if it be
34 the majoritarian view." My Lord, in case of a country governed by democratic principles, the

1 view always which is majoritarian will prevail. When it is question of testing a law, it is
2 always the majority which passes the law. How can you define morality based on this?
3 Thereafter, subsequently there is an improvement in the...

4 **JUSTICE AHSANUDDIN AMANULLAH:** Morality of the law being passed by majority
5 doesn't mean it is the majoritarian view. There is a distinction between a majoritarian view...

6 **TUSHAR MEHTA:** I bow to it. I will not go much into it. Yes, because that's not the
7 question raised. Now please see, My Lord, it is submitted, para 177. "Said judgement was
8 initially set aside by this honourable court. However, thereafter, followed by this honourable
9 court judgement in *Navtej Singh Johar* and *Joseph Shine* and Government of India
10 Act, each of which constitutional morality given expanded doctrinal scope." My Lord, please
11 have a look. This is cited in *Young Lawyers Association*, that is Sabarimala case. Kindly
12 see the second view of My Lord Justice Chandrachud. "The right guaranteed under Article
13 25(1) has been made subject to by the opening words of the Article itself, 'public order,
14 morality, health and other provisions of Part III of the Constitution'. All the three words, that
15 is 'order', 'morality' and 'health' are qualified by the word 'public'. Neither public order nor
16 public health will be at peril by allowing entry of women devotees of the age group of so-and-
17 so into Sabarimala temple for offering their prayers. As regards public morality, we must
18 make it absolutely clear that since the Constitution was not shoved by any external force
19 upon the people of this country, but was rather adopted and given by the people of this
20 country to themselves, the term 'public morality' has to be appositely understood as being
21 synonymous with constitutional morality." My Lord, host of judgments saying that the term
22 'morality' in 25, 19(2), 19(4) is societal morality. Here, My Lord, the first departure that it
23 should be constitutional morality which is subjective. "Further, these founding principles
24 must govern our constitutional notions of morality. Constitutional morality must have a
25 value of permanence which is not subject to fleeting fancies of every time and age. If the
26 vision which the founders of the Constitution adopted has to survive, constitutional morality
27 must have a content which is firmly rooted in the fundamental postulates of human liberty,
28 etc., etc."

29 Then, My Lord, comes *Navtej Singh Johar*. Please come to page 64. Page 131. This is
30 *Navtej Singh Johar* page 64, judgement para 131, only bold part. "The court has to be
31 guided by the conception of constitutional morality and not by societal morality. This is
32 where My Lord, now the shift takes place and the constitutional morality takes centre stage
33 as a tool for deciding validity of statutes, and constitutional morality not only takes a centre
34 stage... My apologies, My Lord. The constitutional morality not only takes a centre stage; it
35 now excludes societal morality. Cultural ethos, nothing. Constitutional morality as individual
36 subjective view would dictate. "Then we may hasten to add here that in the context of the

1 issue at hand, when a penal provision is challenged... " Your Lordships can skip that. 268.4,
2 "The primary objective...", that also Your Lordships can skip, it is more repetition. 268.5,
3 bottom, "Constitutional morality cannot be martyred at the altar of social morality." Please
4 have a look My Lord. Now social morality goes, replaced by a vague term called
5 'constitutional morality', which never had the meaning which the courts have started giving.
6 "... morality that can be allowed to permeate into the rule of law. The veil of social morality
7 cannot be used to violate fundamental rights to even a single individual, for the foundation of
8 constitutional morality rests upon the recognition of diversity that pervades the society." My
9 Lord, diversity is respected, pluralism is respected. How does, I'm posing a question to
10 myself, it becomes constitutional morality? It may be a constitutional principle.

11 Then next page, para 606. "Constitutional morality will impact upon any law which deprives
12 so-and-so individuals of their entitlement to a full and equal citizenship. After the
13 Constitution came into force, no law can be divorced from constitutional morality." Now, My
14 Lord, the laws are being tested based on this vague doctrine which never had any place in our
15 jurisprudence. "Society cannot dictate the expression of sexuality between consenting adults.
16 That is a private affair. Constitutional morality will supersede any culture or tradition." Now
17 this is, My Lord, the statement of law by five honourable judges which will be further
18 expanded so far as, My Lord, sexuality between two consenting adults is concerned in the
19 context of constitutional morality.

20 Now Your Lordships may kindly turn the page. My Lord, at this stage, two things I would like
21 Your Lordships to be... to assist and I would request Your Lordships to allow me to read this
22 fully for two reasons. One of the questions My Lords have formed is what is the extent and
23 what can be the judicial review? What is the scope of judicial review? And number two, what
24 is constitutional morality, whether it is societal morality or it is constitutional morality? My
25 Lord, in this context, there is a judgment of **Joseph Shine vs. Union of India** which I
26 have referred to at page 66.

27 **CJI SURYA KANT:** Page?

28 **TUSHAR MEHTA:** 66, My Lord. This is a case where, kindly, I'm little concerned as a
29 citizen, as a student of law and therefore, kindly read this little carefully. This was an
30 adultery provision in challenge. I have no difficulty; adultery provision is declared
31 unconstitutional. I'm not on the merits of the case. I'm on the treatment of the judicial
32 review and the constitutional morality, the questions which have directly arisen before a
33 nine-judge bench. And I request, I urge and I beseech Your Lordships to read this and
34 examine whether this can be a statement of law in Indian jurisprudence. Please have a look,
35 My Lord, page 68. "Gender, the discursive struggle." Your Lordship gets, My Lord? This is,

1 My Lord, please bear in mind, this is sexual choice of a woman. That is the subject matter.
2 "Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It
3 envisages the creation of a society where ideas of equality, dignity and freedom triumph over
4 entrenched prejudices and injustices. The creation of a just egalitarian society is a process,
5 etc." Then kindly see 143. "Throughout history the law has failed to ask the woman
6 question." I am unable to assist Your Lordships, what is woman question? But maybe My
7 Lord, gender question, I can, with my limited understanding.

8 **CJI SURYA KANT:** Where are you reading?

9 **TUSHAR MEHTA:** "The woman question was one of the greatest..."

10 **CJI SURYA KANT:** Para 143?

11 **TUSHAR MEHTA:** 143 at page 68. Your Lordship gets? My Lord the Chief Justice gets?

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

13 **TUSHAR MEHTA:** "Throughout history the law has failed to ask the woman question."
14 (The woman question was one of the greatest issues that occupied the middle of the 19th
15 century, namely the social purpose of women. It is used as a tool to inquire into the status of
16 women in law and how they interact with and are affected by it. Some Lady Catherine. T so-
17 and-so, Feminist legal methods, Harvard Law Review). "It has failed to interrogate..." Kindly
18 now see, what this lady in Harvard Law Review says is quoted. I am reading it because it is
19 part of the judgment of this court, which is a law under 141 and it binds 140 crores Indians,
20 My Lord. Therefore, I am reading it. "It is not the common morality of the state at any..."

21 **TUSHAR MEHTA:** Sorry, My Lord. I stand corrected. After quoting, My Lord, this is the
22 statement of law by this court; so, directly binding on me as a citizen. "It is not the common
23 morality of the state at any time in history, but rather constitutional morality which must
24 guide the law. In any democracy, constitutional morality requires the assurance of certain
25 rights that are indispensable for free, equal and dignified existence of all members of society.
26 A commitment to constitutional morality requires us to enforce...", My Lord, this is what has
27 been done even in *Sabarimala*; please read it, "...requires us to enforce the constitutional
28 guarantee to equality before law non-discrimination on account of sex and dignity, all of
29 which are affected by the operation of Section 497." Now, please come to next page, para 152
30 of the judgment. My Lord, some...

31 **CJI SURYA KANT:** This you read is part of the Article?

32 **TUSHAR MEHTA:** No, it is a finding, My Lord. It's a statement of law by this honourable
33 court. The highlighted bold part is a statement of law after quoting Katherine Bartlett. Now

1 152. "The decisions of the US Supreme Court bearing on the issue of privacy has been
2 analysed in an incisive article..."

3 **CJI SURYA KANT:** Page?

4 **TUSHAR MEHTA:** I'm sorry My Lord. Page 69, para 188, where I have quoted the same
5 judgment, para 152.

6 **CJI SURYA KANT:** Of the US Supreme Court.

7 **TUSHAR MEHTA:** "The decisions...", this is the judgment. Now judgment starts, the
8 judgment of the court. "The decisions of the US Supreme Court bearing on the issue of
9 privacy have been analysed in an incisive article titled 'For better or for worse; adultery,
10 crime and Constitution'." Martin Siegel, so and so, so and so, he represents three way in
11 which adultery implicates the right to privacy. "The first is that adultery must be viewed as a
12 constitutionally protected marital choice. Second, that certain adulterous relationships are
13 protected by the freedom of association, and finally, that adultery constitutes an action which
14 is protected by sexual privacy. Therefore, social morality." Because it is done in private.
15 Adultery is in private. Justice Scalia says that none of these activities I have seen, which is
16 being performed on a stage. I will come to that.

17 Then, My Lord, 154. "Siegel points that a decision to commit adultery is a decision relating to
18 marriage and family relationships, and therefore, falls within the domain of protected private
19 choices. He observes that the essence of the offense is in fact, the married status of one of the
20 actors and mere fact that commission of the act consisted of a mere sexual act or a series of
21 them is legally irrelevant. If the argument that adultery, though unconventional, is an act
22 related to marriage and therefore, fundamentally private is accepted, then it deserves equal
23 protection." Siegel cites so and so. And thereafter, some judgments are cited. Kindly turn the
24 page, page 70. "The mere fact..." Your Lordship gets?

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

26 **TUSHAR MEHTA:** Now this is the court's observation. "The mere fact that adultery is
27 considered unconventional in society..."

28 **CJI SURYA KANT:** Just a minute, Mr. Solicitor, because Siegel is... this Siegel, what is his
29 name?

30 **TUSHAR MEHTA:** Siegel, My Lord, it seems... I have Martin J. Siegel. I have come
31 across...

32 **CJI SURYA KANT:** He has been quoted like second Ambedkar almost.

1 **TUSHAR MEHTA:** Because I have seen, My Lord, Justice Douglas, Justice Frankfurter,
2 Justice Denning being quoted, but articles of some, unknown would be very difficult because
3 that becoming part of the judgment binds us. His views are now part of the judgment and
4 this views are accepted and followed by Your Lordships on the ground of constitutional
5 morality. My Lord, please come to page 70. He is a practicing lawyer in America. "The mere
6 fact...", Your Lordship gets? The top.

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

8 **TUSHAR MEHTA:** "The mere fact that adultery is considered unconventional in society
9 does not justify depriving it of privacy protection. The freedom of making choices also
10 encompasses the freedom of making an unpopular choice." In a married relationship, I can
11 have adulterous relation because that is my private choice. It may be unpopular or
12 unconventional. This was articulated by Justice Blackman in the dissent in Harvard vs... I'm
13 sorry, ***Bowers vs. Hardwick***. But there is something more... So, the honourable court
14 cites ***Bowers vs. Hardwick***. This was a decision regarding...

15 **CJI SURYA KANT:** Viewpoint or subjective viewpoint of some professors, some writers,
16 some authors, some... whosoever he may be, we do not know, we have no fair idea about this
17 eminence. That his view has been followed, but ultimately, the judgment as such is not now
18 under question. The judgment...

19 **TUSHAR MEHTA:** Judgement... kindly... No, My Lord, I'm saying something. Please have
20 a look at page 71.

21 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, what the Honourable Chief Justice is
22 indicating is, these are observations of one of the honourable justices, but the ratio on the
23 basis of which ***Joseph Shine*** declared adultery...

24 **TUSHAR MEHTA:** But why are we shying away from reading... My Lord, allow me to read
25 it. My Lord, I'm saying with a sense of responsibility.

26 **JUSTICE JOYMALYA BAGCHI:** It's a... issue of gender discrimination where the
27 equality in gender has not been respected in the law.

28 **TUSHAR MEHTA:** My Lord...

29 **JUSTICE JOYMALYA BAGCHI:** Human has been deemed to be in the sense, a property,
30 not being *sui juris* in the matter of initiation of prosecution.

31 **TUSHAR MEHTA:** My Lord, allow, with a sense...

32 **JUSTICE JOYMALYA BAGCHI:** Fundamental issue as we read it.

- 1 **TUSHAR MEHTA:** With a sense of responsibility, allow me to read it and read it further.
2 My Lord, 497 could have been declared unconstitutional on the ground of Article 14, but it is
3 arbitrary, discriminatory.
- 4 **JUSTICE JOYMALYA BAGCHI:** 18 and 14.
- 5 **TUSHAR MEHTA:** Now...
- 6 **JUSTICE JOYMALYA BAGCHI:** In fact, it has been declared so. These are certain
7 observations of one of the honourable justices as His Lordship then was.
- 8 **TUSHAR MEHTA:** They are not... Kindly allow me, My Lord. Kindly allow me. Why should
9 we not, My Lord, I must point this out.
- 10 **JUSTICE B.V. NAGARATHNA:** You can say that for enforcement of fundamental rights,
11 it cannot be... it need not be on the touchstone of constitutional morality. Constitutional
12 morality is in the realm of constitutional governance; it's not in the realm...
- 13 **TUSHAR MEHTA:** It's my submission. I have something more to say; allow me to finish
14 this. Allow me to finish this.
- 15 **JUSTICE B.V. NAGARATHNA:** The approach you...
- 16 **TUSHAR MEHTA:** I'm grateful, but allow me to finish.
- 17 **JUSTICE B.V. NAGARATHNA:** It may not be palatable to you, but then that is not the
18 subject matter as such here.
- 19 **TUSHAR MEHTA:** It is, My Lord...
- 20 **JUSTICE B.V. NAGARATHNA:** Morality under Article 25 and 26.
- 21 **TUSHAR MEHTA:** I'm coming to constitutional morality only, and My Lord, I would
22 wish... allow me, My Lord, let me. Just have some... I'll complete before 04:00.
- 23 **JUSTICE M.M. SUNDRESH:** Yes, please go on.
- 24 **TUSHAR MEHTA:** I want nine honourable judges to read whether this part which binds
25 me is a correct statement of law or not.
- 26 **JUSTICE JOYMALYA BAGCHI:** Our questionnaire has placid view.
- 27 **TUSHAR MEHTA:** Yes. My Lord page 71, "Reflecting..." please allow me, please allow me,
28 My Lord, "Reflecting on the relationship..." My Lord, kindly read. Page 71. There is a request
29 after that; please allow me to complete and I'll make a prayer. There is a prayer. "Reflecting

1 on the relationship between marital privacy and associational freedom, Siegel remarks, the
2 heterogeneity of experience resulting in a variety of... "

3 **CJI SURYA KANT:** [INAUDIBLE]

4 **TUSHAR MEHTA:** Pardon me? My Lord, page 71, bold part. Somewhere in the middle, the
5 bold part, page 71. Yes. "Reflecting on the relationship between marital privacy and
6 associational freedom...", this is, My Lord, considered and followed in *Sabarimala*;
7 therefore, I'm requesting, "...Siegel remarks, the heterogeneity of experience resulting in a
8 variety of choices necessarily include", the court says, "adulterous union which must be
9 protected since it is unrealistic to expect all individuals to conform to society's idea of
10 sexuality because...", quoted part, I'll skip. Then "Catharine MacKinnon...", some New York
11 University, "implores us..." from Siegel, Siegel's article, that is the... "Catharine MacKinnon
12 implores us to look more critically at the reality of this family sphere termed personal and
13 view the family as a crucible of women's unequal status and subordinate treatment sexually,
14 physically, economically and civilly."

15 Now 182. Now this is the finding of the court. "Implicit in seeking to privilege the fidelity of
16 women in a marriage..." Now court decides on fidelity. "...is the assumption that a woman
17 contracts away her sexual agency when entering into the marriage; that a woman by
18 marriage consents in advance to sexual relations with her husband or to refrain from sexual
19 relations outside marriage without the permission of her husband is offensive to liberty and
20 dignity." This is followed in *Sabarimala*. The liberty and dignity of women, that when a
21 woman gets married, or for that matter, a man gets married, we barter or mortgage our
22 choice of having sexual relation with someone else, except husband or the wife. That's the
23 finding. That's the law declared by this court.

24 Further, My Lord. Now 194 and there is something very, very serious which I have... I have a
25 very serious objection. Nivedita Menon is quoted twice. I don't wish to... JNU professor,
26 known for her views that Indian state is illegally occupying two states, etc., etc., I'm not going
27 into it, but now it is... it has the status of being a part of Supreme Court judgment, which is a
28 court of record.

29 **CJI SURYA KANT:** If these Harvard professors who have nothing to do with Indian
30 society have occupied so much space, what is wrong with an Indian professor?

31 **TUSHAR MEHTA:** Your Lordships are right. I respectfully bow down. I respectfully bow
32 down, My Lords.

33 **JUSTICE B.V. NAGARATHNA:** Because even without all this the validity of the section
34 could have been tested.

- 1 **TUSHAR MEHTA:** I'm not... I'm not on validity.
- 2 **CJI SURYA KANT:** Validity is struck down.
- 3 **TUSHAR MEHTA:** I'm not on validity.
- 4 **CJI SURYA KANT:** [INAUDIBLE]
- 5 **TUSHAR MEHTA:** It remains invalid. I am not on validity. But this view is the view which
6 is foundation of *Sabarimala* that dignity is dignity based on gender. Could you please have
7 a look? 218. This is again the finding of the court and I'll read from *Sabarimala*. 218. "This
8 Court has recognised sexual privacy as a natural right protected under the Constitution. To
9 shackle the sexual freedom of a woman and allow criminalisation of consensual relationship
10 is denial of this right. Section 497 denudes a married woman of her agency and identity,
11 employing the force of law to preserve a patriarchal conception." My Lord, fidelity, is it a
12 patriarchal conception? It applies to me also, it applies to man also; it's not applicable to...
13 fidelity is not expected only from women " ...and patriarchal conception of marriage..."
- 14 **CJI SURYA KANT:** Because it was a one-sided offence, the provision was on the face of it,
15 unconstitutional.
- 16 **TUSHAR MEHTA:** It could have been Article 14, I concede.
- 17 **CJI SURYA KANT:** Four line could be struck down.
- 18 **TUSHAR MEHTA:** It should have been. It should have been.
- 19 **CJI SURYA KANT:** Offended to me. Only against woman.
- 20 **TUSHAR MEHTA:** Then further. Then further. "Infidelity was born on the day that natural
21 flows of sexual desire were bound into the legal and formal permanence of marriage. In the
22 process of ensuring male control over progeny and property, women were chained with the
23 fetters of fidelity." My Lord, fidelity expected out of the marriage is termed by this
24 honourable court and which is a court of record, as a shackles of sexuality? I am arguing
25 societal morality versus constitutional morality. Is it, My Lord, I'm putting a question to
26 myself, a societal morality? This is not the jurisprudence of our country; it's not
27 jurisprudence of my country and I don't think there would be any dispute on that. Then
28 further, "Constitutional protections and freedoms permeates every aspect of citizen's life.
29 The delineation of private or public spheres become irrelevant as far as the enforcement of
30 constitutional rights is concerned; therefore, even intimate personal sphere of marital
31 relations is not exempt from constitutional scrutiny. The enforcement of forced female
32 fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and

1 equality." This is the right which is the foundation of **Sabarimala**. Right to dignity and
2 equality. Now...

3 **JUSTICE B.V. NAGARATHNA:** The institution of marriage in India is based on fidelity
4 of not only by the wife, but the husband also.

5 **TUSHAR MEHTA:** Yes. And you say it's patriarchal? It applies to man equally. You take
6 that oath, whether it's Christian marriage, whether it's *nikah*, whether it's *saptapadi*, you
7 take oath to remain faithful to each other. When I marry, I do not mortgage my choice of
8 having sexual relation with someone else. The society, the norms, the cultural ethos accepts
9 that fidelity from me. Otherwise, I don't marry, and do whatever I do.

10 **CJI SURYA KANT:** Even if you ignore the societal or cultural norms, let us not bring these
11 principles while testing that provision. The point is that how can there be, that something an
12 offence for woman and no offense for the man, on that ground, particularly when the...it's a
13 mutual...

14 **TUSHAR MEHTA:** That is wrong, My Lord. I'm not saying that you please revisit that, but
15 this is considered to be a part of dignity of a woman. And dignity of the woman is the ground
16 for **Sabarimala**. Now My Lord, I have three problems with this judgement and I am
17 requesting Your Lordship, there is...

18 **JUSTICE B.V. NAGARATHNA:** In other words, you are saying this is the foundation.

19 **TUSHAR MEHTA:** Yes, it is foundation.

20 **CJI SURYA KANT:** This para 189 also, you are saying?

21 **TUSHAR MEHTA:** Yes, My Lord, 189. "The judgement, in **Joseph Shine** proceeds on a
22 premise which is not only against the societal morality but even against constitutional
23 morality, if Indian Constitution is being considered. The judgement of **Joseph Shine** in
24 para 152 and 154 not only cites, fully relies upon and makes a part of the judgement, one
25 professor cum lawyer Martin Seigal, which binds the entire country, etc." There are two other
26 problems. My Lord...

27 **JUSTICE M.M. SUNDRESH:** Now if you go by this, the presumption of paternity also will
28 go.

29 **TUSHAR MEHTA:** It has to. Because a woman can say, or a man can say that I am not
30 supposed to... it's a private, intimate affair.

31 **JUSTICE M.M. SUNDRESH:** It is not may presume, but it is not shall presume. It's a
32 conclusive proof unless, though it is debatable even otherwise. Now it will go.

- 1 **JUSTICE:** It will become need not be presumed.
- 2 **TUSHAR MEHTA:** My Lord I had...
- 3 **JUSTICE B.V. NAGARATHNA:** Institution of marriage and monogamy is precisely for
4 the reason that there should not be multiple partners.
- 5 **TUSHAR MEHTA:** May not be. That's the societal morality. We cannot divorce our
6 jurisprudence from that societal morality.
- 7 **JUSTICE ARAVIND KUMAR:** In the entire judgement, there is no Indian philosopher
8 quoted?
- 9 **TUSHAR MEHTA:** Except Nivedita Menon.
- 10 **JUSTICE ARAVIND KUMAR:** All right.
- 11 **TUSHAR MEHTA:** Now, My Lord, the problem is, the court quotes ***Bowers vs.***
12 ***Hardwick.*** I'm not going into the details. The court quotes minority judgment in Lord
13 Blackman in ***Bowers vs. ...***
- 14 **CJI SURYA KANT:** Partly blame can go to the law clerks also. They do lot of...
- 15 **TUSHAR MEHTA:** I have my limitations, My Lords, I will not say that because majority
16 view takes the view which I am canvassing, which, I would say, within the limitations which I
17 have, has escaped the attention of the bench. The majority view has escaped the attention of
18 the bench and therefore, minority view is quoted without quoting the majority view. Now,
19 My Lord, comes this very view which the learned judge relies upon. This ***Bowers vs.***
20 ***Hardwick*** minority view is quoted, My Lord, was tested again in ***Lawrence*** case where
21 there is a beautiful... two minority opinions, five versus four of the US Supreme Court, I have
22 not cited any US judgment.
- 23 **CJI SURYA KANT:** There was one very interesting, if I recollect, by John Roberts, Justice.
- 24 **TUSHAR MEHTA:** Chief Justice Roberts. My Lord, please come to that directly. I have
25 cited, My Lord. Page 76. But before that can I show one page of Scalia? Justice Antonin
26 Scalia. It's five versus four. The first case was ***Sodomy*** and Justice Scalia and others
27 dissented. And please see, My Lord, what Justice Scalia says at page 75. Then immediately
28 I'm obliged to My Lord the Chief Justice. Second para. "Next, the court makes the claim."
29 Here 'court' would mean the majority. It was a thin majority of five versus four.
- 30 **JUSTICE JOYMALYA BAGCHI:** But, Mr. Solicitor, when you were speaking of English
31 and American courts, morality, *vis-à-vis* sexual acts like sodomy, etc., we should also bear in

1 mind that the idea of sodomy or Gomorrah is a Victorian concept of immorality. In India, the
2 traditional moral thoughts were not at all anti-libertarian in choice.

3 **TUSHAR MEHTA:** I would not, very respectfully, respond to that, because my views are
4 different, but that's not relevant.

5 **JUSTICE JOYMALYA BAGCHI:** It's not our view or your view; it's...

6 **TUSHAR MEHTA:** No, no, whether Indian view...

7 **JUSTICE JOYMALYA BAGCHI:** It's a historical...

8 **TUSHAR MEHTA:** No, whether Indian view is different or not.

9 **JUSTICE JOYMALYA BAGCHI:** If you see in Justice Nariman's judgment saying that
10 these are Victorian morals, they were actually imported into the Indian liberal society.

11 **TUSHAR MEHTA:** I... That is view of Justice Nariman with which I respectfully disagree
12 because that has always been immoral even in Indian context.

13 **JUSTICE JOYMALYA BAGCHI:** Yeah.

14 **TUSHAR MEHTA:** But let's not go into it. I'm...

15 **CJI SURYA KANT:** If you logically deduce from this, how will one file a petition for divorce
16 on the... on the ground of adultery? Because under the... on the touchstone of the
17 Constitution, if you say that it's part of liberty, can anyone...?

18 **TUSHAR MEHTA:** It's not a cruelty, because I was exercising my choice. It was a question
19 of my dignity, my bodily autonomy.

20 **JUSTICE B.V. NAGARATHNA:** My learned Brother is saying divorce on the ground of
21 adultery can never rise.

22 **TUSHAR MEHTA:** Can never rise, exactly that's what I am responding, that a person
23 would say that, there is no question of adultery because it's... that's my dignity.

24 **JUSTICE M.M. SUNDRESH:** Notwithstanding adultery, I would like to continue with
25 the... with the relationship,

26 with the husband-wife relationship.

27 **CJI SURYA KANT:** The defence might be that this is my constitutionally protected right.

28 **JUSTICE M.M. SUNDRESH:** Right. Protected right.

29 **TUSHAR MEHTA:** Protected right. So, it cannot be a ground on which you grant divorce.

1 **JUSTICE M.M. SUNDRESH:** Yes. Whatever the provision you bring in, it can't go against
2 the Constitution.

3 **TUSHAR MEHTA:** Cannot. Now, My Lord, I am not now on *Sodomy* being good, bad,
4 moral, immoral. I'm on the judicial review, and that is what Justice Scalia and Chief Justice
5 Roberts very beautifully explained. It was mere coincidence that this was a case of sodomy.
6 Please see page 75, unnumbered para 2. "Next the court makes the claim... " court means
7 majority, five; Scalia is four, "... the claim, again unsupported by any citations that laws
8 prohibiting sodomy do not seem to have been enforced against consenting adults acting in
9 private. The key qualifier here is 'acting in private'. Since the court admits that sodomy laws
10 were enforced against consenting adults, although the court contends that prosecutions were
11 infrequent."

12 **CJI SURYA KANT:** Mr. Solicitor, from where you started?

13 **TUSHAR MEHTA:** My Lord, I'm sorry, page 75, second para, unnumbered paragraph,
14 "Next, the court..."

15 **CJI SURYA KANT:** 75.

16 **JUSTICE JOYMALYA BAGCHI:** Para 1-9.

17 **TUSHAR MEHTA:** Yes. "Next the court makes...", the court means the majority, five
18 judges versus four. "Next, the court makes the claim, again unsupported by any citations that
19 laws prohibiting sodomy do not seem to have been enforced against consenting adults acting
20 in private. The key qualifier here is 'acting in private', since the court admits that sodomy
21 laws were enforced against consensual consenting adults, so-and-so. I do not know what
22 'acting in private' means. Surely consensual sodomy, like heterosexual intercourse, is rarely
23 performed on stage. Then realising the fact that the court instead says," that is the majority,
24 "we think that our laws and traditions in the past half century are of most relevance here.
25 These references show an emerging awareness that liberty gives substantial protection to
26 adult persons in deciding how to conduct their private lives in matters pertaining to sex."
27 Then skip that.

28 Next, "The court's discussion of these foreign views ignoring of course, the many countries
29 that have retained criminal prohibition on sodomy, is therefore, meaningless dicta,
30 dangerous dicta. However, since this court should not impose foreign moods, fads or
31 fashions on Americans." I emphatically rely upon it, My Lord, the converse is also true.
32 "Today's opinion is...", now, My Lord, why should the court not go into it, in a judicial review
33 discussion. "Today's opinion is the product of a court which is the product of law profession
34 culture that has a largely signed on the so-called homosexual agenda, by which I mean the

1 agenda promoted by some homosexual activists directed at eliminating the moral
2 opprobrium that has traditionally attached to homosexual conduct." Please note, "I noted in
3 an earlier opinion the fact that American Association of Law Schools, to which any reputable
4 law school must seek to belong, excludes membership, any school that refuses to ban from its
5 job interview facilities a law firm, no matter how small, that does not wish to hire a
6 prospective partner." The court says this emanates from eminent American law schools. This
7 idea. There is a narrative building which starts. "It is clear from this that the court has taken
8 sides in the culture war, departing from its role of assuring as neutral observer that
9 democratic rules of engagement are observed."

10 Last three lines. "So imbued is the court with the law profession's anti-homosexual culture
11 that it is seemingly unaware that attitudes of that culture are not obviously mainstream that
12 in most states what the court calls discrimination against those who engage in so-and-so is
13 perfectly legal."

14 Then My Lord red part, "But persuading one...", My Lord the court said that remedy is, you
15 persuade your fellow human beings to accept your view, like in religion, that you persuade
16 them that permit entry of women if there is some logic, etc. Don't do it by a judicial fiat.

17 My Lord, now as My Lord the Chief Justice kindly said, Chief Justice John Robert's minority
18 view. Here the learned Chief Justice is in minority, but My Lord, this words will haunt all of
19 us, after reading it. How the learned Chief Justice perceives this kind of a situation being
20 examined in a court on morality grounds, forgetting the morality at all. Please see My Lord.
21 "Today, however, the court takes the extra...", court means majority, "...extraordinary step of
22 ordering every state to license and recognise same sex marriage. Many people will rejoice at
23 this decision and I begrudge none for their celebration. But for those who believe in a
24 government of laws, not of men, the majority's approach is deeply disheartening. Supporters
25 of so and so have achieved considerable success, persuading their fellow citizens through the
26 democratic process to adopt their view, that ends today. Five lawyers...", My Lord, that is the
27 five honourable judges and majority. "Five lawyers have closed the debate and enacted their
28 own wisdom of marriage..."

29 **CJI SURYA KANT:** Vision of marriage.

30 **TUSHAR MEHTA:** Sorry, "...vision of marriage as a matter of constitutional law. The
31 majority's decision is an act of will, not legal judgment. The right it announces has no basis
32 in the Constitution or this court's precedent. The majority disclaims judicial caution and
33 omits even a pretence of humility, openly relying on its desire to remake society according to
34 its own new insight into the nature of injustice, *ante* at so and so. As a result, the court
35 invalidates the marriage laws of more than half the states and orders the transformation of a

1 social institution, that has formed the basics of human society for millennia from the
2 Kalahari Bushmen and the Huns, Chinese, Aboriginals to the modern, the Carthaginians and
3 the Aztecs." Now the court Chief Justice says, "Just who do we think we are?"

4 These words, My Lord, would be haunting. "Who do we think?" Are we social reformers as
5 lawyers? And he says, His Lordship says in a judicial review, "Who do we think we are?" Five
6 lawyers. And please see further. "It can be tempting for judges to confuse our own
7 preferences with the requirements of law, but this court has been reminded throughout our
8 history, the Constitution is made for people of fundamentally different views. Then
9 accordingly, courts are not concerned with the wisdom of policy legislation, etc."

10 Please see the red part. "And it answers that question based not on neutral principles of
11 constitutional law, but its own understanding of what freedom is and must become. I have
12 no choice but to dissent." See the vigour of the dissent. "Understand well, what this dissent is
13 about. It is not about whether in my judgment the institution of marriage should be changed
14 to include same sex couples. It is instead about whether in a democratic republic that
15 decision should rest with the people acting through their elected representatives or with five
16 lawyers who happen to hold commissions authorising them to resolve legal disputes
17 according to law. The Constitution leaves no doubt about the answer, allowing unelected
18 federal judges to select which unenumerated rights rank as fundamental and to strike down
19 state laws on the basis of that determination raises obvious concerns about the judicial role.
20 Our precedents have accordingly insisted that judges exercise the utmost care in identifying
21 implied fundamental rights...", this right to dignity based on sexuality, "...implied
22 fundamental rights, lest the liberty protected by the Due Process Clause be subtly
23 transformed into the policy preferences of the members of this court." His Lordship has not
24 minced words. Further, thereafter, in this also, My Lord, this was a marriage case; Justice
25 Scalia pens a dissent and please see the bold part on the foot of this page 77. "Take for...", I'll
26 read the full. "Judges are selected..."

27 **CJI SURYA KANT:** Just read through highlighted lines of... don't need to... also.

28 **TUSHAR MEHTA:** "Over and over, the majority exalts the role of Judiciary in delivering
29 social change. Those who founded our country would not recognise the majority's conception
30 of judicial role." My Lord, if these judgments, *Navtej Johar*, *Joseph Shine*, etc., were to
31 be read by Dr. Ambedkar or Kanhaiyalal Munshi or Alladi Krishnaswamy Iyer, I do not know
32 whether they would be surprised, shocked or they would say that this is what we wanted. I
33 believe, they did not want this to happen.

34 But My Lord, now, Justice Scalia, second para. "Judges are selected precisely for their skill as
35 lawyers. Whether they reflect the policy views of a particular constituency is not and should

1 not be relevant." Constituency means a particular point of view. "Not surprisingly then,
2 federal Judiciary is hardly a cross-section of America. Take, for example this court which
3 consists of only nine men and women, all of them successful lawyers who studied at Harvard
4 or Yale Law School. Four of the nine are natives of New York City, eight of them grew up in
5 East and West Coast states, only one hails from the vast expanse in between, not a single
6 South-Westerner or even to tell the truth, a genuine Westerner. California does not count.
7 Not a single Evangelical Christian, a group that comprises about one quarter of America, or
8 even a Protestant of any denomination. The strikingly unrepresentative character of the body
9 voting on today's social upheaval would be irrelevant if they were functioning as judges,
10 answering the legal question whether the American people had ever ratified a constitutional
11 provision that was understood to proscribe the traditional definition of marriage. But of
12 course, the Justices in today's majority are not voting on that basis. They say they are not.
13 And to allow the policy question of same sex marriage to be considered and resolved by a
14 select, partisan, highly unrepresentative panel of nine is to violate a principle even more
15 fundamental than no taxation without representation, i.e., no social transformation without
16 representation." My Lord, I am respectfully urging, Your Lordships is a court of plenary
17 jurisdiction.

18 **CJI SURYA KANT:** What can be the outcome of these proceedings, that we do not know,
19 but these nine judges will never be criticised for this. For non-representation. This criticism,
20 at least, will not be invited by us.

21 **JUSTICE M.M. SUNDRESH:** Thanks to the Chief Justices.

22 **JUSTICE B.V. NAGARATHNA:** Thanks to the Chief Justices. Principle of [INAUDIBLE].

23 **TUSHAR MEHTA:** No, no, My Lord.

24 **CJI SURYA KANT:** We do not know about outcome. Outcome can be wrong also.

25 **TUSHAR MEHTA:** No, any... anything, My Lord, but there are only three reasons and I'll
26 switch over to the next point. (a), Your Lordships are a court of plenary jurisdiction.

27 **JUSTICE B.V. NAGARATHNA:** By hinting about the composition of this bench, you can't
28 say no representative...

29 **TUSHAR MEHTA:** It is representative, My Lord. And none of them have come from
30 Harvard and Yale and this reflects those who have risen from the ranks and they have played
31 on the streets; so, we know what the social morality is. Your Lordships have the plenary
32 power. Your Lordships are a court of record. Court of record not only enables but makes it a
33 duty. If this is the statement of constitutional law, it's to be dealt with properly, but based on
34 this fundamental principle, the dignity of a woman, the implied fundamental right is the

1 foundational basis of ***Sabarimala***. Therefore, Your Lordships will have to necessarily
2 pronounce upon the validity, correctness or otherwise, of these observations.

3 Now, My Lord, I'll come to next subject. My Lord, page 82. I'm not taking Your Lordship...
4 last part, I'm not even reading. I'm just giving oral propositions because I know it need not
5 be read, Your Lordships are fully aware. "Blanket reliance on international judgment is
6 impermissible." I have given the judgments. It's at page 82. I have given all the judgments on
7 the point. My Lord, please, as a combination as a, sitting as nine judge combination, please
8 hold this, that blanket reliance is impermissible and I'll read only one judgment in
9 ***Kesavananda Bharati***. My Lord, please see page 83, para 1107.

10 **CJI SURYA KANT:** Mr. Solicitor, you have already qualified by using the blanket. There is
11 no controversy; there can't be any blanket...

12 **TUSHAR MEHTA:** Yes, please.

13 **CJI SURYA KANT:** You have shown that in the backdrop of a factual position that we
14 follow...

15 **TUSHAR MEHTA:** The only thing...

16 **CJI SURYA KANT:** ...certain principles. Sometimes we don't find our own precedent
17 available then we... as a guideline we take it.

18 **TUSHAR MEHTA:** But My Lord, for the purpose of some issues, it's always preferable to
19 avoid. My Lord then page 91.

20 **CJI SURYA KANT:** Persuasive value.

21 **TUSHAR MEHTA:** Page 91. Judicial review on... My Lord, unfortunately, the court was not
22 assisted with the other two judgments ***Lawrence*** and ***Obergefell*** which I read. The court
23 should have been assisted, My Lords. Court's therefore, it seems that the court's attention
24 has missed, because of our inability to assist correctly.

25 **JUSTICE AHSANUDDIN AMANULLAH:** Our approach is better. We write our own
26 separate judgments, but we don't criticise the other judgments.

27 **TUSHAR MEHTA:** That's true. That's correct. That's a healthy thing.

28 **JUSTICE AHSANUDDIN AMANULLAH:** It's more mature and more restrained.

29 **TUSHAR MEHTA:** That's a healthy thing. This is, I found, happens only in America.

30 **JUSTICE AHSANUDDIN AMANULLAH:** This has no relevance there.

1 **TUSHAR MEHTA:** Your Lordships are right. Absolutely right. My Lords, this is... I will not
2 say anything right now, but I have written something on that. This is only in America that
3 there is a response to the majority by the minority, and one more thing; there is a Rejoinder
4 by the majority to that minority.

5 **JUSTICE AHSANUDDIN AMANULLAH:** But it is on the topic. I've also done that. I
6 have also given a Rejoinder in a differing view, but on the merits, not on the comments of the
7 mind thought of a person commenting. This is a personal comment. We are more mature as
8 a system.

9 **TUSHAR MEHTA:** My Lord, absolutely right. Our system is more matured and it
10 maintains the dignity of the highest court of the country. It should not be seen that the
11 judges are fighting *inter se* and saying anything.

12 **JUSTICE AHSANUDDIN AMANULLAH:** No, that's what...

13 **TUSHAR MEHTA:** But this is the position. In America, this is the position but...

14 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.

15 **JUSTICE B.V. NAGARATHNA:** On an intellectual level, see, that is why a dissent is
16 always longer than the main judgment.

17 **TUSHAR MEHTA:** Dissent is My Lord...

18 **JUSTICE B.V. NAGARATHNA:** With respect to...

19 **TUSHAR MEHTA:** Call for the brooding spirit of the future generation.

20 **JUSTICE AHSANUDDIN AMANULLAH:** After the viewpoint.

21 **JUSTICE B.V. NAGARATHNA:** Yes, you have to counter that.

22 **JUSTICE JOYMALYA BAGCHI:** But here Mr. Solicitor, you are quoting an American
23 Chief Justice.

24 **TUSHAR MEHTA:** Yes, yes, My Lord. I have never quoted any American judgment, but
25 this...

26 **JUSTICE JOYMALYA BAGCHI:** No, saying... when you use that word, "the brooding
27 spirit of a future society."

28 **JUSTICE B.V. NAGARATHNA:** Justice Hughes.

29 **TUSHAR MEHTA:** My Lord, I think Justice...

30 **JUSTICE B.V. NAGARATHNA:** Justice Hughes.

- 1 **JUSTICE JOYMALYA BAGCHI:** Hughes.
- 2 **TUSHAR MEHTA:** Yeah, Hughes. Justice Hughes.
- 3 **JUSTICE B.V. NAGARATHNA:** Evans Hughes.
- 4 **JUSTICE JOYMALYA BAGCHI:** Quoted by Justice Khanna in his dissent, but that again
5 is an American Chief Justice.
- 6 **TUSHAR MEHTA:** It is, but whenever we see the law...
- 7 **CJI SURYA KANT:** Justice Khanna.
- 8 **TUSHAR MEHTA:** But whenever we see law of dissent, it starts with this; Academic Law
9 of Dissent, it starts with this. And in some of the countries, My Lord...
- 10 **JUSTICE JOYMALYA BAGCHI:** We should always look for the best from everywhere,
11 and not be a slave of anywhere.
- 12 **TUSHAR MEHTA:** I would, My Lord, put it differently.
- 13 **JUSTICE B.V. NAGARATHNA:** East or the West.
- 14 **TUSHAR MEHTA:** We should...
- 15 **JUSTICE B.V. NAGARATHNA:** Whichever is the best.
- 16 **TUSHAR MEHTA:** We should expect light from every quarter of the world provided we are
17 in dark. Let us not reverentially follow something coming from the West and introduce it
18 selectively in our jurisprudence.
- 19 **JUSTICE B.V. NAGARATHNA:** Now you are commenting Chief Justice Frost, I mean
20 Roberts to us now.
- 21 **TUSHAR MEHTA:** Now, My Lord, page 91. Your Ladyship is right. "Judicial review on
22 vague notions", My Lord, not permitted. And page 96, I have given one more nuanced
23 interpretation. Because My Lord, we as, our culture is, we generally attempt to be polite and
24 express ourselves in the most humble way. These are the views which are no holds barred.
25 There is no mincing of words, that who do we think we are? Are we here to reform the
26 societies? We are nine of us, studied in Harvard and Yale; we don't have the representation,
27 etc., etc. But therefore, it was really something which I thought must place before Your
28 Lordship.
- 29 **CJI SURYA KANT:** But there is nothing personal attack; that's all the beautiful reasoning,
30 their own views.

- 1 **TUSHAR MEHTA:** Yes, yes, My Lord.
- 2 **CJI SURYA KANT:** We may not agree, we may agree. That dissent is... that's that...
- 3 **TUSHAR MEHTA:** Yeah. They have not said that you are fools or something, you have not
4 understood or your understanding is lacking. They have said that this is not the way in which
5 you as judges deal.
- 6 **JUSTICE JOYMALYA BAGCHI:** It is, Mr. Solicitor, the First Amendment culture. First
7 Amendment. Unhindered speech.
- 8 **TUSHAR MEHTA:** First amendment, without reasonable restrictions.
- 9 **JUSTICE JOYMALYA BAGCHI:** First Amendment culture.
- 10 **TUSHAR MEHTA:** But without reasonable restrictions. My Lord, their First Amendment
11 culture, freedom of expression includes right to burn national flag as a form of expression of
12 anger against the government. In our country it's a criminal offense, My Lord. Therefore, in
13 right citing...
- 14 **JUSTICE B.V. NAGARATHNA:** Article 19(2), like we have here, is not there.
- 15 **TUSHAR MEHTA:** Not there. It's absolute.
- 16 **JUSTICE B.V. NAGARATHNA:** [INAUDIBLE] content.
- 17 **TUSHAR MEHTA:** It's absolute terms. There are no reasonable restrictions, none of the
18 provisions. And that's what My Lord, Justice Douglas said while comparing it with India,
19 that we don't have reasonable restrictions like India.
- 20 Now please come to page 96. "The classic...", what I have said is, I'll just paraphrase and
21 leave it at that.
- 22 **CJI SURYA KANT:** Page?
- 23 **TUSHAR MEHTA:** Page 96.
- 24 **CJI SURYA KANT:** 96 is only on Question no. 5?
- 25 **TUSHAR MEHTA:** Yes, page... It's on judicial review. Judicial review only. I have come out
26 of... as a citizen, as a...
- 27 **JUSTICE M.M. SUNDRESH:** You also have a bearing on this.
- 28 **TUSHAR MEHTA:** Yes.
- 29 **JUSTICE M.M. SUNDRESH:** Actually, what he actually meant is only this.

- 1 **TUSHAR MEHTA:** Yes My Lord, the religion.
- 2 **JUSTICE M.M. SUNDRESH:** Forget about the other part. Actually, what he meant was
3 that we should be very careful in not having a personal view into it, you don't inject it.
- 4 **TUSHAR MEHTA:** Exactly, that's... I'm grateful. That was the case. Forget homosexuality,
5 forget same sex marriage, the judicial review.
- 6 **JUSTICE M.M. SUNDRESH:** You just find out what is available under the Constitution,
7 do it accordingly. Don't go beyond.
- 8 **TUSHAR MEHTA:** What the Constitution should have been, what the society should have
9 been, is not the function.
- 10 **JUSTICE M.M. SUNDRESH:** Yes.
- 11 **JUSTICE AHSANUDDIN AMANULLAH:** But we should credit you for taking so long on
12 that portion, that it's also showing us the mirror.
- 13 **TUSHAR MEHTA:** No, I was showing myself the mirror, that we missed to point this out
14 to the honourable bench.
- 15 **JUSTICE M.M. SUNDRESH:** From that we can also look at ourselves.
- 16 **TUSHAR MEHTA:** My Lord, nobody... That's not the purpose.
- 17 **JUSTICE AHSANUDDIN AMANULLAH:** Point taken. Point taken.
- 18 **TUSHAR MEHTA:** That is My Lord, something very, very serious. Your Lordships taking
19 that point is a serious thing.
- 20 **JUSTICE AHSANUDDIN AMANULLAH:** That was in a lighter way.
- 21 **TUSHAR MEHTA:** Obviously, My Lord, I know. Your Lordships would never.
- 22 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.
- 23 **TUSHAR MEHTA:** My Lord, the proposition which I have made is, once a religious belief
24 or faith question comes and somebody comes and says either as a Petitioner or as a
25 Respondent that this is my faith and this is my belief, my religion permits and this faith and
26 belief is widely practiced, then it is a rebuttable presumption; I don't have to prove that this
27 is my faith and belief, I don't have to prove that this is a part of 25. It will be for those who
28 are opposing it to prove that no, it is either against public order or against morality or
29 against health or Part III of the Constitution. That is how I have put it.

1 And then page 99. My Lord 98, if Your Lordship sees, I have earmarked the structured
2 review. This is the suggestion.

3 **JUSTICE AHSANUDDIN AMANULLAH:** 96? You want to read?

4 **TUSHAR MEHTA:** Page 98. para 252. My Lord, structured review. Your Lordships can
5 read A, B and C. I'm not reading it right now because of... I don't wish to waste time, but pre-
6 empt...

7 **CJI SURYA KANT:** Next point also, proper remedy of a civil suit. You had, in the
8 beginning itself, pointed out.

9 **TUSHAR MEHTA:** I did point out My Lord, that ultimately these are all questions of fact.
10 Whether faith is there or not? What is the pervasiveness of that faith and belief? Whether it
11 is a part of religious faith or not? There also I may have to examine expert Witnesses and the
12 court would have the assistance. So, 25, 26... Article 25 and Article 26 are the questions
13 which may perhaps not be possible to be decided on Affidavits. Somebody says this is a belief
14 long held and somebody said no, no, this is not a belief at all, or it's not a part of our religion
15 at all, how would Your Lordships decide as a court of judicial review, as a court of first
16 instance? That's why I have said that remedy, if at all, is with a limited jurisdiction, judicial
17 review but will be the civil suit.

18 Then I have given some judgments. Then, My Lord, I have given the critique of essential
19 religious practices doctrine. My Lord, on that all of us are at *ad idem*, as I understand as of
20 now.

21 **JUSTICE AHSANUDDIN AMANULLAH:** That is extent of judicial review?

22 **TUSHAR MEHTA:** Page 103, My Lords. It is a question... Yes, My Lord, question is...

23 **JUSTICE B.V. NAGARATHNA:** Essential religious practice.

24 **TUSHAR MEHTA:** Yes, My Lord, Question no. 5.

25 **CJI SURYA KANT:** Paragraph 265 of your written submissions. Page 103.

26 **TUSHAR MEHTA:** Yes, My Lord. It's Question no. 5. My Lord, there is a question framed
27 by Your Lordships about essential religious practice. No, no, I'm sorry, it is extent of judicial
28 review question. That's the test, whether that can be the test or not.

29 **JUSTICE B.V. NAGARATHNA:** You are having this test under Article 26 or under Article
30 25?

31 **TUSHAR MEHTA:** My Lord, my view is same, subject to what my other learned friends
32 want to say. And I didn't want to repeat because I attempted yesterday. My Lord, both rights

1 are fundamental rights. Article 26(b) is a right which is not an island but between the two
2 being a denominational right would have a precedence provided that if there is some
3 provision of law which requires it to be curtailed, or to be regulated or restricted, then it
4 would be 25(2). And my concern also I have shared. If we say 26(2), 26(b) is unhindered,
5 then there can be an argument that even people from, say, Schedule Caste, forget 17, can also
6 be prevented. Worry is, My Lord, and a larger worry, this is my worry. If that is the way in
7 which it is interpreted as standalone provision without being... I'm aware, My Lord, some
8 states are taking away control of some religious institutions and there is a serious issue going
9 on, but if this right is conferred upon the denomination, one denomination amongst the
10 Hindus or Muslims will prevent another denomination of the same religion. It will prevent
11 another denomination of the same religion. My Lord, we may not create a situation where
12 there is disharmony internally amongst the religions. So, it would be the rare circumstance
13 where you will interpret 26(b) subject to 25(b) but it would never be an isolated island
14 provision.

15 **JUSTICE B.V. NAGARATHNA:** So, we are not... we are not clear, the applicability of the
16 essential... rest with regard to...

17 **TUSHAR MEHTA:** It is not possible.

18 **JUSTICE B.V. NAGARATHNA:** In the context of *Sabarimala*, how does it arise?

19 **TUSHAR MEHTA:** My Lord it says, *Sabarimala* says that it is not a denomination at all.

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

21 **TUSHAR MEHTA:** It is, in any case, it's not an essential religious practice. But my
22 question is, first, whether it is necessary for me to prove that the religion, religious practice
23 or affairs regarding religion is essential. Once I prove that these are religious practices and it
24 does not fall foul of public order, morality and health, where the essential doctrine comes,
25 there is no... the textual reading of 25 or 26...

26 **JUSTICE B.V. NAGARATHNA:** Not able to follow...

27 **TUSHAR MEHTA:** Yes.

28 **JUSTICE B.V. NAGARATHNA:** ...what is the relevance of that doctrine on the issue in
29 Sabarimala?

30 **TUSHAR MEHTA:** First of all, the question is not framed on Sabarimala. Question is...

31 **JUSTICE B.V. NAGARATHNA:** But why this question is raised now then? Let it be in a
32 vacuum?

- 1 **TUSHAR MEHTA:** I'll just tell you. There is no vacuum. My Lord, *Shirur Mutt*, which is
2 the highest strength so far, seven honourable judges, does not say that essentiality is to be
3 proved. Correct? *Shirur Mutt* doesn't say that. It was *Durgah Committee*, five judge
4 which misinterprets *Shirur Mutt* and says that for being protected as a religious practice,
5 you have to show that it is not only religious, it is essential to the religion.
- 6 **CJI SURYA KANT:** So, your argument is that from the religious practice or religious
7 practices, it has travelled to essential religious practices by virtue of use of this expression
8 'essential' to that particular judgment.
- 9 **TUSHAR MEHTA:** I am grateful. I could not... yes.
- 10 **CJI SURYA KANT:** And that judgement has been followed in *Sabarimala* .
- 11 **TUSHAR MEHTA:** Yes.
- 12 **CJI SURYA KANT:** Therefore, it is required to be determined...
- 13 **TUSHAR MEHTA:** I'm grateful.
- 14 **CJI SURYA KANT:**... whether... yes. That is the background.
- 15 **TUSHAR MEHTA:** That is My Lord, the relevance of this practice. Otherwise, My Lord,
16 what...
- 17 **JUSTICE B.V. NAGARATHNA:** It's not an essential religious practice.
- 18 **GOPAL SANKARANARAYANAN:** Exclusion of women is not an essential religious
19 practice. That is our argument.
- 20 **JUSTICE B.V. NAGARATHNA:** We want to know a little context to it, regarding this
21 question.
- 22 **TUSHAR MEHTA:** My Lord, questions framed has no context. Yes, My Lords. Otherwise,
23 this results into *ad hoc* results.
- 24 **CJI SURYA KANT:** Say in a different way. To say differently, contention is that what is
25 required to prove is only that there is a religious practice. Once that religious practice is there
26 and once that religious practice does not fall within the three exceptions referred to in 25 and
27 again in 26, then that itself ensures protection.
- 28 **TUSHAR MEHTA:** Protection.
- 29 **CJI SURYA KANT:** Of 25 and 26.

1 **TUSHAR MEHTA:** Additional condition of it being essential is not required. Otherwise,
2 what happens?

3 **CJI SURYA KANT:** The additional onus of proving that practice as an essential religious
4 practice is neither here nor there. It is neither in the Constitution nor it was held by the
5 seven judge bench, which was until that day...

6 **TUSHAR MEHTA:** Nor contemplated by the constitutional framer.

7 **CJI SURYA KANT:** It is your argument that...

8 **TUSHAR MEHTA:** Otherwise... otherwise, what the difficulty is, My Lord, say religions
9 like Hinduism. We have Hinduism, Islam, Christianity. Other two religions have one creator,
10 one originator, one holy book from which you can show that this is what is stated and
11 therefore, it is essential. Hinduism, as I have said, is not only having plurality, it is internal
12 plurality also, and there is no one originator, no one creator, one God, one religious
13 scripture. It becomes impossible at times to show that this is essential. So, it creates an
14 arbitrary situation and therefore, My Lord also, this essential religious practice doctrine
15 which is inserted according to me, wrongly in the judgment, which is contrary to *Shirur*
16 *Mutt* is a wrong interpretation, apart from textually it doesn't come out either from 25 or
17 26. That is my respectful submission.

18 **JUSTICE B.V. NAGARATHNA:** If ee just practice, it is sufficient, according to you.

19 **TUSHAR MEHTA:** Yes, yes. The last submission is that in in every religion there are
20 certain attributes attributable to the deity and you have to go by those attributes. The secular
21 courts are not supposed to sit in appeal over the validity, legality, propriety, or rationality of
22 attributes of the deity. Like, My Lord, in case of Ayyappa Swamy, which is Naishtik
23 Brahmachari, and therefore, there are certain rules which have been followed. It would not
24 be possible or permissible to examine the attributes of the deity. And every deity, My Lord,
25 has a particular attribute across religions. Number three, comparative intra-fundamental
26 right conflict. And this is my last submission. My Lord, whenever we talk about one
27 particular fundamental rights, it affects more than one individual. My Lord, my right to
28 speak affects my learned senior friend's right not to be offended. I should not speak
29 anything, which is derogatory or defamatory to him. So, it is his corresponding right. So,
30 right of entry into a temple will have to be tested in the context of right of devotees who feel
31 that particular class of persons should not be permitted to enter. That is never examined at
32 all, My Lords. You can say that one or few individuals wants to go, but has anyone examined
33 the corresponding fundamental right under Article 25? My right under Article 25 and 26 is

1 that if my religious tenets, if my religious belief or faith prohibits a particular thing to be
2 done, it will not be done. So, even my right as a follower...

3 **JUSTICE M.M. SUNDRESH:** Subject to reasonable restriction that aspect has not been
4 considered.

5 **TUSHAR MEHTA:** And proportionality. That has not been considered.

6 **JUSTICE B.V. NAGARATHNA:** Even before that, sorry.

7 **JUSTICE AHSANUDDIN AMANULLAH:** Would you be assisting us on some of the
8 basic facets of Lord Ayyappa?

9 **TUSHAR MEHTA:** I'm so sorry?

10 **JUSTICE AHSANUDDIN AMANULLAH:** Will you be also assisting on the background
11 that what was already integral part of the rituals about entering of Lord...?

12 **TUSHAR MEHTA:** No, My Lord, yesterday it was clear that we are not addressing the
13 court, on the merits of the matter. My Lord, I said yesterday that *Sabarimala* judgment is
14 wrong, which I will demonstrate, irrespective of what view Your Lordship takes on 25, 26
15 being read together, being read separately, irrespective of that. I am in favour of review. I am
16 saying it is a wrong judgment. But My Lord, it was decided that the reference says that it is
17 referred to nine honourable judges to decide the judicial policy how to deal with religious
18 freedoms. And therefore, as we all of us understood that on merits, the *Sabarimala*
19 judgement and its correctness or otherwise is not to be gone into.

20 **JUSTICE B.V. NAGARATHNA:** See, what follows from what you have said just now, the
21 Writ Petitioners, original Writ Petitioners, if we have understood correctly, are not the
22 devotees.

23 **TUSHAR MEHTA:** No, no, it's someone.

24 **JUSTICE B.V. NAGARATHNA:** No devotee has approached this court challenging this.
25 Then who is the Writ Petitioner who is assailing this?

26 **TUSHAR MEHTA:** There are, there are more than... Only a minute. Only a minute.

27 **JUSTICE B.V. NAGARATHNA:** Who is the original Writ Petitioner?

28 **TUSHAR MEHTA:** Original Writ Petitioner is one in Young Lawyers Association.

29 **JUSTICE B.V. NAGARATHNA:** They are not devotees.

30 **TUSHAR MEHTA:** My Lord, but...

- 1 **INDIRA JAISING:** Devotees who are on this side, I am representing one of them.
- 2 **JUSTICE B.V. NAGARATHNA:** One minute. Let us be clear. Can any devotee of Lord
3 Ayyappa file a Writ Petition challenging it? No.
- 4 **TUSHAR MEHTA:** It is not, My Lord, it is not...
- 5 **JUSTICE B.V. NAGARATHNA:** If non-devotees, a person who is not concerned with that
6 temple challenges it, can this court entertain the Writ Petition?
- 7 **TUSHAR MEHTA:** Please see Question 7. Question 7.
- 8 **JUSTICE B.V. NAGARATHNA:** Then that should be addressed first.
- 9 **TUSHAR MEHTA:** Yes, My Lord. Kindly come to... I'm not reading it. I'm not reading, My
10 Lords, but please have a look at..., don't feel that I am reading. Come to page 120.
- 11 **CJI SURYA KANT:** The five judge bench has taken the view, following the general
12 principles of PIL that if there is an element of public interest in an issue, the court can
13 examine. That is what Justice Nariman, while upholding the maintainability of the PIL and
14 the other honourable judges have taken the view. Your objection that Question no. 7 is that
15 the conditions, or the protection of 25, 26; the three constitutional exceptions therein, these
16 are all personal issues, that somebody who has any grievance will come to the court and
17 others have a view, a stranger can be permitted.
- 18 **TUSHAR MEHTA:** I am grateful. That is the view the minority view of Justice Indu
19 Malhotra in *Sabarimala* takes. That a stranger, who has nothing to do, cannot jump, just
20 jump into the bandwagon and say that prevent it. Suppose, My Lord, some...
- 21 **CJI SURYA KANT:** Contrary observation by my Sister is also...
- 22 **JUSTICE B.V. NAGARATHNA:** The Writ Petitioners be aggrieved, they are [UNCLEAR].
- 23 **TUSHAR MEHTA:** They are not, My Lord, they are some young lawyers.
- 24 **JUSTICE B.V. NAGARATHNA:** What is the causal connection?
- 25 **TUSHAR MEHTA:** It's a PIL. It's a Young Lawyers Association.
- 26 **JUSTICE B.V. NAGARATHNA:** Mr. Solicitor, we all know, we have been... We have all
27 practiced in the trial court. If a suit had been filed by such an association, the first question
28 would have been on Order 7, Rule 11A. No cause of action, no causal connection. The plaint
29 would have been dismissed.
- 30 **TUSHAR MEHTA:** My Lord, for now, my last, for my satisfaction come to page 120. My
31 Lord, please come to 120 and I end. 120. This is apropos Your Ladyship's question. And I'm

1 not reading. Just see the question framed. And in my submission, I have given all judgments
2 on the point. This has to stop, My Lord. This has to stop. Please see 120, Question no. 7. Your
3 Lordships may see... Your Ladyship may see Question no. 7. Whether a person... Your
4 Ladyship has got? 120. "Whether a person not belonging to a religious denomination or
5 religious group can question a practice of that religious denomination or religious group by
6 filing a PIL?" This is the question framed.

7 **JUSTICE B.V. NAGARATHNA:** We expected that this should be addressed first, Mr.
8 Solicitor.

9 **TUSHAR MEHTA:** It was framed as Question 7, My Lords. Sequence was not ours. But 120
10 onwards... Full submission, it could have been dismissed only by two-page judgment that
11 you have no locus, you are not concerned, you are only an interloper and you're... none of...
12 it's not your right which is concerned. For 25 and 26, you must be a person within that
13 denomination.

14 **JUSTICE B.V. NAGARATHNA:** Person aggrieved.

15 **TUSHAR MEHTA:** Person aggrieved.

16 **JUSTICE B.V. NAGARATHNA:** Causal connection AIR 1976 Supreme Court, J.M. Desai.
17 The bench of... the judgment of this court.

18 **TUSHAR MEHTA:** I will read, My Lord, that.

19 **CJI SURYA KANT:** Your year is incorrect.

20 **JUSTICE B.V. NAGARATHNA:** 578.

21 **CJI SURYA KANT:** If it was to be dismissed at the threshold, it should have been done in
22 2006.

23 **JUSTICE AHSANUDDIN AMANULLAH:** Now we will have...

24 **JUSTICE B.V. NAGARATHNA:** Filed in which year?

25 **JUSTICE AHSANUDDIN AMANULLAH:** 2006.

26 **INDIRA JAISING:** It was filed in 2006. That's what I was pointing out. So, we are today 20
27 years down the line. And now if you want to dismiss, we are ready to pack up and go home.
28 Then the reference must be discharged.

29 **CJI SURYA KANT:** That's why I said that it should have been done in 2006.

30 **INDIRA JAISING:** My Lord, either we address you or we don't, on the merits. If Your
31 Lordship feels that there is no need for an address on merit, kindly discharge the reference.

- 1 And we will deal with the situation as and when it arises on the facts of each individual case.
2 There are seven cases pending here, a Parsi woman, a Muslim woman...
- 3 **CJI SURYA KANT:** Exactly. Those issues are also there.
- 4 **INDIRA JAISING:** Yes, they are all there.
- 5 **CJI SURYA KANT:** Those issues will also be there.
- 6 **INDIRA JAISING:** These are facts on different religions.
- 7 **TUSHAR MEHTA:** My Lord, suppose I file a petition that permit Muslim women in the
8 mosque; but how am I concerned? Would the court not ask me? That's the Question no. 7.
9 That let an affected lady come. So, My Lord, but...
- 10 **JUSTICE B.V. NAGARATHNA:** That is why [UNCLEAR] no devotee who challenged it.
- 11 **INDIRA JAISING:** [UNCLEAR] address you on the merits of this preference.
- 12 **JUSTICE B.V. NAGARATHNA:** No devotee would challenge it.
- 13 **TUSHAR MEHTA:** Yes, yes.
- 14 **JUSTICE B.V. NAGARATHNA:** It is a person who has no concern with, who has come to
15 the court.
- 16 **TUSHAR MEHTA:** 120 onwards are all the judgments that this petition is not
17 maintainable.
- 18 **RAJEEV DHAVAN:** My Lord, what this Question no. 7 raises is two issues. The direct
19 interest of a person that can file a PIL, but a large number of PILs are filed, My Lord, because
20 the carriage of proceedings is by somebody else. Suppose there's somebody from the
21 backward class, somebody from the forward class says, I carry the proceedings. Now suppose
22 somebody comes along and says the carriage of proceedings on behalf of Hindu women,
23 would Your Lordship dispose that off at the threshold?
- 24 **JUSTICE B.V. NAGARATHNA:** Yes, because no devotee of the Lord is challenging it, and
25 why should this court concern about a non-devotee?
- 26 **RAJEEV DHAVAN:** May I make myself clear?
- 27 **JUSTICE B.V. NAGARATHNA:** No non-devotee. This court cannot concern with a non-
28 devotee.
- 29 **TUSHAR MEHTA:** No, let us complete.
- 30 **RAJEEV DHAVAN:** When the Lawyers Association that comes along...

- 1 **JUSTICE B.V. NAGARATHNA:** Correct.
- 2 **RAJEEV DHAVAN:** ...and says a lot of Hindu women are, in fact, being denied access into
3 the temple.
- 4 **JUSTICE B.V. NAGARATHNA:** That's it.
- 5 **RAJEEV DHAVAN:** Do they have the courage of refusing the...[UNCLEAR]
- 6 **TUSHAR MEHTA:** They do not. That's my answer.
- 7 **JUSTICE B.V. NAGARATHNA:** Not devotees. Because a devotee...
- 8 **TUSHAR MEHTA:** My Lord, is he supporting the review petition?
- 9 **CJI SURYA KANT:** Today, in fact, we have crossed that bridge. The question which have
10 been formulated and five six of questions which have already been addressed partly.
- 11 **RAJEEV DHAVAN:** Yes.
- 12 **CJI SURYA KANT:** And the answers and responses will come. These questions are likely to
13 have and in fact, will have a direct impact on the review, on the review. Therefore, it is...
- 14 **INDIRA JAISING:** No, My Lords, but on six other petitions which are pending on
15 [UNCLEAR].
- 16 **JUSTICE M.M. SUNDRESH:** All right. See...
- 17 **JUSTICE B.V. NAGARATHNA:** We are only talking, we are only talking.
- 18 **CJI SURYA KANT:** Therefore, it is in all fairness that we hear all of you and whoever have
19 formed an opinion...
- 20 **JUSTICE M.M. SUNDRESH:** To tell you...
- 21 **RAJEEV DHAVAN:** What we are saying is, this will impact from the concept of PIL?
- 22 **JUSTICE M.M. SUNDRESH:** No, no, see...
- 23 **TUSHAR MEHTA:** We wish to argue that only. We wish that PIL...
- 24 **JUSTICE M.M. SUNDRESH:** The issue has to be answered...
- 25 **TUSHAR MEHTA:** Give me five minutes.
- 26 **JUSTICE M.M. SUNDRESH:** Let us assume it goes against you, as you are trying to argue
27 before the next issue will be, what extent? What extent, in the sense, can... let us assume can
28 the court presume that this person represents, they represent the larger part of the society or
29 the collective belief of the community?

- 1 **TUSHAR MEHTA:** No, religious freedom.
- 2 **JUSTICE M.M. SUNDRESH:** Now we'll tell you why. For *Sabarimala* we will take it. In
3 example, we aren't going into the merits. Let us say 100 women are there; 99 of them they
4 don't... they want... they believe that the sanctity of the practice should be upheld.
- 5 **TUSHAR MEHTA:** Nobody goes.
- 6 **JUSTICE M.M. SUNDRESH:** Therefore, we don't want to go. If somebody goes it will go
7 against your own belief. It is possible, we'll take it hypothetically to say. Can the court ignore
8 that and then decide it, which will have a bearing on their own faith?
- 9 **TUSHAR MEHTA:** If they come, yes, they can.
- 10 **JUSTICE M.M. SUNDRESH:** No, can... do we do we have a parameter, do we have a
11 parameter to say that it will be binding on them also, because whatever we decide will have a
12 substantial impact.
- 13 **TUSHAR MEHTA:** Your Lordships are right. Correct, correct.
- 14 **JUSTICE M.M. SUNDRESH:** That is why you have to read it subject to the rights of the
15 larger... you also referred to this sometime back.
- 16 **TUSHAR MEHTA:** Yes, comparative.
- 17 **JUSTICE M.M. SUNDRESH:** Your right versus a larger right.
- 18 **CJI SURYA KANT:** I have been using an expression and in two judgments also I used but I
19 first time used in the High Court, "invisible victims of a judicial system."
- 20 **INDIRA JAISING:** Yes.
- 21 **CJI SURYA KANT:** I use the word "invisible victims of a judicial system."
- 22 **INDIRA JAISING:** My Lord, it maybe it is a wise [INAUDIBLE].
- 23 **TUSHAR MEHTA:** My Lord, I have used it a different way. It is a fight between silent
24 majority versus very vocal minority.
- 25 **INDIRA JAISING:** We have a right to be vocal Mr. Mehta.
- 26 **TUSHAR MEHTA:** It's not a religious minority, viewpoint, viewpoint minority. My Lord,
27 last point. Let me complete my last point.
- 28 **JUSTICE M.M. SUNDRESH:** Vibrant [UNCLEAR].
- 29 **INDIRA JAISING:** Can I make a suggestion? Would it be advisable if it pleases you?

- 1 **CJI SURYA KANT:** That's why, that's why we...
- 2 **TUSHAR MEHTA:** Sir, let me complete my last point.
- 3 **INDIRA JAISING:** My Lord, I only have a suggestion. My Lord, is it necessary to decide...
- 4 **TUSHAR MEHTA:** Let me complete my last point, ma'am.
- 5 **INDIRA JAISING:** Is it necessary to decide 7? Can we have it deleted My Lord? Since
6 we've already addressed you on everything.
- 7 **TUSHAR MEHTA:** No, no.
- 8 **INDIRA JAISING:** We have already addressed you.
- 9 **TUSHAR MEHTA:** My Lord, last point and I'm not... I'm closing my file. Last point on this
10 question of PIL jurisdiction, please examine Your Lordships rarely sit in this combination of
11 nine. My Lord, PIL jurisdiction was initiated in *Bandhua Mukti Morcha*, where people
12 had no means to approach the court. I have given in my written submissions. Now the
13 judicial system has become so transparent and virtually catering to the doors of the Litigant
14 that by e-filing, one letter can reach the court. Now nobody needs to represent any
15 unrepresented class. NALSA is there, District Legal Services Authority is there. If someone
16 has nothing, My Lord, then he can go to District Services Authority that this is my
17 fundamental right, it is violated, advise me, or give a petition to the Supreme Court or the
18 High Court on my behalf. Now why entertain all these PILs? And PILs, generally we know,
19 are motivated PILs. Somebody else is behind the back.
- 20 **CJI SURYA KANT:** Mr. Solicitor, the answer is very simple. Nowadays, and nowadays
21 does not mean that, I'm talking about last so many years now.
- 22 **TUSHAR MEHTA:** Yes.
- 23 **CJI SURYA KANT:** The court themselves are very, very circumspect; they are very, very
24 extraordinarily cautious of entertaining PILs. We have laid down the parameters of testing
25 the *bona fide*, the *locus*, the real cause, the... so many factors we are nowadays testing. And
26 given a day when you sit in Court No. 1, you must have seen that how many PILs we
27 entertain. We...
- 28 **TUSHAR MEHTA:** Your Lordships are very circumspect.
- 29 **CJI SURYA KANT:** Maybe that in 2006 to now 2026, in two decades the situation has
30 gone a little more or more cautious. The point is today in this issue. On general principles,
31 PIL, we need not even hear you; we are agreeing to that, that the court will be very, very

1 cautious in entertaining a PIL in these days, particularly when people come with different
2 kind of agendas and...

3 **TUSHAR MEHTA:** They are...

4 **CJI SURYA KANT:** And this court started way back.

5 **TUSHAR MEHTA:** Business rivalry in disguise. Business rivalry in disguise. Somebody is
6 always there to back the PIL Petitioners.

7 **CJI SURYA KANT:** So, we are conscious of those principles. General principles we are
8 aware. But the point is that here, a PIL was entertained in 2006.

9 **TUSHAR MEHTA:** But My Lord, Your Lordships may have to decide on a point, short
10 limited point, whether in case of freedom, religious freedoms, a stranger can come. That's all.

11 **CJI SURYA KANT:** This can be one of the parameter for the purpose of maintainability of
12 a PIL, that should be maintained PIL in this kind of plaint. That can be one argument. We
13 can examine that in a given case, but general principles are well known.

14 **TUSHAR MEHTA:** My Lord, I'm grateful.

15 **CJI SURYA KANT:** Thank you. Now, Mr. Vaidyanathan, Mr. Dhavan and Mr. Singhvi,
16 during lunch time I got a message from one of my friend, from... my friend, means the
17 person in media knows to me; that if you have observed principle of seniority, then Mr.
18 Vaidyanathan is probably the senior most among the senior lawyers who are appearing. And
19 then Dr. Singhvi probably and then Mr. Dhavan. So, how much time, Mr. Vaidyanathan, you
20 will take?

21 **C.S. VAIDYANATHAN:** About 90 minutes, My Lord. Around 90 to 100 minutes. Less
22 than one and half hour.

23 **V. GIRI:** There was another aspect.

24 **ABHISHEK MANU SINGHVI:** I asked for more but I will take two hours or so.

25 **CJI SURYA KANT:** And immediately after that, Mr. Dhavan, we will hear you.

26

27

28

END OF DAY'S PROCEEDINGS