

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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

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

KANTARU RAJEEVARU

Petitioner(s)

VERSUS

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

Respondent(s)

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1 **TUSHAR MEHTA:** My Lords first, *Sabarimala* judgement proceeds on an assumption
2 that men are superior and women on a lower pedestal. At page 30 of my written submissions,
3 Volume II, at PDF 36; I'm not reading it, Your Lordships need not open. I have given instances
4 of temples where men are not allowed. Because it's a Devi Bhagwati temple, there are some
5 faith and belief. There are temples, My Lord, I have mentioned the details, where male priests
6 are under a mandate, religious mandate, to wash the feet of female devotees. There are temples
7 like Pushkar temple, only Brahma temple in the country, where married men are not allowed.
8 There are certain temples where... there is one temple in Kerala, where the system is that man
9 will go dressed as women, and My Lord, I read in detail, they go to beauty parlours, and their
10 family, the lady family members, help them dress wearing saree and other things, and they go
11 My Lord, and only males go. So it is not male centric or female centric religious beliefs.

12 In this particular incident, it happened to be My Lord, a women centric. Second, there was a
13 question regarding Article 25, 26 and their interplay. Day before, I have substantially argued.
14 I thought yesterday night, when I began yesterday, I said that I'll take that last, because
15 otherwise I will not be able to finish other questions. And I couldn't get time for that. I am not
16 re-arguing. Substantially I have answered. Rest is in my written submission.

17 **CJI SURYA KANT:** That's okay.

18 **TUSHAR MEHTA:** But it may not be felt that I skirted or I ducked those questions.

19 **CJI SURYA KANT:** No, no, no.

20 **TUSHAR MEHTA:** That's the only thing.

21 **CJI SURYA KANT:** We have noticed at the outset.

22 **TUSHAR MEHTA:** Yes. And My Lord, last thing, My Lord, I have confined my submissions
23 on 25, 26, for so far as the questions framed. There are other issues like control of government,
24 government controlling temples, there are other issues etc. My Lord, that is not the issue
25 arising. So I have not addressed...

26 **CJI SURYA KANT:** Before us, before us there are only those seven questions which you have
27 to...

28 **TUSHAR MEHTA:** My argument is confined My Lord. It may not be understood.

29 **CJI SURYA KANT:** Yesterday you argued confining to only respond to those questions.

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

1 **CJI SURYA KANT:** Yes Mr. Nataraj, for the Union. Is there any written submissions given
2 by you?

3 **K.M. NATARAJ:** Yes, my written submissions are at Volume I.7, starts from page number
4 220.

5 **JUSTICE B.V. NAGARATHNA:** Which volume?

6 **K.M. NATARAJ:** Volume 1.7.

7 **CJI SURYA KANT:** 1.7. Page?

8 **K.M. NATARAJ:** 1.7, starts from page 220.

9 **CJI SURYA KANT:** 220?

10 **K.M. NATARAJ:** 220. I have the hard copies also. I can share the hard copies.

11 **CJI SURYA KANT:** Actually starting from 222.

12 **K.M. NATARAJ:** Yes, I'm sorry, 222. Religious rights under the Constitution are well
13 knitted, protected, and regulated under a scheme of Article 25 and 26. We have a three-tier
14 mechanism to protect, to connect and to regulate religious rights under the Constitution. First
15 part of 25(1), that guarantees an individual right. Second part of 25(2), that is a regulatory
16 mechanism. And when it comes to 26, that relates to institutional right. So, 25(1) and 26 are
17 well interconnected, and 26 is embedded on 25 and vice versa. When 26 is to be enforced,
18 basically it relates to 25(1). So 25 and 26 are well-connected, interconnected to mechanisms,
19 giving rise to an individual under 25(1). And when it comes to an institutional right, it is
20 guaranteed under 26. But however, when it comes to regulatory mechanism, it is 25(2) which
21 applies to both. This is the scheme of 25(1), 25(2) and 26. Therefore, there are three-tier
22 mechanism is provided under the constitution to provide, to regulate, the religious rights
23 under the Constitution. It's a well-balanced right which is provided under the Constitution,
24 that is the first part of it.

25 Now kindly take my written note, where I pointed out the broad submissions starting from
26 para 2. I pointed out about eight salient aspects of the rights under Article 25 and 26 are
27 concerned. First one, scheme under 25 and 26 constitutes a three-tier mechanism, 25(1), 25(2)
28 and 26. Right under 25 is two-fold, that is a religious freedom of and state's power to regulate.
29 And Article 25(2) further consists of two independent parts. That's a... 25 is concerned, there's
30 a two-fold initially. First one is individual right, then 25(2) for the regulatory.

31 Then "Article 25 and 26 must be harmonised; neither provision is subordinate to the other."
32 That is the third one. Fourth one, "Denomination must be understood in the Indian context."

1 That I will elaborate when I come to with reference to the debates also. It has to be understood
 2 how the denomination has to be understood or construed while interpreting the provision.
 3 Then, "Public morality is the governing standard and not a constitutional morality as
 4 interpreted earlier." So public morality is the governing standard. Governing standard is the
 5 public morality not the constitutional morality as held in other previous cases. That is the next
 6 one.

7 The next one is the, "Determination of essential religious practices unsustainable in the Indian
 8 religious landscape." When we consider the cases of Indian religious landscape where there is
 9 a diversity or plurality, we can't apply the principles of essential religious practice. Then, "The
 10 religious practices are to be internally assessed; external examination is impermissible." I'm
 11 saying the judicial review of whether it is an essential practice or to what extent in the judicial
 12 matters we can go into, has a very limited scope.

13 The last one, "The deities' right is an integral part of the devotees' right and protected under
 14 Article 25 and 26 of the Constitution." Deities' right; that is an integral part of devotees' right
 15 and it's vice versa. If a devotee has a right, that relates to the deity. If the deity has a right that
 16 is related to the devotee. So 26 and 25(1) are necessarily to be connected; we can't separate. If
 17 you have a faith then you have right under 26. If you have no faith, if you are a non-believer,
 18 you have no right under Article 26. So necessarily 26 will have to be connected to 25(1). These
 19 are the broad points which I would like to elaborate.

20 Now kindly turn to the second page. Scope and contents of Article 25(1), without reading in
 21 detail, what I have said is Article 25(1) includes not merely internal belief but also the external
 22 manifestation of religion through practice and propagation. There are two folds: one is the
 23 internal, internal faith. I may have certain internal faith, that is completely protected. Not only
 24 that, even the manifestation of my faith, that is also equally protected under Article 25(1).

25 Then kindly come down to 25(2). That is, as an independent enabling mechanism. "Article
 26 25(2) creates a distinct field of legislative competence for the State. This provision is not a
 27 mere restriction on 25(1), but an independent Constitutional authorisation that allows the
 28 State to regulate secular activities associated with the religion to achieve broader societal
 29 objectives and intent to transform the society. The object of 25(2) is to regulate or as an
 30 independent enabling mechanism given under the Constitution to the State, that is, to
 31 eliminate social evils and bring about inclusive reforms." That is the second stage of it.

32 However, when we come to 25(2)(b) is concerned, there are two independent components.
 33 The first one is make enabling the State to make law. The second one is throwing open the
 34 Hindu religious institutions to all sect and sections of Hindu. First part and second part are,
 35 both are independent. Disjunctively, it is expressed. 25(2)(b) are disjunctively expressed.

1 Kindly see, "providing for social welfare and reform or the throwing open of Hindu religious
2 institutions of a public character to all classes and sections of Hindus." So first part is providing
3 for social welfare and reform; that's the first part of it. And the second one is for throwing
4 open. So, disjunctively that is expressed. So there are two parts, both are independent.

5 Then kindly go to Article 26 is the next provision which I dealt with in the next under the
6 heading (c).

7 **JUSTICE B.V. NAGARATHNA:** So keep in mind...

8 **K.M. NATARAJ:** Please.

9 **JUSTICE B.V. NAGARATHNA:** Article 25(2) itself is in two parts.

10 **K.M. NATARAJ:** Two parts.

11 **JUSTICE B.V. NAGARATHNA:** The first part is, "nothing in this article shall affect the
12 operation of any existing law."

13 **K.M. NATARAJ:** Correct.

14 **JUSTICE B.V. NAGARATHNA:** Second part is, "or..."

15 **K.M. NATARAJ:** To make law.

16 **JUSTICE B.V. NAGARATHNA:** ...preventing the State from making any law." The latter
17 part is (a) and (b).

18 **K.M. NATARAJ:** Yes.

19 **JUSTICE B.V. NAGARATHNA:** That is a enabling provision to the State. But what is the
20 meaning of "nothing in this article shall affect the operation of any existing law?"

21 **K.M. NATARAJ:** Existing law will have to be when...

22 **JUSTICE B.V. NAGARATHNA:** Pre-constitutional laws.

23 **K.M. NATARAJ:** Pre-constitutional laws. Article 366 or whatever the laws...

24 **JUSTICE B.V. NAGARATHNA:** Component of that existing law include a custom and
25 usage.

26 **K.M. NATARAJ:** Custom and usages, if not inconsistent with the Part III, they have to be
27 protected. The test would be whether Article Part III would be applicable or not. We can't
28 argue or we can't read 25 and 26 de hors Part III. Both 25 and 26 are subject to Part III. They
29 are interconnected. Therefore, I pointed out 26 can't exist without 25(1) and 25 has to be

1 related to 26. When they are related each other, then necessarily Part III has to apply.
2 Notwithstanding, there is no express provision under 26 to say that it is subject to Part III.

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

4 **K.M. NATARAJ:** But nevertheless 25 provides, it is connected to 26, 25(1) is individual.
5 When it comes to 26, it relates to the institution. So 25(1) and 26 have to be read together and
6 subject to Part III.

7 **JUSTICE B.V. NAGARATHNA:** Then are you not putting a fetter on Article 26 in the form
8 of Part III?

9 **K.M. NATARAJ:** Part III, yes.

10 **JUSTICE B.V. NAGARATHNA:** It is conspicuous by its absence.

11 **K.M. NATARAJ:** Yes, but it can't... yes...

12 **JUSTICE B.V. NAGARATHNA:** It says, Part III is conspicuous by its absence. But now you
13 are saying you read Part III into it.

14 **K.M. NATARAJ:** You have to read Part III because there can be no independent existence
15 without 25(1).

16 **JUSTICE B.V. NAGARATHNA:** 25(1) is for individual.

17 **K.M. NATARAJ:** Individual. Without individual, there can be no 26.

18 **JUSTICE B.V. NAGARATHNA:** [NO AUDIO]

19 **K.M. NATARAJ:** Denomination is formed on the basis of collective faith or belief of
20 individuals.

21 **JUSTICE M.M. SUNDRESH:** From collective consciousness, collective faith will come.

22 **K.M. NATARAJ:** Absolutely.

23 **JUSTICE M.M. SUNDRESH:** Collective faith can be given effect to the collective
24 association.

25 **K.M. NATARAJ:** Collective association.

26 **JUSTICE M.M. SUNDRESH:** In the form and the form of...

27 **K.M. NATARAJ:** Absolutely.

28 **JUSTICE JOYMALYA BAGCHI:** Mr. Nataraj, to summarize what you are saying is,
29 26(1)(b) is a subset of 25(1).

- 1 **K.M. NATARAJ:** It's not subset but it can be an offshoot of an individual right, collectively.
- 2 **JUSTICE JOYMALYA BAGCHI:** Why I say subset, is the word "maintain."
- 3 **K.M. NATARAJ:** Yes.
- 4 **JUSTICE JOYMALYA BAGCHI:** Religious affairs.
- 5 **K.M. NATARAJ:** Yes.
- 6 **JUSTICE JOYMALYA BAGCHI:** So it only relates to maintaining religious affairs, whereas
- 7 25(1) has much expensive expressions, profess practice, and propagate.
- 8 **K.M. NATARAJ:** Correct, yes.
- 9 **JUSTICE JOYMALYA BAGCHI:** So profess practice, propagate is the bigger set.
- 10 **K.M. NATARAJ:** Bigger set.
- 11 **JUSTICE JOYMALYA BAGCHI:** Of which the subset is maintenance. And maintenance
- 12 naturally relates to organization which yesterday I indicated to the Solicitor General, that it is
- 13 not the devotee, but the management, whose rights are envisaged in 26. And therefore, you
- 14 say that these to be harmoniously construed.
- 15 **K.M. NATARAJ:** Harmoniously construed. 25 and 26 will have to be harmoniously
- 16 construed and...
- 17 **JUSTICE JOYMALYA BAGCHI:** Thereby 26(1)(b) is also subject to this social reform
- 18 legislations of 25(2).
- 19 **K.M. NATARAJ:** Yes 25, it has to.
- 20 **JUSTICE JOYMALYA BAGCHI:** But the next question is, you are saying, as you rightly
- 21 say, that if the harmony is to exist, it is to exist on all Part III. How do you compatibly interpret
- 22 26(1)(b) with Article 15 or Article 14? That is definitely you have addressed that.
- 23 **K.M. NATARAJ:** That we have to read only, by reading under 25(1) only that can be
- 24 achieved.
- 25 **JUSTICE JOYMALYA BAGCHI:** Argue in your own way. I have just indicated that.
- 26 **K.M. NATARAJ:** I understood. Because 25 and 26 are two phases of the same coin of
- 27 religious right. This one is relating to an individual right, the other one relating to institutional
- 28 right to form an association or to express through as a denomination. So it will be two phases
- 29 of same coin of religious right of the either citizens or collective.
- 30 **JUSTICE JOYMALYA BAGCHI:** 26 is not of citizen. 26 is of the..

- 1 **K.M. NATARAJ:** Collective.
- 2 **JUSTICE JOYMALYA BAGCHI:** ...Rather the organization, 25 is of the individual.
- 3 **K.M. NATARAJ:** Individuals, that's what I... 25 yes, without individual...
- 4 **JUSTICE JOYMALYA BAGCHI:** 25, therefore is a larger suite of practice profess. 26 is of
5 a narrow spectrum, manage. See the word, that they are definitely the word Constitution
6 makers have intended to...
- 7 **JUSTICE M.M. SUNDRESH:** It is just like the concept of an association or trade union,
8 you represent the collective group of the labourers. Which means you are entitled to protect
9 the rights of labour vis-a-vis your own individual rights with respect to management of
10 managing the affairs of the association.
- 11 **K.M. NATARAJ:** Absolutely.
- 12 **JUSTICE M.M. SUNDRESH:** The property and other things.
- 13 **K.M. NATARAJ:** Absolutely, absolutely, that is, that is it.
- 14 **CJI SURYA KANT:** 25 is individual, 26 is a group of individuals.
- 15 **K.M. NATARAJ:** Group of individuals.
- 16 **CJI SURYA KANT:** Who have been nomenclature of a particular religion.
- 17 **K.M. NATARAJ:** So therefore...
- 18 **JUSTICE B.V. NAGARATHNA:** Group of individuals having the same conscience with
19 regard to a philosophy of religion can come together as a religious denomination. And then
20 that religious denomination as a community or that group will have some rights.
- 21 **K.M. NATARAJ:** Rights. It can be faith, can be different. It can be varied faiths, this one
22 individuals can have.
- 23 **JUSTICE B.V. NAGARATHNA:** It is individual.
- 24 **K.M. NATARAJ:** Yes 25(1), it is especially for individuals.
- 25 **JUSTICE B.V. NAGARATHNA:** He need not be part of a denomination.
- 26 **K.M. NATARAJ:** Correct.
- 27 **JUSTICE B.V. NAGARATHNA:** But if he is a part of a denomination, then the
28 denomination gets that right.

1 **K.M. NATARAJ:** Right, under 26. This is a scheme of the Constitution under 25 and 26, but
2 both can be regulated by invoking 25(2).

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

4 **K.M. NATARAJ:** So this is a fine mechanism provided under 25(1), 25(2) and 26.

5 **CJI SURYA KANT:** The overriding expression in 25(2), that nothing in this article says, that
6 kind of a *non obstante* clause, is referable to Article 13. When they talk of the operation of any
7 existing law, means a law which is protected under Article 13, and that includes the custom,
8 that includes the usage having force of law.

9 **JUSTICE B.V. NAGARATHNA:** I mean the expression 'existing law' is given in sub-
10 article... Clause 10 of Article 366. How do you reconcile that existing law with Article 13 law,
11 we have to see.

12 **K.M. NATARAJ:** We have to read both the provisions harmoniously when it comes to
13 religious right, to say that which is not inconsistent with the Part III. That is the only solution.
14 So long as it is consistent with the Part III, whether it is a pre-existing or the future the law,
15 they have to succumb to Part III, regulated by Part III of the Constitution.

16 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Nataraj, you just referred to, if I've
17 understood you correctly, that Article 25(1) includes not merely internal belief, but also the
18 external manifestation of religion through practice and propagation.

19 **K.M. NATARAJ:** Correct.

20 **JUSTICE AHSANUDDIN AMANULLAH:** Are you putting it in very plain terms that
21 whatever is your internal belief, religious belief, the external manifestation also is protected?

22 **K.M. NATARAJ:** Yes.

23 **JUSTICE AHSANUDDIN AMANULLAH:** How can it be? Till the time internally, yes,
24 blanket it is yours. The moment your external manifestation has affected the right of some
25 other section, how can it be protected? Then it has to be tested.

26 **K.M. NATARAJ:** Subject to Part III.

27 **JUSTICE AHSANUDDIN AMANULLAH:** Your internal may be very okay, you are
28 absolutely protected, but then the moment you say that my internal will also be enforced
29 externally and that has some relationship with the rights of others in the society generally,
30 then the other Part III, XIV, XV will come.

31 **K.M. NATARAJ:** Part III immediately steps in.

1 **JUSTICE AHSANUDDIN AMANULLAH:** You are right. Then you cannot say that
2 whatever internal you carry, externally also and then that be protected.

3 **JUSTICE B.V. NAGARATHNA:** Article is subject to... in there it is...

4 **K.M. NATARAJ:** Yes, because, number one, article itself provides it is subject to, when we
5 come to 25.

6 **CJI SURYA KANT:** Yes, you develop your submission. Let's...

7 **K.M. NATRAJ:** Then article... kindly turn to the next page Column C. I pointed out or I said
8 it is Article 26 is not absolute. Again it is subject to Part III of the Constitution that is the next
9 argument or the line which I have taken. The third one is religious denomination or any section
10 thereof must be interpreted in the Indian context. Now the right guaranteed under Article 26
11 that is to religious denomination or any section thereof the construction would be kindly
12 turned to para 11. "Article 26 of the Constitution of India, which guarantees the right to
13 manage religious affairs find its origin in Article 44 of Irish Constitution 1937, which itself was
14 based on Article 114 of the Polish Constitution 1921. However, such borrowing must not be
15 used as a rigid transplantation of meaning. The origin or the idea of Article 26 may be foreign,
16 but its interpretation must necessarily be indigenous, keeping in mind the Indic religions and
17 the social, cultural and religious demography of India. In view of the above stated position the
18 expression 'religious denomination or any section thereof' must be given a purposive
19 interpretation considering India's unique religious landscape." So while interpreting the
20 "denomination or section thereof", we can't keep in mind what prevailed in the Ireland or
21 when they brought in the idea of the Irish Constitution or the Polish Constitution. We have to
22 keep in mind how they thought of to introduce the denomination into Indian system, that will
23 have to be understood.

24 Kindly for that purpose, kindly go to how it was understood and how it was debated. Actually
25 how it is understood in original Hindi language, how it was said, it is said as... kindly turn to
26 para 12, Article 394A(3) of the Constitution. Kindly turn to Article 394A. Article 394A(3) -
27 "The translation of this Constitution and of every amendment thereof published under this
28 article shall be deemed to be, for all purposes, the authoritative text thereof in Hindi language."
29 So 'denomination', no doubt it is as a English word that is employed in the Constitution. But
30 when it comes to Indian landscape it is called "*sampradaya*". What is protected under Article
31 26 is nothing but *sampradaya*. It's a *dharmic sampradaya*. In Hindi, it is said it is
32 *sampradaya*. If you take the original Constitution also, Article 26 refers to *sampradaya*.

33 **JUSTICE B.V. NAGARATHNA:** Not actually denomination which is protected, it is
34 matters of religion.

1 **K.M. NATARAJ:** Religion.

2 **JUSTICE B.V. NAGARATHNA:** Which is *sampradaya*.

3 **K.M. NATARAJ:** *Sampradaya*.

4 **JUSTICE B.V. NAGARATHNA:** That is protected.

5 **K.M. NATARAJ:** Protected. For 26, the word or the expression of denomination will have to
6 be understood as a *sampradaya*.

7 **CJI SURYA KANT:** "*Dharmic sampradaya ya uske kisi anubhaag ko*"...

8 **K.M. NATARAJ:** Yes.

9 **CJI SURYA KANT:** Means a section thereof.

10 **K.M. NATARAJ:** Yes. Now kindly turn to para 13 of my note. "The meaning of the term
11 '*sampradaya*' is significantly broader and culturally rooted than English word 'denomination'.
12 *Sampradaya* denotes a religious tradition that is transmitted through teachings, practices,
13 customs and lineage and does not necessarily require formal institutional structure.
14 *Sampradaya* will not or necessarily have any formal institutional structure. As such, any
15 group of persons sharing a common religious tradition in any form could be *sampradaya* or
16 denomination. The recognition of group of individuals or institution as *sampradaya* or
17 denomination would depend on the standard of classification and the fact in a particular case."
18 So it is ultimately standard of classification. The classification not preferable to the
19 denomination relating to a particular religion and the section thereof. It is a form of, the
20 collective group of... the collective expression of a group or the collective right of the group and
21 having a common belief. That is the test.

22 Para 14. "Further, the inclusion of the words 'any section thereof' clearly indicates that the
23 Constitution contemplates not only well-defined denomination, but also smaller segments
24 within the broader religious traditions. This includes but is not limited to, practices that may
25 be unique to a particular temple, sect or institutional tradition. Thus, in the intent of using
26 *dharmic sampradaya*, reflects a wide and inclusive protection rather than a narrow and
27 exclusionary which encompasses a wide range of beliefs, practices and traditions. A restrictive
28 interpretation of the said phrase would defeat the constitutional objective of protecting
29 religious autonomy across the spectrum of India's religious life and lead to a situation where
30 the protection under Article..."

31 **JUSTICE M.M. SUNDRESH:** Therefore, you are saying, there is no need for a review on
32 the... it has no need to go through this. Simply you have to take the existence of a group of
33 believers.

- 1 **K.M. NATARAJ:** That's right, that's right, absolutely.
- 2 **JUSTICE M.M. SUNDRESH:** It should be given that much of flexibility.
- 3 **K.M. NATARAJ:** That's right. That's right.
- 4 **JUSTICE M.M. SUNDRESH:** Please don't worry.
- 5 **K.M. NATARAJ:** It is very flexible.
- 6 **JUSTICE M.M. SUNDRESH:** So therefore, that flexibility you give.
- 7 **K.M. NATARAJ:** Yes, it should be very flexible.
- 8 **JUSTICE M.M. SUNDRESH:** Yes.
- 9 **K.M. NATARAJ:** A group of few people they may follow a particular *sampradaya* and if that
10 is according to their belief, collective belief, that has to be protected. It is with reference to
11 Article 25(1). So collectively, we have right under 25(1) and it transfers into the denomination
12 or *sampradaya* to be followed from time immemorial, and that is protected under 26. That is
13 a protection.
- 14 **JUSTICE JOYMALYA BAGCHI:** Can the *sampradaya* change its belief?
- 15 **K.M. NATARAJ:** It can, it can. It is no rigid... no rigid structure at all for *sampradaya*. It is
16 a matter of faith.
- 17 **JUSTICE B.V. NAGARATHNA:** *Sampradaya* is something which has come from time
18 immemorial.
- 19 **K.M. NATARAJ:** From time immemorial.
- 20 **JUSTICE B.V. NAGARATHNA:** It is a something of permanence.
- 21 **JUSTICE M.M. SUNDRESH:** But it can be done actually afresh also. No problem.
- 22 **K.M. NATARAJ:** Yes.
- 23 **JUSTICE M.M. SUNDRESH:** You can make it, create a new ideas, new belief, there's no
24 difficulty.
- 25 **JUSTICE B.V. NAGARATHNA:** We've introduced many things, of course but the base
26 remains.
- 27 **JUSTICE JOYMALYA BAGCHI:** When the *sampradaya* changes its belief, does it become
28 a new *sampradaya* or it is the same *sampradaya*?

1 **K.M. NATARAJ:** *Sampradaya*, it has no definite meaning as such. If you are able to under
2 the facts of a particular situation, if you are able to point out or prove in a particular given case.
3 Yes, this is a *sampradaya*, we are collectively following it, and that has to be protected.

4 **JUSTICE JOYMALYA BAGCHI:** Let us say a *sampradaya* means, one of the common
5 beliefs is one of vegetarianism. And thereafter decides, a section of it decides, that that is not
6 enough. There should be fasting and that becomes a belief. Now, can that *sampradaya* of the
7 change of belief become a new *sampradaya*?

8 **K.M. NATARAJ:** Yes, that's how the different religions...

9 **JUSTICE JOYMALYA BAGCHI:** According to you, that will become a new *sampradaya*.

10 **K.M. NATARAJ:** New *sampradaya*. Different, yes, different *sampradaya* keep on coming.

11 **JUSTICE JOYMALYA BAGCHI:** That is why I am asking you that is a *sampradaya* having,
12 because if you see religion, although we are not seeing a specific religion, we test it on the
13 ambit of Hindu religion. The religion has in fact been wave after wave of philosophical
14 interrogations with self, with life, with nature, and if at all there is one, maker. Now in this
15 exercise, various philosophers have put in their ideas and these ideas have populated
16 themselves into structures which you say is the idea of *sampradaya*. Now in this situation my
17 question is, that when a *sampradaya* is created, and again a new philosophical challenge or a
18 new philosophical idea creates an antithesis, a group evolves to that, will that become a new
19 *sampradaya*? That is what is the test.

20 **K.M. NATARAJ:** Yes, it has to be, it has to be, it has to be, it has to be.

21 **JUSTICE JOYMALYA BAGCHI:** That is, you have... You please proceed on.

22 **K.M. NATARAJ:** Yes, it has to be. That is a...

23 **JUSTICE JOYMALYA BAGCHI:** That is why it's not always immutable. The continuous
24 way of interrogation with truth.

25 **K.M. NATARAJ:** Truth. Because it is an offshoot of 25(1). Collectively we believe something
26 as our right, as a faith, and when it is transformed...

27 **JUSTICE JOYMALYA BAGCHI:** 25(1) is individually I believe something.

28 **K.M. NATARAJ:** But when it comes to collectively...

29 **JUSTICE JOYMALYA BAGCHI:** It's individual beliefs who lays, it forms a group and that
30 is the *sampradaya*.

31 **K.M. NATARAJ:** *Sampradaya*, collective. Collective.

- 1 **JUSTICE JOYMALYA BAGCHI:** Then again, that group, like every living organism, can
2 multiply or even self-destruct.
- 3 **K.M. NATARAJ:** Yes. And it can continue for generations to generation, and ultimately it
4 has to be proved in a particular given case, depending upon the set of facts placed before the
5 court, for consideration. At once it is a *sampradaya*, and it is claimed to be *sampradaya*, that
6 has to be protected, or even section thereof.
- 7 **JUSTICE B.V. NAGARATHNA:** Ultimately *sampradaya* or the.... See, if we take the
8 example of Hindu religion, you want to find the truth and ultimately salvation and *moksha*,
9 there are various paths to that.
- 10 **K.M. NATARAJ:** Correct.
- 11 **JUSTICE B.V. NAGARATHNA:** They are represented by various *sampradayas*,
12 denominations. It is a manifestation of the various paths. There is no single path. Like other
13 religions, in Hinduism there is no single path to *moksha*.
- 14 **K.M. NATARAJ:** No.
- 15 **JUSTICE B.V. NAGARATHNA:** It is multiple.
- 16 **K.M. NATARAJ:** Multiple.
- 17 **JUSTICE B.V. NAGARATHNA:** You can belong to various, you say denomination or
18 *sampradaya*, to reach ultimately the truth, the God or attain salvation or *moksha*. So that is
19 why the denomination has come in the context of Hindu religion. Therefore, there is no...
- 20 **JUSTICE M.M. SUNDRESH:** See the path may be different.
- 21 **JUSTICE B.V. NAGARATHNA:** Various paths, yes.
- 22 **JUSTICE M.M. SUNDRESH:** Not only Hindu religion, every other religion. All religions
23 you know, it's like beautifully described by one of the authors. They say, it's rainwater. It gets
24 in, it partakes different character, but it goes through different streams but ultimately they just
25 merge...
- 26 **K.M. NATARAJ:** Merges in one point...
- 27 **JUSTICE M.M. SUNDRESH:** They can... everyone will have a different route but then the
28 ultimate goal is the same.
- 29 **K.M. NATARAJ:** Goal is...
- 30 **JUSTICE M.M. SUNDRESH:** That what Kabir said...

- 1 **K.M. NATARAJ:** It has to be understood, it has to be done like that. This is the *sampradaya*.
- 2 **JUSTICE B.V. NAGARATHNA:** The beauty of the Hindu religion is that there are many
3 paths unlike the other religions where there may be only one path. Here, there are several
4 paths, therefore, several *sampradayas* or denominations has to be...
- 5 **K.M. NATARAJ:** Correct, different *sampradayas*... And collectively and many, many times
6 we have seen in the common parlance, collectively when it comes to many rituals, we call it as
7 a Hindu *sampradaya*. Hindu itself can be denomination collectively, collectively. Christianity
8 itself can be denomination, Islam can be denomination. Then only it gets a complete
9 protection, depending upon the facts. If you are able to prove it is a collective, the exercise of
10 the faith or the collective exercise of your right and guarantee under 25(1).
- 11 **JUSTICE M.M. SUNDRESH:** One could believe it is not static.
- 12 **K.M. NATARAJ:** It's not static.
- 13 **JUSTICE M.M. SUNDRESH:** It keeps changing.
- 14 **K.M. NATARAJ:** Keeps changing.
- 15 **JUSTICE M.M. SUNDRESH:** Only thing is you need to have an identified group and then
16 they combine together and then form a denomination.
- 17 **K.M. NATARAJ:** Then it becomes *sampradaya*.
- 18 **JUSTICE M.M. SUNDRESH:** You can change. From today, you have something tomorrow.
19 Because enlightenment wisdom comes only when there is a change.
- 20 **K.M. NATARAJ:** Yes. On many times even in the... how the... commonly we read in the
21 newspapers when the funeral and all takes place, we see it as it happened according to Hindu
22 *sampradaya*, because collectively as per Hindu *sampradaya*, it has happened, or it happened
23 according to Vaishnav *sampradaya*, it can be Shaivite *sampradaya*. Everything is a
24 denomination. That has to be understood in the Indian context. It can be according to
25 Christian *sampradaya*, it can be according to Islam *sampradaya*, and we need not probe to
26 what extent that *sampradaya* is followed or not, whether it's *sampradaya* or not. Collectively
27 it is called... a religion itself can be *sampradaya*. Religion itself is a denomination under
28 Article 26.
- 29 **CJI SURYA KANT:** 17, last two three lines.
- 30 **K.M. NATARAJ:** Yes. "Thus the phrase religious denomination or any section thereof in
31 Article 26 must be interpreted in Indic sense, informed by the concept of *sampradaya* as
32 reflected in the authoritative Hindi text of the Constitution. The interpretation must be rooted

1 in India's unique, pluralistic and culturally rich religious landscape. Only by adopting such an
 2 approach can the constitutional promise of religious autonomy be fully realized. To achieve
 3 the religious autonomy guaranteed under Article 26, this is the only and only interpretation
 4 permissible or possible."

5 Next, I'm coming to scope of the term Matters of Religion, Article 26, because it refers to the
 6 matters of religion. There in the *Shirur Mutt* case itself, the first sentence, only one sentence
 7 I would like to read in para 18. "What are... what then are matters of religion? The word
 8 'religion' has no... has not been defined in the Constitution, and it is a term which is hardly
 9 susceptible to any of rigid definition." That exactly is the relatable, even to *Sampradaya*. Once
 10 it is a religion, once it is a *sampradaya* and we can't give a definite definition for that. What
 11 constitutes a religion? There are basically we can take three aspects which is in the next page
 12 in para 19.

13 **CJI SURYA KANT:** The form and manner.

14 **K.M. NATARAJ:** "The form and manner of worship", Number one. Number two, "The
 15 characteristics attributed to the deity". There is a plurality. A deity may have a different the
 16 character, especially when it comes to Hindu society. The third one, "The observance and
 17 customs that define the religious practice". The observance, how it has to be, what are the
 18 things to be observed and the customs that has to be followed. Collectively or individually that
 19 can form... that can be basis for religion. Further, "These matters lie within the exclusive
 20 domain of the denomination and not amenable to external scrutiny." Now, which I mean, with
 21 the due respect, normally when it comes to judicial scrutiny, whether this is a particular
 22 *sampradaya* which is correct or not, whether it has to be followed or not, that cannot be
 23 assessed by an external body. That is what that...

24 **JUSTICE JOYMALYA BAGCHI:** Mr. Nataraj, what he says that as the first instance the
 25 court decides, what is the *sampradaya* or what is the religious practice or the matters of
 26 religion administered by the *sampradaya*. The courts come into question when there is a
 27 conflict in these facts. A group says this is a *sampradaya* whereas the other group says this is
 28 not a *sampradaya*, or a group says... or a member of the *sampradaya* itself says that this is
 29 not the form of worship. There, the courts necessarily require...

30 **K.M. NATARAJ:** On evidence.

31 **JUSTICE JOYMALYA BAGCHI:** Exactly sir, because of Section 9 of the Civil Procedure
 32 Code. Any question where there is a divergence or a conflict requires to be resolved through
 33 the process of adjudicatory mechanisms. To say that this cannot be answered by the court,
 34 appears to be a very, it actually...

1 **K.M. NATARAJ:** No, certainly in a particular properly instituted suit.

2 **JUSTICE JOYMALYA BAGCHI:** If somebody questions the *sampradaya's* right to define
3 itself or to define its religious practices. But what happens when the *sampradaya's* rights as
4 to the religious practices are themselves in challenge that (a), that whether you must have a
5 fast before you go to the temple, or you must pray in a particular manner. Who will decide
6 when the two groups or two members of the same *sampradaya* are challenging?

7 **K.M. NATARAJ:** Yes, when there are competing groups.

8 **JUSTICE JOYMALYA BAGCHI:** Yes.

9 **K.M. NATRAJ:** When there are competing claims, then based upon the evidence...

10 **JUSTICE JOYMALYA BAGCHI:** We are not on the mechanism of... we are on the forum.
11 The forum is nothing but the court, and there the court necessarily has to decide as a matter
12 of issue that this is a *sampradaya*. This *sampradaya* had a particular religious practice and
13 this is the religious practice and not what you are controverting to it. This will also come into
14 play when, let us say, a non-believer, who is also having conscience of non-belief says my right
15 of conscience is in conflict with your *sampradaya's* matters of religion, where a non-believer
16 can also bring into question the matters of religion of a particular *sampradaya*. This is what
17 we would read.

18 **K.M. NATRAJ:** That's right.

19 **JUSTICE JOYMALYA BAGCHI:** Because it cannot be that institution of courts...

20 **K.M. NATARAJ:** No, I'm not saying... definitely not, definitely not. Kindly don't take that...

21 **JUSTICE JOYMALYA BAGCHI:** ...or a very clear inferable propositions. They must be
22 expressly excluded, or most necessarily have to be excluded because of the context. This is not
23 a situation like that.

24 **K.M. NATARAJ:** Kindly do not...

25 **JUSTICE B.V. NAGARATHNA:** In *Venkataramana Devaru*, this court has said, the
26 context of matters of religion a restrictive interpretation must be given having regard to Article
27 25(2).

28 **K.M. NATARAJ:** 2.

29 **JUSTICE B.V. NAGARATHNA:** Therefore, you can't bring everything into matters of
30 religion so as to prevent social reform. That is why they have that said to balance it.

31 **K.M. NATARAJ:** Yes. You have to balance.

1 **JUSTICE B.V. NAGARATHNA:** But a restrictive interpretation must be given as to what is
2 matters of religion, and at the same time, one cannot negate the other. 25(2) cannot negate
3 26(b).

4 **K.M. NATARAJ:** Correct.

5 **JUSTICE B.V. NAGARATHNA:** And 26(b) cannot negate...

6 **K.M. NATARAJ:** All the articles, all the articles under the Constitution, especially Part III
7 will have to be harmoniously construed or constructed. Nothing can be read in isolation,
8 especially Article 26 cannot be read as an island. It is not an island provision. So kindly now
9 go to (ii) at... "Harmonization of Article 26 with Article 25 is the essence of interpretation.
10 Article 25 and 26 occupy the same normative plane within Part III. Article 25 secures
11 individual freedom of consciences and religious practice, while Article 26 protects the
12 collective autonomy of religious denomination. Neither provision is textually subordinate to
13 the other." 25 is not subordinate to 26, nor is 26 subordinate to 25; both will have to be read
14 together. You have to harmonize.

15 **JUSTICE JOYMALYA BAGCHI:** I find it a bit difficult. How do you read the subject to
16 other provisions of this part in 25(1) and its conspicuous absence in 26? It must be that the
17 individual freedom of conscience once coalesced into the collective, the collective has to be
18 given some degree of reverence.

19 **K.M. NATARAJ:** But without 25(1), can there be any...

20 **JUSTICE JOYMALYA BAGCHI:** There cannot be 26(b).

21 **K.M. NATARAJ:** 26(b).

22 **JUSTICE JOYMALYA BAGCHI:** Absolutely. That Mr. Nataraj, you are absolutely right.
23 But when this, let us say, small atomic faith molecules coalesce into the *sampradaya*, and the
24 *sampradaya* has a common denominatory religious belief, that common denominatory
25 religious belief has some cohesive preference to the individual divergent views or individual
26 divergent views beyond the *sampradaya*. Sir, please see also 25(1) not of the *sampradaya*
27 itself, but also of views of other's conscience where you see the conflict. Here, will you say that
28 both stand on the same plain?

29 **K.M. NATARAJ:** Neither is subordinate to the other.

30 **JUSTICE M.M. SUNDRESH:** Correct. There are three ways of looking at it.

31 **K.M. NATARAJ:** Yes.

1 **JUSTICE M.M. SUNDRESH:** One can be as my brother said, it can be a dispute between
2 the believer and the denomination, what extent court, and which forum? The other will be a
3 non-believer is saying in which case he goes out of the denomination, what extent? The third
4 will be a denomination and you. The fourth is the role required to be played by the court in
5 these aspects. This is what we have exactly.

6 **K.M. NATARAJ:** You have to harmonize, therefore. That is only possible approach.

7 **JUSTICE M.M. SUNDRESH:** It is a believer and, a believer and the denomination then
8 usually right, as brother said, it is a matter for suit and evidence, you will go there.

9 **JUSTICE JOYMALYA BAGCHI:** 26(b) at a higher platform than 25(1). That is your
10 observation.

11 **K.M. NATARAJ:** Yes. We have to understood or read together harmoniously that both is
12 Article 25(1) and entire 26 will have to be read together.

13 **JUSTICE B.V. NAGARATHNA:** See, when it comes between the state and the
14 denomination, there is a conflict between the states right under 25(2) and the right of a
15 denomination under 26(b).

16 **K.M. NATARAJ:** 26.

17 **JUSTICE B.V. NAGARATHNA:** Possibly that is where the question of essential religious
18 practice comes in. And what is protected is an essential religious practice of that
19 denomination. Otherwise 25(2) reform can never happen. Everything cannot say, it is my
20 *sampradaya*, don't touch it. You can't say that to the State.

21 **K.M. NATARAJ:** Correct.

22 **JUSTICE B.V. NAGARATHNA:** Or to the court. What is saved is the essential religious
23 practice of that denomination. If there is anything else where reform is required, then the state
24 can legislate.

25 **K.M. NATARAJ:** For that matter...

26 **JUSTICE B.V. NAGARATHNA:** ...Between 25(2) and 26(b).

27 **K.M. NATARAJ:** Yes. For that matter, every religious practice or religious...

28 **CJI SURYA KANT:** I think this may be only a purely an academic debate, so there is no
29 conflict between 25(2) and 26 which might require any harmonization.

30 **K.M. NATARAJ:** Absolutely.

31 **CJI SURYA KANT:** There is absolutely... these are two different kind of...

- 1 **K.M. NATARAJ:** Different kinds.
- 2 **CJI SURYA KANT:** What is 25(2) is regulated only by three constitutional conditions: public
3 order, morality and health. Unless somebody make out a case in these three exceptions,
4 everything is permissible in 25(2).
- 5 **K.M. NATARAJ:** 25, because 25(2) that controls both 25(1) and 26.
- 6 **CJI SURYA KANT:** That's right.
- 7 **K.M. NATARAJ:** So it is a mechanism to regulate both 25(1) and 26.
- 8 **JUSTICE M.M. SUNDRESH:** Please don't say it controls.
- 9 **K.M. NATARAJ:** Not controls, enabling provision.
- 10 **JUSTICE B.V. NAGARATHNA:** Nothing contained in that article.
- 11 **JUSTICE M.M. SUNDRESH:** We'll put it this way, 25(2) tells you what is your jurisdiction,
12 that is only with respect to the political and other things. Things and economic and other
13 factors and the secular things, which may be loosely connected with this actually. And then the
14 25(2)(b) where you have an extended role to play like superstition, something is there, the
15 larger interest of the society, including then the third one is with the non-entry. These are the
16 factors you can do so which means beyond that you are not supposed to go into, subject to
17 other things. So which means if you don't do it, what extent the court can do it is...
- 18 **K.M. NATARAJ:** Justice Bagchi's question precisely answered in para 24 of my submission,
19 "As stated above, the relationship between Article 25 and 26 must be one of harmonization in
20 so and so case. It may be in certain circumstances be balanced with the broader social
21 objective. However, such balancing cannot result in the effacement of Article 26 which must
22 retain substantive content and meaning." So 26 cannot be effaced at all completely, but in
23 substantive form and its content, that has to be given some kind of weightage when it comes
24 to Article 26. Notwithstanding, there is no expression of it is governed by Part III. Then kindly
25 come to III.
- 26 **JUSTICE JOYMALYA BAGCHI:** You are absolutely right and you are also quoted
27 *Devaru*.
- 28 **K.M. NATARAJ:** Yes.
- 29 **JUSTICE B.V. NAGARATHNA:** *Devaru* has said that, what is protected under 26(b).
- 30 **K.M. NATARAJ:** 26.
- 31 **JUSTICE B.V. NAGARATHNA:** In the context of 25(2)(b).

1 **K.M. NATARAJ:** Correct, 25(2)(b).

2 **JUSTICE B.V. NAGARATHNA:** A balance

3 **K.M. NATARAJ:** Correct

4 **JUSTICE B.V. NAGARATHNA:** One cannot negate the other.

5 **K.M. NATARAJ:** That is the correct approach, that's my respectful submission to the court.
6 And kindly come to III. "Public morality as the governing standard, it is submitted that term
7 morality in Article 25 and 26 must be understood as a public morality and not as an abstract
8 notion of constitutional morality. The phrase 'public order, morality and health' constitutes a
9 cluster of external regulatory grounds, all of which are directed towards maintaining social
10 and public order. The interpretation of morality must therefore be consistent with this
11 context." For this purpose, no doubt Article simply says that it is the public order, morality
12 and health. But when actually it came to constituent assembly debates, which are annexed in
13 my written note, at the last three pages, 236. It starts from 234, that's a Constituent Assembly
14 debates Volume VII held on 6th December 1948. It was referred to as Draft Article 19, that is
15 relatable to Article 25 or now it is Article 25. Now kindly turn to 236, Laxmi Kantha Maitra,
16 "This Article 19 of the Draft Constitution i.e. 25, confers on all persons the right to profess,
17 practice and propagate any religion they like, but this right has been circumscribed by certain
18 conditions which the state would be free to impose in the interest of public morality, public
19 order and public health and also insofar as the right conferred here does not conflict in any
20 way with the other provisions of the... elaborated under this part of the Constitution." So
21 actually the debate was actually to bring in was the public morality, public order and public
22 health. It is only draftsman's convenience to say that it is the public... omitting public morality
23 and bringing only public order, morality and health.

24 **JUSTICE M.M. SUNDRESH:** Correct. That is the essence.

25 **K.M. NATARAJ:** Yes. So therefore the... the standard which has been applied then was only
26 the public morality, not the constitutional morality. Once public morality itself is the guiding
27 or the light under which we have to read the provision, then it is the public morality and that
28 alone has to guide us to interpret the religious rights. Nothing else.

29 Then in para 27, "The constitutional text does not recognize or employ the concept of
30 constitutional morality as a limitation on religious freedom. Therefore, importing such a
31 standard would amount to judicial overreach. The role of courts is limited to examine whether
32 a practice violates the rights guaranteed under Part III of the Constitution and not to
33 independently determine or redefine morality." We need not examine or we need not redefine
34 what would be the constitutional morality, what is the morality, what or what is the standard

1 of morality; that we need not define because Constitution itself guides us to take it as a public
2 morality and that has to be followed.

3 Then kindly come to (iv). "Unsustainability of the Essential religious practice, REP doctrine,
4 ERP doctrine." Why the test of essential religious practice that cannot be accepted, I put it on
5 for two grounds. Number one at (a) - "ERP that is Essential Religious Practice lacks textual
6 foundation in the Constitution. The Constitution under Articles 25 and 26 only recognise the
7 distinction between the religious practice and the secular practice. Article 25 protects the right
8 to practice, profess, propagate religion simpliciter while reserving the State power so and so.
9 It is pertinent to note that the terms 'religion and religious practice' used in Article 25 and 26
10 are not qualified by any restrictive words, so as to narrow down the scope thereof. In the
11 absence of any qualifying or restrictive word or phrase, the terms 'religion and religious
12 practice' should be interpreted to give wide interpretation." So when Article 25 or 26
13 employees only the religious practice, there is no question of bringing something else, reading
14 it in a different with a different meaning as an essential or in the restrictive sense, that is not
15 permissible.

16 **JUSTICE B.V. NAGARATHNA:** Who is it entered then the constitutional discourse?
17 Essential religious practice has come about in which case? Is it a judicial invention?

18 **K.M. NATARAJ:** It is a judicial invention as it developed.

19 **JUSTICE B.V. NAGARATHNA:** First decision.

20 **K.M. NATARAJ:** Yes, we have addressed in the subsequent paras, we have addressed it. Now
21 in para 29, "As can be seen under 25 and 26 do not draw any distinction between religious
22 practice that are essential and those are non-essential." Absolutely there is nothing. What is
23 protected under 25, 26, are all religious practices are protected. Then only limitation would be
24 Part III.

25 **JUSTICE B.V. NAGARATHNA:** Which is that case where this discussion on essential
26 religious practice happened?

27 **K.M. NATARAJ:** Yes, kindly turn to... That is in a... First time that has been wrongly applied
28 or interpreted in *Durgah Committee, Ajmer. Ajmer Durgah Committee* case.

29 **JUSTICE B.V. NAGARATHNA:** Not in *Shirur Mutt*?

30 **K.M. NATARAJ:** Not in *Shirur Mutt*.

31 **JUSTICE B.V. NAGARATHNA:** That was under 26.

32 **K.M. NATARAJ:** Yes, it was wrongly applied

- 1 **JUSTICE B.V. NAGARATHNA:** It's Under 26.
- 2 **GOPAL SANKARNARAYANAN:** The argument is taken by the Attorney General in
3 ***Shirur Mutt*** and it's recorded at the top of page... In ***Shirur Mutt*** at the top of page 180.
4 That is his argument.
- 5 **JUSTICE B.V. NAGARATHNA:** Given its due importance there.
- 6 **GOPAL SANKARNARAYANAN:** Correct. Perhaps, but it is first argued there.
- 7 **JUSTICE JOYMALYA BAGCHI:** Paragraph 33 of your note...
- 8 **K.M. NATRAJ:** Correct.
- 9 **JUSTICE JOYMALYA BAGCHI:** Paragraph 33 of your note. Please read that. That is where
10 ***Shirur Mutt*** uses the word 'essential religious practice' to on... to explain the argument of
11 the Attorney General. Attorney General was making a distinction between essential and non-
12 essential. And ***Shirur Mutt*** says that anything connected with religion is essential. Anything
13 which is associated with the religion through secular activity is essential.
- 14 **K.M. NATRAJ:** And that was later misinterpreted or wrongly interpreted in ***Ajmer***
15 ***Durgah*** case.
- 16 **JUSTICE JOYMALYA BAGCHI:** No, before that in... Justice Gajendragadkar using the
17 word 'essential religious practice' invents the outer layer of superstition in ***Tilkai...***
- 18 **K.M. NATARAJ:** That's in ***Durgah Committee*** case.
- 19 **JUSTICE JOYMALYA BAGCHI:** Govindlalji.
- 20 **K.M. NATARAJ:** ***Tilkayat*** case. ***Tilkayat*** case.
- 21 **JUSTICE JOYMALYA BAGCHI:** Plus it is noted in ***Shirur***, accepted in ***Troilokya***. In
22 ***Troilokya...***
- 23 **K.M. NATRAJ:** ***Tilkayat*** case.
- 24 **JUSTICE JOYMALYA BAGCHI:** Sorry. ***Tilkayat***.
- 25 **K.M. NATRAJ:** Govind.
- 26 **JUSTICE JOYMALYA BAGCHI:** Govindlalji... that Rajasthan.
- 27 **K.M. NATARAJ:** But ***Durgah*** is before. Just about a month before or so.
- 28 **JUSTICE JOYMALYA BAGCHI:** Yes, almost one.
- 29 **K.M. NATARAJ:** Yes, by the same author.

- 1 **JUSTICE JOYMALYA BAGCHI:** Same, right. Justice Gajendra.
- 2 **K.M. NATRAJ:** So in para 30, I pointed I specifically pointed out when the Article 25 and 26
3 Both the articles do not refer to...
- 4 **JUSTICE JOYMALYA BAGCHI:** Mr. Nataraj, if the *sampradaya* has various rites and
5 customs and as you will find in all religions as in law, there are mandatory customs, there are
6 directory customs. Now if we get a bouquet of customs, some mandatory, and thereby essential
7 and some non-mandatory or discretionary and thereby non-essential, do you see that the idea
8 of essentiality of custom to the very ethos of the tenet, that will not be a relatable factor?
- 9 **K.M. NATARAJ:** That depends upon the faith of an...
- 10 **JUSTICE JOYMALYA BAGCHI:** It depends on the facts, yes, you are right.
- 11 **K.M. NATARAJ:** And the faith.
- 12 **JUSTICE JOYMALYA BAGCHI:** But you're saying that your submission that the
13 essentiality is not posited on religious, on secular character but with its relation or relatable to
14 the tenet and the belief of the *sampradaya*.
- 15 **K.M. NATARAJ:** *Sampradaya*. Even by not following that particular tenet, you cannot be
16 excommunicated. You have independent right of existence either to follow or not to follow. As
17 a non-believer, you can continue.
- 18 **JUSTICE JOYMALYA BAGCHI:** That is the question that's put to you that the challenge
19 can be by a non-believer, of a believer's existing custom interfering with his freedom of
20 conscience.
- 21 **K.M. NATARAJ:** He can't, he can't because he's a non-believer. He does not believe in that
22 particular *sampradaya*. He is totally... his belief is something else.
- 23 **JUSTICE JOYMALYA BAGCHI:** Correct.
- 24 **K.M. NATRAJ:** As a non-believer, he has an independent belief that I don't believe.
- 25 **JUSTICE JOYMALYA BAGCHI:** And therefore, I have a right to interrogate.
- 26 **K.M. NATARAJ:** He can't interfere in others right.
- 27 **JUSTICE JOYMALYA BAGCHI:** His belief is to question. His belief is to interrogate. Think
28 of an atheist, an atheist belief and his right to profess atheism is to interrogate the belief of
29 another. And therefore, if he goes into an exercise to test the belief of others believe, he said,
30 to not exercise his powers under... constitutional right under 25(1). And there is my question

1 to you, that an atheist propounding his right under 25(1), will he or will he not be subjected to
2 the *sampradayas'* collective faith of matters under 26(b)?

3 **K.M. NATARAJ:** He can introspect, he can't question somebody else. He has a right to
4 introspect. He can't question somebody's right.

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

6 **JUSTICE M.M. SUNDRESH:** There is no question, there is no common belief, there's no
7 common belief, how do we even come into the...?

8 **K.M. NATARAJ:** Yes, it can't be.

9 **JUSTICE B.V. NAGARATHNA:** Mr. Natraj, belief is something common whether atheist
10 or agnostic or a believer in any religion, it is belief. That is conscience.

11 **K.M. NATARAJ:** Perfect.

12 **JUSTICE M.M. SUNDRESH:** I think now...

13 **JUSTICE ARAVIND KUMAR:** His right will get restricted only to agree to disagree.

14 **K.M. NATARAJ:** Disagree.

15 **JUSTICE ARAVIND KUMAR:** That's all. Nothing beyond that.

16 **K.M. NATARAJ:** That's all. Nothing beyond that. You can't question, somebody believes it,
17 you can't question it. You can't say that that's wrong. You can introspect yourself and say that
18 yes, I don't believe, it's not acceptable to me. That's fine, perfectly fine.

19 **CJI SURYA KANT:** Yes, on para 31.

20 **JUSTICE JOYMALYA BAGCHI:** Thereby, you are saying that 26(b), the collective belief
21 of a *sampradaya* will eclipse the belief of the non-believer to practice or profess something
22 under 25(1).

23 **K.M. NATARAJ:** 26, they have...

24 **JUSTICE JOYMALYA BAGCHI:** That is where I was...

25 **K.M. NATARAJ:** Believers have that right. Right is guaranteed. Believer's right is guaranteed
26 and that cannot be eclipsed by non-believers.

27 **JUSTICE JOYMALYA BAGCHI:** Right under 25(1)?

28 **K.M. NATARAJ:** Can't be. 25, that belief of non-believer, that is confined to himself.

1 **JUSTICE JOYMALYA BAGCHI:** That is what we are asking you. That is why I was again
2 putting this question to you that will you put them on equal platform when it comes to a
3 contrarian believer?

4 **K.M. NATARAJ:** Yes.

5 **JUSTICE JOYMALYA BAGCHI:** Now I've got your answer on this.

6 **K.M. NATARAJ:** Yes. Now kindly go to para 32. The first one I pointed out with regard to
7 essential religious practice, there is no textual foundation, that is the first one I said in para 28
8 onwards. Insofar as whether it's essential or not, when we test in the Indian context, let us take
9 the major religion of Hinduism, there's nothing called it is mandatory if you want to you follow
10 it or if you don't follow it, leave it. There is no particular text as such which has to be followed.
11 So therefore in the absence of textual foundation the essentiality test cannot be applied,
12 number one. Number two, in the Indian religious landscape in para 32 how I have put it, "The
13 doctrine of essential religious practice presupposes the existence of certain subset of religious
14 practices that are essential to a particular religion. We said presupposition is inherently
15 flawed, inasmuch as, no particular practice can be called essential to a religion to the exclusion
16 of other. The religious practices are a matter of faith, and faith differs from community to
17 community and from individual to individual. In such a situation, deeming certain practices
18 to be essential to a religion or religious denomination to the exclusion of others, would lead to
19 securing fundamental right to one, and at the same time denying it to the other."

20 **JUSTICE B.V. NAGARATHNA:** So it is said Hinduism is ultimately a way of life.

21 **K.M. NATARAJ:** A way of life.

22 **JUSTICE B.V. NAGARATHNA:** Even though a person does not go to a temple or pray or
23 worship, he still remains a Hindu.

24 **K.M. NATARAJ:** Yes, correct. Still as a non-believer also he can survive as a Hindu. Then
25 kindly go to para 33 to 35, three paras. "For example, Hindu religion encompasses many
26 religious practices and no particular practice is/are more essential than others. Many religious
27 practices are not derived from any particular codified text and may be based on various sources
28 including scriptures, customs, traditions or beliefs. The religious practices that arise from any
29 of the aforesaid sources are ultimately based on faith, which varies from community to
30 community and from individual to individual. The diversity is evident from the fact that
31 Hinduism embraces both believer as well as non-believer. This inherent plurality makes it
32 impossible to identify any practice as universally essential to Hinduism. The absence of rigid
33 doctrinal structure further reinforces the argument that essential religious practice test is
34 inapplicable, where diversity itself is the defining character. As such, deeming any particular

1 practice as essential would be an anathema to the very foundation of the rights guaranteed
2 under Article 25, 26. The Constitution must be interpreted to protect such rights and not to
3 destroy them." Which means, the diversity is the one of the basic structure which is recognized
4 under the Constitution. When there is a plurality, when there is a diversity, you must respect
5 everyone; the right of every individual has to be respected. That has to be protected. So you
6 can't say that it is essential and that alone is protected. When there is a multiple practices,
7 multiple faiths, multiple sects, multiple beliefs, you can't say that we protect only this
8 particular aspect is the claim of the other; everyone has to be protected, every right has to be
9 protected.

10 Then para 34. "The right under Article 25 and 26 is guaranteed only to believers and not to
11 non-believers, in as much as a non-believer has no right to invade the right of a believer", that
12 is the precise answer a question posed to Justice Bagchi. The non-believer has no right to
13 invade the right of a believer.

14 **JUSTICE JOYMALYA BAGCHI:** Here you are putting beyond *Devaru*. *Devaru* says that
15 there should be a proportionality between the non-believer's rights expression and the
16 believers Article 26(b), matter of religion.

17 **K.M. NATARAJ:** Not to invade the right of the believers, therefore it has to be harmonized.
18 You can protect your right as a non-believer, you can go to the court or you can say anywhere
19 yes, this is my right to not to believe but I have no right to...

20 **JUSTICE M.M. SUNDRESH:** So long as it is not imposed, they have no right to poke their
21 nose into others. It is as simple as that.

22 **K.M. NATARAJ:** Correct.

23 **JUSTICE M.M. SUNDRESH:** To put it simply.

24 **JUSTICE B.V. NAGARATHNA:** 26 does not give rise to a horizontal right, only against the
25 state.

26 **K.M. NATARAJ:** No. Only against the state.

27 **JUSTICE B.V. NAGARATHNA:** No horizontal right.

28 **K.M. NATARAJ:** Yes, let us take in many of the temples, only the vegetarian food is served.
29 I'm giving you an example, and a person by choice or by conscience, he says that, I want to
30 have the non-vegetarian food. He can't go to a particular denominational temple and say yes,
31 I have a right to have the particular non-vegetarian food, therefore I can eat it, I it has to be
32 served to me. He has no such right to invade the right of those believers under the
33 denomination or under any religion. Similarly, liquor. In some of the temples even liquor is

1 given as a prasadam. Tomorrow you can't object by saying that yes, you don't give a liquor as
2 a *tirtham* or *prasadam* in a particular temple. In many temples you have seen liquor is also
3 given as a *tirtham* in many South Indian temples.

4 **JUSTICE B.V. NAGARATHNA:** South, North East, West everywhere

5 **K.M. NATARAJ:** Yes.

6 **JUSTICE M.M. SUNDRESH:** We have heard the learned SG and you. To our mind, I think
7 you are trying to complicate things which is not there. There is no need. As Honourable Chief
8 Justice just said, If you read Article 25 it gives adequate protection to the individual to profess;
9 subjected to only three riders that is public order, morality or health. You can say
10 constitutional morality or public morality. This and that. As my Brother again said 26(2) is
11 only enabling profession and while enabling it also restricts you. Which means 26(2)(b), you
12 can do it only that involves a public health, public morality and public order. But.... I think any
13 other interpretation would again, then it will not make any other sense.

14 **K.M. NATARAJ:** That will destroy.

15 **JUSTICE M.M. SUNDRESH:** That is the priority. It gives protection to the person, whether
16 non-believer, this and that. It is right to profess, practise and propagate is subject to public
17 order, morality and health. And this... when these are not, they are not followed other things,
18 you can step in and incidentally court can just verify whether to what extent we can interfere.
19 That is our understanding so far as the arguments are concerned which is [UNCLEAR].

20 **JUSTICE B.V. NAGARATHNA:** So according to you, matters of religion must be given a
21 broad interpretation.

22 **K.M. NATARAJ:** Broad interpretation. Broadest interpretation you have to give. Then para
23 35. "Any interpretation imposing test of essentiality or centrality would affect the rights of
24 several others following such a faith, practice and in interpretation so and so. Adversely
25 affecting the faith in the absence of their participation in the legal proceedings would result in
26 destruction of their faith as non-essential." Let us take in a particular proceedings, if you try
27 to decide whether it's essential or not, there may be many people who may be having a similar
28 faith who may not be able to participate in such an adversarial situation, that may affect their
29 faith or the right also. So we need not go into all those issues.

30 **JUSTICE JOYMALYA BAGCHI:** We can always convert the case into a representative case.

31 **K.M. NATARAJ:** Yes.

32 **CJI SURYA KANT:** About *Shirur Mutt* we have understood that.

1 **K.M. NATARAJ:** Then para 38. "Further, The ERP doctrine necessarily requires the... ERP
2 doctrine necessarily requires the court to determine whether a particular practice is essential
3 to a religion. It is respectfully submitted that such an inquiry lies beyond the institutional
4 competence of the constitutional courts." To decide whether it's essential or not, to what
5 extent, whether it's a particular, it's essential or not that is normally not for the court unless
6 there are two competing, as Justice Bagchi put it, there are two rival claims with regard to
7 particular *sampradaya*, that necessarily court has to step in. Otherwise it is not for the court
8 to decide whether it is essential or not or whether it's a... what type of practice you have...

9 **JUSTICE B.V. NAGARATHNA:** It's against the state.

10 **K.M. NATARAJ:** That's against the State. Then correct constitutional approach in para (d).
11 "It is therefore submitted that the correct approach is the threshold inquiry into the religious
12 character of the practice rather than its essentiality. Once it is established that the practice is
13 religious in nature it attracts constitutional protection under Article 25 and 26." Once it is
14 religious, it gets complete protection under 25, 26 subject to Part III and other rigours. "Then
15 once a practice is essential to the religious, the role of the court is limited." So and so. Same
16 thing, I do not want to repeat. Then para (v) the last one. Another nuance of the right of
17 devotee. "Manifestations of deities will transform to faith and practice and protected under
18 Article 25 and 26. In *Ram Janmabhoomi* case..." And *catena* of decisions earlier, especially
19 from Tamil Nadu, the Madras High Court judgments, it has been recognised that the deity is
20 the juristic person. He has some right. The right of the deity that includes what are the
21 observances, what are the things you have to follow in a particular institution, he has such a
22 right. If he has such a right, it relates to the right of an individual guaranteed under Article
23 25(1). That's a faith. Now, the right...

24 Then para 42, "The Hindu tradition, the management of affairs of a temple and how worship
25 is to be conducted is intrinsically a matter of faith for the devotee and what is regarded as a
26 faith is often understood as a manifestation of the will of the deity. In Hindu context, such
27 manifestation is not always directly traceable to written scriptures, rather it is often embedded
28 in faith that has been transmitted across generations, whether brought through scriptures,
29 customs or long standing traditions. This continuity of belief forms the foundation of religious
30 practice. The manifestation of the deity's will is not uniform. It may vary from institution to
31 institution, community to community, village to village and even from individual to individual.
32 There is therefore, no fixed or universal formula governing such thing."

33 Para 43 and 45, last three paras and I would like to conclude. "Such manifestation of the will
34 of the deity which as stated above, is nothing but the faith of the devotees and is protected
35 under Articles 25 and 26 of the Constitution as the right of the devotees to practice their

1 religion and the right of the denomination to manage the affairs. Therefore, the protection
2 protecting the right of the deity would amount to protecting the right of the devotee as well.
3 Similarly, protecting the right of the devotee would necessarily entail protecting the right of
4 the deity. In other words, both rights are interconnected and cannot be viewed in isolation.
5 Any deviation from such manifestation risks the erudition of customs and beliefs of the
6 devotees, as well as the integrity of the religious denomination. Both rights are protected under
7 Articles 25 and 26. Accordingly, the manifestation of the deity's will, as expressed through
8 faith, cannot be disregarded or extinguished merely by interpretative exercise of constitutional
9 provision without a thorough examination of the factual matrix. The Constitution was never
10 intended to abrogate or undermine such manifestation of faith which lie at the core of religious
11 freedom but are protected under Articles 25 and 26."

12 The last para. "When a claim is made in derogation of this manifestation of deities' will, the
13 issue must be adjudicated on the basis of the proper material evidence. Further, as stated
14 previously, non-believers cannot make a claim destroying the manifestation of the will of the
15 deity which is protected in Articles 25 and 26 as the right of the believers to practice their
16 faith." So in the... in a particular temple or a particular institution, the deity has a particular
17 manifestation to follow a particular practice or custom that transfers into the right of the
18 devotees as well, they are interconnected. And that is preferable to Article 25(1).

19 **JUSTICE B.V. NAGARATHNA:** That is a matter of religion.

20 **K.M. NATARAJ:** A matter of religion. So therefore, a non-believer cannot come and say that
21 yes, the deity can't do it or the devotee can't do it. It is an issue between the deity and devotee.

22 **CJI SURYA KANT:** Specific you want to point out from the Constituent Assembly debate
23 which you are... one and a half page which are there.

24 **K.M. NATARAJ:** That is the same thing about the Constitutional morality which I pointed
25 out.

26 **CJI SURYA KANT:** Statement by Mr. Muhammad Ismail Khan?

27 **K.M. NATARAJ:** Yes.

28 **CJI SURYA KANT:** 7.6, 7.75

29 **K.M. NATARAJ:** Yes. 75, correct.

30 **CJI SURYA KANT:** It maybe some relevance.

31 **K.M. NATARAJ:** Yes. "The question of professing, practicing and propagating one's faith is
32 a right which the human being had from the very beginning of time and that has been

1 recognized as an inalienable right of every human being, not only in this land but the whole
2 world over I think that nothing should be done to affect that right of a man as a human being
3 that part of the article is as it stands is properly worded and it should stand as it is. That is my
4 view." Perfect.

5 **JUSTICE B.V. NAGARATHNA:** To preserve Sanatana Dharma insofar as Hinduism is
6 concerned.

7 **K.M. NATARAJ:** That's all. That's all.

8 **JUSTICE B.V. NAGARATHNA:** Similarly to preserve other religions.

9 **K.M. NATARAJ:** Other religions as well, they're...

10 **JUSTICE B.V. NAGARATHNA:** Practices also in other religions.

11 **K.M. NATARAJ:** If Article 26 is construed as very, very in the very narrow compass as it is
12 limited to denomination means only a sect then no institution whether it's a mosque, whether
13 it's a church or whether it's a temple will not get any protection under the Constitution. There
14 is no other provision under the Constitution which protects any of the public temples or any
15 of the churches or any of the mosques. The complete protection what we get is only from
16 Article 26. For that purpose all the institutions collectively, whether it's a religion or
17 individually or section thereof will have to be construed.

18 **JUSTICE M.M. SUNDRESH:** Consequently that will destroy Article 25 only. They cannot
19 say they are separated there as you rightly said.

20 **K.M. NATARAJ:** Correct. So with this one, I'm grateful for the... I'll take a little more time.

21 **VIKRAMJIT BANERJEE:** Five minutes.

22 **CJI SURYA KANT:** You are appearing for whom?

23 **VIKRAMJIT BANERJEE:** On behalf of the Union, My Lords. Two minutes.

24 **CJI SURYA KANT:** Alright. Two minutes.

25 **VIKRAMJIT BANERJEE:** I think everything has...

26 **CJI SURYA KANT:** Yes, straight start.

27 **VIKRAMJIT BANERJEE:** My time starts, My Lords. My submission is this, that largely
28 what has been addressed by Mr. Nataraj, I'm not going to take one more. I have two points.
29 First is My Lordship has read Article 394(A) which is that there has to be and there is an
30 authoritative Hindi version, this is not a translation, it is a Hindi version, that is what it is to
31 be taken as. Now, in terms of which my first submission was, which has been addressed which

1 I'm not going to address, is by Mr. Nataraj when he says that religious denomination has to be
2 interpreted as *sampradaya*. So I have in my note addressed that in great detail; I am not
3 addressing it for... The other, My Lords, will see the other two provisions, both 25 and 26, for
4 the word "morals", the word which is used in the Hindi version of both is the word
5 "*sadaachar*". Approved *sadaachar*, My Lords, I have described in detail. "*Sadaachar*" means
6 "approved custom" and there is no scope in this in short. That note is on record. There is no
7 scope for something like constitutional morality to be read into morality under these two
8 provisions. When the word is "*sadaachar*" and there's a long description as to history of what
9 is "*sadaachar*". My Lords, I have described what can I say is "*sadaachar*" in terms of what are
10 the Brihat Hindi Kosh says, "*achha aacharan is sadaachar*". That's direct Hindi translation.
11 And I've described all, including the provisions, including judgments of this Honourable
12 Court, which says approved custom over a period of time. So there is no question of the
13 exercise of constitutional morality to be read in because that's an objective which everybody
14 wants to reach in future while in the present case "*sadaachar*" is something which has already
15 existed and you think that's the best possible exercise. So, morality to that extent, will have to
16 also be read as "*sadaachar*". And since My Lordships...

17 **JUSTICE B.V. NAGARATHNA:** Redundant to constitution, it is applicable to
18 constitutional functionaries.

19 **VIKRAMJIT BANERJEE:** Yes.

20 **JUSTICE B.V. NAGARATHNA:** To function under the constitution is an aspect, their
21 constitutional morality comes in the context of conventions, structures etc.

22 **VIKRAMJIT BANERJEE:** Yes, that was the...

23 **JUSTICE B.V. NAGARATHNA:** But not in the context of 25, 26.

24 **VIKRAMJIT BANERJEE:** That was the way the Greeks...You Lordships are right, that was
25 in context, that was the way the Greeks understood it.

26 **JUSTICE B.V. NAGARATHNA:** Interpretation of these Articles...

27 **VIKRAMJIT BANERJEE:** ...Is to have an understanding that the constitution... that to
28 respect of the constitution is actually constitutional morality, it cannot be used as a
29 constitutional instrument to interpret or circumscribe Article 25 and 26 because that is not
30 what was envisaged at all. And if Your Lordships are taking some sort of, and Your Lordships
31 have spoken about a Swadeshi interpretation of the Constitution in that presidential reference
32 of the Governor's reference as to the bills, that have also quoted.

- 1 **CJI SURYA KANT:** You have reproduced 25 in Hindi version? *Lok vyavastha, sadaachar*
2 *or swasthya?* These are the three components.
- 3 **VIKRAMJIT BANERJEE:** Yes.
- 4 **CJI SURYA KANT:** Yes, **Lok vyavastha, sadaachar or swasthya.*
- 5 **VIKRAMJIT BANERJEE:** First, that's health.
- 6 **JUSTICE B.V. NAGARATHNA:** **Lok vyavastha* is public order.
- 7 **CJI SURYA KANT:** Public order.
- 8 **VIKRAMJIT BANERJEE:** Public order. Approximately public order. I could go down and
9 explain that, that's not perfectly public order, but approximately public order.
- 10 **JUSTICE B.V. NAGARATHNA:** What is the Hindi version for public order in the
11 Constitution?
- 12 **VIKRAMJIT BANERJEE:** *Lok vyavastha.*
- 13 **CJI SURYA KANT:** *Lok vyavastha.*
- 14 **VIKRAMJIT BANERJEE:** In Bengali we would say, *Lok byabastha*, is the same, more or
15 less approximately the same thing. So, in the crux Your Lordships have talked about a
16 Swadeshi interpretation of the Constitution recently and I would...
- 17 **CJI SURYA KANT:** We have also seen your the... dictionary meaning of *Brihat Hindi Kosh*
18 of that. *Achcha aacharan.*
- 19 **VIKRAMJIT BANERJEE:** Yes. *Achcha aacharan.* That's the official dictionary.
- 20 **CJI SURYA KANT:** Official publication. It's an Official publication.
- 21 **VIKRAMJIT BANERJEE:** Official publication, My Lords.
- 22 **CJI SURYA KANT:** *Brihat Hindi Kosh. Sadaacharan* means *achcha aacharan.*
23 *Bhalmansahat.*
- 24 **VIKRAMJIT BANERJEE:** *Achcha aacharanwala purush, dharmaatma, sadaachari* are
25 also My Lords... So there is no scope of reading in something like constitutional morality.
- 26 **CJI SURYA KANT:** *Aur sadaachari ko toh bahuthi sammanit shabd diya gaya hai,*
27 *Dharmaatma tak bol diya gaya hai. Agar aap sadaachari hain toh you can be Dharmatma.*
- 28 **VIKRAMJIT BANERJEE:** You are a good person. You are a good person.

- 1 **JUSTICE JOYMALYA BAGCHI:** Will you equate *sadaachar* with justice equity and good
2 conscience?
- 3 **VIKRAMJIT BANERJEE:** My Lord, *sadaachar* in this context, in the context of the
4 provision has been used as a interchangeable, approximate interchangeable with morality.
- 5 **JUSTICE JOYMALYA BAGCHI:** *Sat achchaa aacharan...*
- 6 **VIKRAMJIT BANERJEE:** *Sat aacharan. Sat aacharan.*
- 7 **JUSTICE JOYMALYA BAGCHI:** Justice, equity and good conscience. Will that be a clear
8 comparison?
- 9 **VIKRAMJIT BANERJEE:** My Lord, there would be an element of custom which goes with
10 *sadaachar* because that *aachar* would be custom which I think equity... equity, good
11 conscience.
- 12 **JUSTICE JOYMALYA BAGCHI:** That's also quoted by [UNCLEAR].
- 13 **VIKRAMJIT BANERJEE:** Yes, yes. We have quoted all that.
- 14 **JUSTICE JOYMALYA BAGCHI:** Paragraph 20. Approved custom.
- 15 **VIKRAMJIT BANERJEE:** Approved custom. Your Lordships are right. That's the word
16 which I had highlighted to highlight to the court. *Sampradaya* has been addressed in great
17 detail by my learned friend. So I won't address. That's about all. Obligated My Lords.
- 18 **CJI SURYA KANT:** All right. Thank you.
- 19 **VIKRAMJIT BANERJEE:** I'm sorry. I'm not taking any more time, whatever has been
20 addressed...
- 21 **BHAKTI PARSIIJA SETHI:** Your Lordship a very small thing regarding what my learned
22 senior on the other side said.
- 23 **CJI SURYA KANT:** We will give you chance.
- 24 **BHAKTI PARSIIJA SETHI:** Your Lordship, a very small thing. He said *sadaachar* means
25 *achchaa aacharan*, then how can a ten year old girl who is being discriminated and...
- 26 **CJI SURYA KANT:** That he's not saying, he has only reproduced the dictionary.
- 27 **BHAKTI PARSIIJA SETHI:** How it can be *achchaa aacharan*?
- 28 **CJI SURYA KANT:** He has only reproduced the dictionary. It's not that...

1 **BHAKTI PARSIIJA SETHI:** He said in context of the matter. So, in the matter, if a ten year
2 girl goes to temple they say the temple becomes impure. So how it can be *achcha aacharan*?

3 **CJI SURYA KANT:** We will see.

4 **BHAKTI PARSIIJA SETHI:** It can't be.

5 **C.S. VAIDYANATHAN:** May I please start? My Lord, I beg to appear on behalf of review
6 petitioners Nair Service Society. My Lord, we had just handed over a statement.

7 **CJI SURYA KANT:** Yes.

8 **C.S. VAIDYANATHAN:** Nair Service Society which has been representing the devotees
9 throughout and the Ayyappa Seva Samajam and Kerala Kshetra Samrakshana Samithi. My
10 Lord, these are the devotees organisations in Kerala and I also represent an intervenor that's
11 the...

12 **CJI SURYA KANT:** Society then Sabarimala Ayyappa Seva Samajam?

13 **C.S. VAIDYANATHAN:** Yes, My Lords.

14 **CJI SURYA KANT:** Then Kerala...

15 **C.S. VAIDYANATHAN:** Kshetra Samrakshana Samithi. That's right and Mathru Samithi;
16 that's a women's organisation of the Kerala Kshetra Samrakshana Samithi. And the Hindu
17 Dharma Acharya Sabha representing 133 *sampradayas* which was started by Dayanand
18 Saraswati. And My Lord, I am representing them. I have given a written submission which is
19 part of the record. I want starting at page 168 to 255, I have copies of that and in the light of
20 the specific questions which My Lords have been raising, I have given an additional
21 submission, because on the interplay of Article 25(2) and Article 26, which has been one of the
22 issues which have been troubling My Lords, I have given a separate note. I shall place that
23 more elaborately. My Lord, my first submission, I will rush through I won't take much time,
24 but the second one, I will deal a little more elaborately because that raised the question, that
25 deals with the questions that have been raised. I believe the copies have been given of my
26 submissions.

27 If My Lords will kindly come to... from page 1 to 4. Yeah, first volume. Yes, part of the
28 compilation.

29 **JUSTICE B.V. NAGARATHNA:** What you have given today?

30 **C.S. VAIDYANATHAN:** I'm sorry?

31 **JUSTICE B.V. NAGARATHNA:** The submissions you have given today, you're referring to
32 that now?

- 1 **C.S. VAIDYANATHAN:** My Lord, there are... first volume, first submission is Volume I, (I.I)
2 at page 168, but I have given copies for My Lord's convenience. And My Lord, the second one
3 perhaps has not been uploaded because that is prepared in answer to My Lord's question.
- 4 **CJI SURYA KANT:** Which one you want to start first, Mr. Vaidyanathan?
- 5 **C.S. VAIDYANATHAN:** (I.I) at page 168. I have given copies.
- 6 **CJI SURYA KANT:** 168?
- 7 **C.S. VAIDYANATHAN:** Yes.
- 8 **CJI SURYA KANT:** Yes, yes.
- 9 **C.S. VAIDYANATHAN:** It is in the spiral bound volume.
- 10 **CJI SURYA KANT:** Yes, we have got it.
- 11 **C.S. VAIDYANATHAN:** Yes, spiral bound volume.
- 12 **CJI SURYA KANT:** Actually it starts from page 170, where you have to see...
- 13 **C.S. VAIDYANATHAN:** Very well, very well. Page 170. My Lord, what I have done is at page
14 1, the issues and I have given the synopsis from page 1 to 4. And at page 5, I deal with Issues 1
15 and 2. That's the internal page 5, perhaps page 174 or 175.
- 16 **CJI SURYA KANT:** Where it starts, "meaning and scope of religion..."
- 17 **C.S. VAIDYANATHAN:** That's right. "Meaning and scope of religion," that has been
18 elaborately dealt with I don't want to go into it, where *Shirur Mutt* and those cases have been
19 dealt with. And internal page 8, the heading Article 25 protects both individual and collective
20 religious practice, not just individual but collective also, that's how the courts have
21 approached, I have given the extract. And I will read only at page 10, also the international
22 covenants. Paragraph 14. International Human Rights Instruments also recognise the freedom
23 of religion. I refer to universal declaration...
- 24 **CJI SURYA KANT:** What has not been read before us...
- 25 **C.S. VAIDYANATHAN:** Yes. That's right.
- 26 **CJI SURYA KANT:** Is basically interesting, is para 7 at page 8. We are not in such great
27 hurry, you can read para 7 also.
- 28 **C.S. VAIDYANATHAN:** Yes, yes, para 7. "The Gods have distinct forms as the Article 25
29 also protects religious rights of persons with respect to the deity. This also protects the right

1 to worship a specific manifestation of deity which has to be articulated and understood as per
2 tenets of religious, faith, belief, practices in *Devaru... Venkataramana Devaru*.

3 **CJI SURYA KANT:** *Devaru...* may be...

4 **C.S. VAIDYANATHAN:** "The Gods have distinct forms ascribed to them and their worship
5 at home and in temples..."

6 **CJI SURYA KANT:** Just read this small paragraph.

7 **C.S. VAIDYANATHAN:** Yes.

8 **CJI SURYA KANT:** In *Devaru*, page 17, this court said.

9 **C.S. VAIDYANATHAN:** Yes. "The Gods have distinct forms ascribed to them and their
10 worship at home and in temples is ordained as certain means of attaining salvation. These
11 injunctions have had such a powerful hold over the minds of the people that daily worship of
12 the deity in temple came to be regarded as one of the obligatory duties of a Hindu." My Lord,
13 though we are not worshipping the idol, we are worshipping the *Brahman*. Ultimately it is a
14 supreme being that we worship, but through the form of this idol. And this has been... in our
15 *sampradaya*, in our *Sanatana Dharma* this has been one of the things which has been well
16 established, well recognised. And that's... This is the right. As My Lord earlier read the
17 Constitution Assembly debates also, right is not confirmed for the first time under the
18 Constitution, right is pre-existing. It is only recognised.

19 **CJI SURYA KANT:** Recognition of that right.

20 **C.S. VAIDYANATHAN:** Yes, it's only recognised. May I continue after...

21 **JUSTICE B.V. NAGARATHNA:** Equilibrium right.

22 **C.S. VAIDYANATHAN:** That's right.

23 **JUSTICE B.V. NAGARATHNA:** It doesn't depend upon the Constitution giving it or taking
24 away.

25 **CJI SURYA KANT:** We will continue at 02:00 p.m.

26 **C.S. VAIDYANATHAN:** I'm grateful.

27 **C.S. VAIDYANATHAN:** Paragraph 14.

28 **CJI SURYA KANT:** Paragraph 14?

29 **C.S. VAIDYANATHAN:** Yes, My Lord. Paragraph 14. The international human rights
30 instruments also recognise the freedom of thought, conscience and religion, either alone or in

1 community with others; therefore, individual rights as well as the collective rights, community
2 rights. And similarly, Article 18(1) of the International Covenant on Civil and Political Rights.
3 Therefore, consistent judicial position therefore, demonstrate constitutional guarantees of
4 religious freedom protect both individual belief. I'm sorry... My Lord, page 179.

5 **CJI SURYA KANT:** Page 179 we have got. Internal page.

6 **C.S. VAIDYANATHAN:** Yes, yes, internal page.

7 **JUSTICE M.M. SUNDRESH:** Yes.

8 **C.S. VAIDYANATHAN:** My Lords have?

9 **CJI SURYA KANT:** Will you please read 15, 16 also? 15, 16, 17.

10 **C.S. VAIDYANATHAN:** Yes. Therefore, these show individual belief, collective practice,
11 these are protected. "Understanding was reiterated and elaborated in Article 18(1) of the
12 International Covenant on Civil and Political Rights which guarantees freedom of religion
13 including freedom to manifest religion, either individually or in community with others and
14 in public or private, in worship, observance, practice and teaching. These instruments, thus
15 recognised as the exercise of religion, is often realised through collective practices and shared
16 religious institution." That's our submission. "The consistent judicial position therefore,
17 demonstrates that the constitutional guarantees of religious freedom protects both individual
18 belief and collective practice of religion by communities of believers. Aforesaid understanding
19 in points A and B is also consistent with the constitutional commitment to liberty of thought,
20 expression, belief, faith and worship", which is in the Preamble."

21 Then My Lord, I have set out about the constitutional scheme of Article 25. I'll deal elaborately
22 with this, My Lord, because 25(2), will have to be explained, My Lord. There is a slight
23 divergence of view between us and what Central Government has presented. I'll deal with that.
24 My Lord, para 21, therefore, just to indicate the submission, 25(2)(b) therefore, operates as
25 specific constitutional powers of social reform within the domain of religion. The fact that...
26 My Lord, it is not authorising religious reform; it talks of social reform. It's not authorising
27 religious reform. That's important, because... and My Lord, the second, there are two parts to
28 it which I will explain. In (d), para 23, I'm giving the legislative history, and only to show in
29 the context of the specific finding in the *Sabarimala* case about the right of women, My Lord,
30 15, Article 15, as it stands today was sought to be amended during the course of the Constituent
31 Assembly debates to include also places of worship, and this amendment was rejected. Article
32 15 amendment in regard to throwing open various places; parks, various other amenities, etc.
33 The amendment that was sought was, you must include places of public worship, that
34 amendment was rejected. And the right of access, entry, etc. into places of public worship is

1 specifically dealt with only, if at all, by any legislation that can be made pursuant to Article
2 25(2)(b). We can't invoke general provisions of 15, 16 and various other provisions. And My
3 Lord knows, Article 29 and 30 also do not talk about gender or sex, because we have in our
4 history, had institutions exclusively for girls, exclusively for boys. There are today a large
5 number of co-educational institutions, but nobody wanted to make it mandatory or to enable
6 Parliament or Legislature to make laws which would make it compulsory that it should be co-
7 educational institution. Therefore, that part was kept out. I am just giving you an analogy.

8 Now, if My Lordships may kindly go to para 26. "It is submitted that access to public use of a
9 secular nature is guaranteed under Article 15(2) on all counts; religion, race, caste, sex, place
10 of birth. Article 15(3) and (4) secure educational empowerment for Scheduled Castes and
11 Scheduled Tribes. Article 16(1) guarantees equality in matters of employment under the state,
12 while Article 16(4), (4)(a) and (4)(b) secure social and economic empowerment of Scheduled
13 Castes and Tribes by enabling reservations. Article 330 and 332 secure political empowerment
14 to Scheduled Castes and Tribes by providing for reservation of seats in the House of People
15 and Legislative Assembly. Therefore, on the secular side, justice, social, economic and
16 political, and equality of state as an opportunity is guaranteed to all, by various persons and
17 including Scheduled Caste and Tribes. 335 ensures that claims of SC/ST members are taken
18 into consideration."

19 But otherwise, Article 17 deals with untouchability, specifically in the context of the past
20 unfortunate historical practices. And that's why, My Lords in *Nagaraj*, which I quoted in
21 para 27. "Insofar as religious institutions are concerned, social justice and equality is
22 guaranteed qua Hindu religious institutions of a public character alone and not qua
23 institutions of other religions or even private character, Hindu religious institutions of a
24 private character." And in my respectful submission, even denominational character if they do
25 not throw it open. "The reason is to give effect to the mandate of Article 17.", and I have quoted
26 *Nagaraj*: "Great social injustice resulted from treating sections of the Hindu community as
27 untouchable. And therefore, Article 17 abolished untouchability and 25 permitted the State to
28 make any law providing for throwing open all public Hindu religious temples to untouchables.
29 Therefore, it is in that context; nothing to do with gender or sex." My Lord, Article 25(2)(b) is
30 a targeted social reform provision, not religious reform. I am going to deal with it in a separate
31 note; I'll come to that. Para 32 on untouchability.

32 Now kindly come to para 33. The heading. "Article 25(2)(b) is not a general equality provision.
33 Constitutional power to throw open temples to all classes and sections of Hindus is not a facet
34 of general right..."

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

1 **C.S. VAIDYANATHAN:** Sorry, My Lord. 33. Para 33 and the heading above that, (f). "Article
2 25(2)(b) is not a general equality provision. The constitutional power to throw open temple to
3 all classes and sections of Hindus is not a facet of general right to gender equality. The
4 provision was introduced as a specific response to caste-based exclusion rooted in
5 untouchability and must be understood within that limited constitutional context. The fact
6 that the framers of the Constitution specifically empowered the State to enact laws throwing
7 open Hindu religious institutions to all classes... public institutions to all classes and sections
8 of Hindus is constitutionally significant. The equality guarantees contained in Article 14 or
9 15(2) were themselves sufficient to mandate universal access to temples. 25(2)(b) would serve
10 no independent purpose; it would have been *otiose*." Therefore, we had to give meaning.

11 Then the next one. I want to... This has been dealt with by the learned Solicitor on religious
12 denomination. My Lord, I want to... My submission is going to be, in ***Shirur Mutt*** when
13 reference was made to the Oxford dictionary and three conditions were set out, this was not
14 considered by the court in ***Shirur Mutt*** to be mandatory requirement. This was only an
15 extract from the dictionary. My Lord, the Solicitor has already placed and the learned
16 Additional Solicitor also has placed the authorised Hindi version about *Dharmic*
17 *Sampradaya*. My Lords, I'll deal with that.

18 And if My Lords will kindly see para 39 and 40. This is our respectful submission. "The court
19 did not lay down a rigid three-fold test for identifying a religious denomination in ***Shirur***
20 ***Mutt***. Besides, the court did not have the opportunity to refer to the authentic Hindi
21 translation of the Constitution where the expression used is '*Dharmic Sampradaya*.'" In the
22 absence of that, they referred to the Oxford dictionary which was more concerned with the
23 Abrahamic religions and not in the Hindu context. And My Lord, unfortunately in ***S. P.***
24 ***Mittal*** when Sri Aurobindo Society was a Petitioner, Sri Aurobindo Society was faced with a
25 peculiar problem. My Lord, this was during the Emergency, particularly, when Sri Navajata,
26 who had become a kind of successor after Sri Aurobindo and the Mother and he was heading
27 the Institution. My Lord, he had unfortunately fallen out with some persons who were in
28 power, who had... because in Auroville, lots of foreigners were there and then they had access
29 to the powers that be. And this led to enactment of law and they had to challenge it and
30 challenge the validity of the Auroville takeover. That was the historical background of ***S. P.***
31 ***Mittal***, where though Sri Aurobindo never said he's espousing a new religion. My Lord, his
32 was essentially one of integral yoga and then achieving that every person is capable of rising
33 to the level of supramental consciousness. My Lord, effectively *Advaitic* concepts, because
34 *Tatvamasi*, *Aham Brahmasmi*, therefore, raising yourself to the level of supramental
35 consciousness. That was basically the philosophy of Sri Aurobindo. And My Lord, they, when
36 they were faced with the kind of takeover, they had to raise pleas and I had drafted the petition;

1 so, I'm somewhat familiar with this case. And Mr. Sorabjee and Mr. Venugopal had appeared.
2 Mr. Sorabjee argued the aspect about religion and Mr. Venugopal had argued about religious
3 denomination. The court took the view, "No, this is not separate religion." Now that problem
4 was, they applied the tests of Abrahamic religion. They said it is only a philosophy. A
5 philosophy is, My Lord, what is our concept of understanding a religion? We never had
6 anything like Hinduism as the term for our religion. It was *Sanatana Dharma*. That it is
7 Hinduism is a concept of the colonial rulers in the last two centuries. Before that it was never
8 known as Hinduism. It was always *Sanatana Dharma*. Now if we import all these tests of, in
9 regard to Abrahamic religion and hold that Aurobindo's philosophy is not religion, that part
10 was rejected. Then on the question of religious denomination, they said ***Shirur Mutt*** has
11 referred to Oxford and set out three conditions; these, the expression 'religious denomination'
12 must, must also satisfy three conditions. My Lord, with the greatest respect, I appeal to My
13 Lords to kindly overrule this part of it, the test in regard to religious denomination, which has
14 been laid down as if it is mandatory, I respectfully submit is incorrect. And the test adopted by
15 Justice Chinnappa Reddy, kindly see the underlined portion which I have extracted in
16 paragraph 41. Justice Chinnappa Reddy's dissenting view. "We take care to mention here that
17 whatever the ordinary features of a religious denomination may be considered to be, all are
18 not of equal importance and surely the common faith of the religious body is more important
19 than the other features." And then My Lord, at the bottom of the page. "It is perhaps necessary
20 to say that judicial definitions are not statutory definitions; they are mere explanations, every
21 word of which is not to be weighed in golden scale."

22 Then My Lord, at the bottom of the page. "Religious denomination has not to owe allegiance
23 to any parent religion." This is very, very important because, it is as if, when we say 'religious
24 denomination', it has to be of a particular religion. No, it is not necessary. It can be... it can
25 either be a separate religion or it can be a denomination which is emanating from a particular
26 religion, but it need not be, it need not owe allegiance. "Entire following of a religion may be
27 no more than religious denomination. This may particularly be so in the case of small religious
28 groups or developing religions, that is religions in the formative stage." That is when schism
29 takes place. When in a religion, schism takes place, My Lord, a small group takes a different
30 view; it may not necessarily reflect the... have the same common view. Now I have referred
31 thereafter, in page 18 paragraph 44 to '*Sampradaya*' and kindly read with me the definition
32 given by Dr. Radhakrishnan and also Arnold Toynbee. "Aboriginal tribes, savage and half-
33 civilised people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were
34 the sons of the same mother. The Hindu thinkers reckon with the striking fact that the men
35 and women dwelling in India belong to different communities, worship different Gods and
36 practice different rites." And Arnold Toynbee, in the present-day experiment in Western
37 civilisation, "When we pass from the plane of social practice to the plane of intellectual

1 outlook, Hinduism too comes out well by comparison with the religions and ideologies of the
 2 south-west Asian group. In contrast to these, Hinduism has the same outlook as the pre-
 3 Christian and pre-Muslim religions and philosophies of the western half of the world. Like
 4 them, Hinduism takes it for granted that there is more than one valid approach to truth and
 5 to salvation, and that these different approaches are not only compatible with each other but
 6 are complementary." My Lord that is, that has been our *dharma*. "While retaining an
 7 underlying and cultural, spiritual and spiritual unity, the spread of distinct practices,
 8 practitioners, deities, rituals and traditions across the subcontinent therefore reflect the
 9 inherent diversity of Hindu religious life. It is within this context that *Sampradayas* emerge
 10 and should be understood." And I have extracted the Monier-Williams Sanskrit-English
 11 dictionary. A traditional... *Sampradaya* means, it can refer to the doctrine, it can refer to the
 12 sect. Because one of the things arising from the question that was raised this morning, My
 13 Lord, therefore, there can be changes in the doctrines, but it can lead to a schism or it can lead
 14 to a new sect. "A traditional doctrine handed down, a sect, a particular system of religious
 15 teaching, traditional belief or usage." And Apte's Sanskrit-English dictionary. "A traditional
 16 doctrine or religious system transmitted through successive teachers, a sect, or established
 17 religious tradition."

18 Then My Lord, kindly come to para 47.

19 **JUSTICE B.V. NAGARATHNA:** 46 also, the roots...

20 **C.S. VAIDYANATHAN:** Yes, My Lord, 46 also. "The word itself derives from the word 'root'
 21 *Samprada* meaning to hand down or transmit, signifying a body of religious teaching, ritual
 22 practice and discipline preserved through tradition. The *Agamas* themselves are defined to be
 23 revealed teachings which have come down. A *Sampradaya* is the lineage which transmits that
 24 teaching. The concept of *Sampradaya* is closely connected with the principle of '*Guru*
 25 *parampara*', that is the transmission of spiritual knowledge, ritual practice, and theological
 26 doctrine through a recognised lineage of teachers and disciples. Classical Hindu tradition have
 27 historically preserved the theological identity through such lineages, ensuring continuity of
 28 doctrine, discipline, and ritual observance across generations. The preservation of a
 29 *Sampradaya* therefore depends upon the ability of the community of the worshippers and its
 30 spiritual religious authorities to maintain the distinctive practices and modes of worship
 31 associated with that lineage." Now, My Lord, this unfortunately, is something which has been
 32 missed out in the *Sabarimala* case. Therefore, their identification of what is a religious
 33 denomination and whether therefore, the devotees of Ayyappa constitute a religious
 34 denomination unfortunately, has failed to apply what according to me will be the appropriate
 35 test in the Hindu context in our milieu, in our tradition. "It is well known that the organisation
 36 of Hindu religious life has accordingly taken place through such *Sampradayas*, each

1 characterised by a shared theological understanding, recognised ritual practices and a
2 community of adherents bound by a common discipline of worship. These traditions
3 frequently develop around particular deities, pilgrimage centres or spiritual teachers and are
4 sustained through continuous practice rather than through a centralised ecclesiastical
5 structure.” My Lord, we don’t have a system of a Pope, Archbishops and Bishops and, that kind
6 of an ecclesiastical structure, we don't have.

7 **JUSTICE B.V. NAGARATHNA:** That means in Hinduism, the Hindus belong... they can...
8 there are Hindus who can belong to several *Sampradayas*.

9 **C.S. VAIDYANATHAN:** Yes.

10 **JUSTICE B.V. NAGARATHNA:** But if... and they can visit any temple. There's no bar.

11 **C.S. VAIDYANATHAN:** Yes.

12 **JUSTICE B.V. NAGARATHNA:** But if the Hindus want to visit a particular temple, the
13 *Sampradaya* which is attached to that temple must be followed.

14 **C.S. VAIDYANATHAN:** Yes, correct, exactly. My Lord, I'm very, very, grateful. Now take
15 the case of Ayyappa.

16 **JUSTICE B.V. NAGARATHNA:** We are not, you see, we don't have that rigid system.

17 **C.S. VAIDYANATHAN:** Yes, correct.

18 **JUSTICE B.V. NAGARATHNA:** All Hindus are Hindus.

19 **C.S. VAIDYANATHAN:** Yes. My Lord, interestingly, in *Sabarimala*, no distinction is
20 made; there is no bar to Christians or Muslims entering. They can also go, but if they... they
21 must have the faith and belief in the divinity of Ayyappa. Therefore, you have to follow the
22 *vratham*, the 40-day *vratham*, and whatever are the practices enjoined on the believers, and
23 they go and approach. Nobody is prohibited from that. Therefore, this concept, unfortunately,
24 has not been understood. It is not necessary that a religious denomination means that a person
25 should belong to a particular religion and then it is a branch, sub-branch of that; it's not
26 necessary.

27 **JUSTICE B.V. NAGARATHNA:** There is no scripture like that.

28 **C.S. VAIDYANATHAN:** Yes. My Lord, therefore, that unfortunately is... has an erroneous
29 understanding.

30 **JUSTICE B.V. NAGARATHNA:** You may belong to one *Sampradaya* or may follow one
31 *Mutt*, nothing prevents you from going to another *Mutt* or going to a temple which belongs to
32 another *Sampradaya*, but you must respect that thing.

- 1 **C.S. VAIDYANATHAN:** Correct, exactly. My Lord, in the *Kashi Vishwanath* case again...
- 2 **JUSTICE M.M. SUNDRESH:** ... differently. One does not have any choice, except to go
3 under the *Sampradaya*, which is either attached to the temple or any denomination. Because
4 the moment you start questioning it you go out of the denomination.
- 5 **C.S. VAIDYANATHAN:** Correct, exactly. Then you are no longer in the *Sampradaya*. You
6 are a non-believer.
- 7 **JUSTICE M.M. SUNDRESH:** So, putting it differently, there is not even a question of
8 laying a challenge, because you are not part of the *Sampradaya*.
- 9 **C.S. VAIDYANATHAN:** Yeah.
- 10 **JUSTICE M.M. SUNDRESH:** If you are not a part of the *Sampradaya*, nothing to do with
11 your personal belief; you can have your own personal belief.
- 12 **C.S. VAIDYANATHAN:** Correct.
- 13 **JUSTICE M.M. SUNDRESH:** But you can't try to change the belief.
- 14 **C.S. VAIDYANATHAN:** Yes.
- 15 **JUSTICE M.M. SUNDRESH:** Whether you go under it or leave it.
- 16 **C.S. VAIDYANATHAN:** Correct. Under Article 25, you might have your individual belief,
17 you are entitled.
- 18 **JUSTICE M.M. SUNDRESH:** That is protected subject to the restriction given under 25.
- 19 **C.S. VAIDYANATHAN:** Correct. But if you want...
- 20 **JUSTICE M.M. SUNDRESH:** Yes.
- 21 **C.S. VAIDYANATHAN:** ...to go to a temple or an institution belonging to a particular
22 *Sampradaya*, then you must believe in that *Sampradaya*, you must be part of that
23 *Sampradaya*, follow the practices of that *Sampradaya*.
- 24 **JUSTICE M.M. SUNDRESH:** For example, in Kerala...
- 25 **CJI SURYA KANT:** In North India, ...
- 26 **JUSTICE M.M. SUNDRESH:** Some temples, you know, you have to wear *dhoti* ; you can't
27 wear a shirt.
- 28 **CJI SURYA KANT:** Guruvayur.

- 1 **JUSTICE M.M. SUNDRESH:** And just *dhoti*. If you want to go, you can't say I am entitled
2 to wear shirt.
- 3 **C.S. VAIDYANATHAN:** Correct.
- 4 **JUSTICE M.M. SUNDRESH:** If you want to do this, then you cannot do that.
- 5 **JUSTICE B.V. NAGARATHNA:** You should not wear pant, you should wear *dhoti*.
- 6 **CJI SURYA KANT:** Same example as my Brother is giving. In some of the temples...
- 7 **JUSTICE B.V. NAGARATHNA:** For convenience sake, on pants they put *dhoti*.
- 8 **C.S. VAIDYANATHAN:** Outside the temple you have *dhoti* and you can...
- 9 **JUSTICE B.V. NAGARATHNA:** There is some substantial compliance.
- 10 **C.S. VAIDYANATHAN:** That's right. It's not actual compliance, but substantial compliance.
- 11 **CJI SURYA KANT:** Guruvayur temple, you can't wear the shirt.
- 12 **C.S. VAIDYANATHAN:** Yes.
- 13 **CJI SURYA KANT:** You have to remove the shirt, when you want to go through your temple.
- 14 **C.S. VAIDYANATHAN:** That's right.
- 15 **JUSTICE B.V. NAGARATHNA:** When you go to a...
- 16 **CJI SURYA KANT:** In North India when you go to Gurudwara Sahib, Golden Temple or any
17 other Gurudwara you have to wear the head covering.
- 18 **C.S. VAIDYANATHAN:** Correct. Even in Vaishno Devi if you are going for the *aarti* you
19 have to cover up the head.
- 20 **CJI SURYA KANT:** Millions of Hindus go in the Gurudwara, but they will have to maintain
21 decorum.
- 22 **C.S. VAIDYANATHAN:** Yes, we have to cover. Golden Temple, we have to cover our head.
- 23 **JUSTICE B.V. NAGARATHNA:** Yes.
- 24 **JUSTICE JOYMALYA BAGCHI:** Mr. Vaidyanathan, all these examples, all these examples
25 actually show the precedence of 26 Clause (b) with regard to its superiority in the managerial
26 rights of religious affairs, which are manifested through these expressions of ritual, practice,
27 etc., etc., over the core internal belief which is freedom of conscience and its rights of
28 professing, practicing of religion. So, a person who is a non-believer, even if he goes to a temple

1 or a *Mutt* or any institution managed by a denomination or a section of denomination, has to
2 adhere to the religious affairs manifested through the rules.

3 **C.S. VAIDYANATHAN:** Correct. That's right.

4 **JUSTICE JOYMALYA BAGCHI:** This is... this is what you are...

5 **C.S. VAIDYANATHAN:** Yes, that's my submission.

6 **JUSTICE JOYMALYA BAGCHI:** And in this respect, the real conflict is the propagation of
7 the non-believer of his right becoming eclipsed for that temporary period where he submits
8 himself to the domain of the management of the affairs of the religious denomination.

9 **C.S. VAIDYANATHAN:** My Lord, that... that person's...

10 **JUSTICE JOYMALYA BAGCHI:** That does not mean that the visitor gives up his freedom
11 of conscience not to accept it, but has to subject to it.

12 **C.S. VAIDYANATHAN:** Correct.

13 **JUSTICE JOYMALYA BAGCHI:** Because if we hold otherwise that the non-believer
14 cannot interface, then we would be eroding the non-believer of his core freedom of conscience
15 even to profess. Because to profess, if you look from the contrarian view, a person who has to
16 contradict a proposition must experience the proposition. So, in doing that, the non-believer
17 may subject himself, but need not accept the religious practices.

18 **C.S. VAIDYANATHAN:** Correct. My Lord, individual's freedom of conscience under Article
19 25 cannot defeat the freedom of the community or the denomination and...

20 **JUSTICE JOYMALYA BAGCHI:** It's the core esoteric thought.

21 **JUSTICE ARAVIND KUMAR:** So, now by virtue of this, you admit that Article 26 is not an
22 island provision or island Article or a standalone Article.

23 **C.S. VAIDYANATHAN:** Article 26(b) is, My Lord, I have a submission on that. Article 26(b)
24 is the right of the denomination in regard to religion, religious practice, affairs of religion. My
25 Lord, question is not whether it is an island provision, whether it can be controlled by 25(2)(b).
26 25(2)(a) and 25(2)(b), if My Lord... If...

27 **JUSTICE ARAVIND KUMAR:** No, the reason and the purpose. If you say 26(b) is an island
28 provision or a standalone, that means you will be canvassing, it is not governed by 25(2)(b);
29 by virtue of that, you go out of Part III of the Constitution.

30 **C.S. VAIDYANATHAN:** 25 and 26 come under the heading "Right to Freedom of Religion."
31 Therefore, it is not, in that sense, an island provision. But can the right under Article 26(b),

1 that is, right of a denomination to manage its own affairs in matters of religion be subjected to
2 any law made pursuant to Article 25(2)(b), is perhaps the prime question which I have to
3 address. My Lord, I have dealt with it in a separate note. My respectful submission is, it can't
4 be. My Lord, **Shirur Mutt** was concerned with 25(2)(a). 25(2)(a) because it was, the question
5 therefore asked in **Shirur Mutt** was, the submission of the Attorney General which is
6 recorded at page 173 and 180 was, "Is this a secular aspect which can be regulated under
7 25(2)(a) or is it something to do with religion which can't be regulated under 25(2)(a)?" That
8 was the only limited aspect canvassed before the seven judge bench. Now My Lord, there are...

9 **JUSTICE B.V. NAGARATHNA:** The scale of expenditure for the purpose of an activity
10 associated with religion but not [UNCLEAR].

11 **C.S. VAIDYANATHAN:** Correct. Therefore, which was regulating or restricting any
12 economic, financial, political or other secular activity. That was the question. That was the
13 secular activity. Now, My Lord...

14 **JUSTICE ARAVIND KUMAR:** In other words, you admit, 25(2) has to be read along with
15 26.

16 **C.S. VAIDYANATHAN:** No, I don't. My Lord, because, ...

17 **JUSTICE ARAVIND KUMAR:** There is a reason, because Union of India has canvassed
18 that...

19 **C.S. VAIDYANATHAN:** Correct. Yes, My Lord, I am... Yes, I agree. Therefore, I said I
20 digress from that view.

21 **JUSTICE ARAVIND KUMAR:** So, we wanted to know.

22 **C.S. VAIDYANATHAN:** Yes, My Lord.

23 **JUSTICE ARAVIND KUMAR:** You are in disagreement with that view?

24 **C.S. VAIDYANATHAN:** Yes, I am. I am in disagreement with it.

25 **JUSTICE JOYMALYA BAGCHI:** Vaidyanathan is putting 26(2) at a higher pedestal.

26 **C.S. VAIDYANATHAN:** Yes.

27 **JUSTICE JOYMALYA BAGCHI:** Than 25(2) because...

28 **C.S. VAIDYANATHAN:** 25(2) is only an enabling power. My Lord, 25(2) does not confer
29 any right. It confers a power on the Parliament or the Legislature to make a law. 25(2),
30 therefore, now we are comparing one provision which gives an enabling power, 26 is a right

1 which has been given; there is no comparison between the two. 26 has to prevail. 25(2)
2 cannot... 25(2)...

3 **JUSTICE B.V. NAGARATHNA:** In *Venkataramana Devaru*, both the provisions you
4 have considered. *Venkataramana Devaru*.

5 **C.S. VAIDYANATHAN:** *Venkataramana Devaru* in my respectful submission has
6 unfortunately laid down an incorrect law which needs to be overruled. We have to give...

7 **JUSTICE ARAVIND KUMAR:** Mr. Vaidyanathan, if we accept this proposition...

8 **C.S. VAIDYANATHAN:** Yes.

9 **JUSTICE ARAVIND KUMAR:** ... this 26 is to be construed virtually in exclusion to 25(2),
10 then that means tomorrow there will be a situation where others will start asserting and say
11 you will exclude X, Y, Z. You cannot.

12 **C.S. VAIDYANATHAN:** With the greatest respect.

13 **JUSTICE ARAVIND KUMAR:** Part III steps in, you know.

14 **C.S. VAIDYANATHAN:** With great respect... My Lord, with great respect, there can be
15 temples, there can be private... there can be temples which are not public temples,
16 denominational temples which can exclude. I'm sorry?

17 **CJI SURYA KANT:** Mr. Vaidyanathan, it is very high. I think, Mr. Vaidyanathan, first you
18 complete your argument because probably you are yet to read that note, then probably we will
19 be in a better position to understand and appreciate what you want.

20 **C.S. VAIDYANATHAN:** Very well. This is a crucial question; I have to answer it, I have to,
21 yes. My Lord let me complete this note. When I come to that note where I have dealt with it
22 elaborately, I will answer that.

23 **CJI SURYA KANT:** We will go through that.

24 **C.S. VAIDYANATHAN:** Now, My Lord, page 19, paragraph 50. "The plural and internally
25 diverse character..." I am sorry.

26 **CJI SURYA KANT:** No. Page, your page 192?

27 **C.S. VAIDYANATHAN:** That's right. 188, I think, para 50.

28 **CJI SURYA KANT:** 188.

29 **C.S. VAIDYANATHAN:** "The plural and internally diverse character of Hindu religious
30 traditions has also been recognised by this honourable court. This recognition that religion

1 includes distinctive rituals, observances and modes of worship necessarily acknowledges that
2 different religious communities and traditions may preserve their own doctrinal and ritual
3 disciplines. In the Hindu religious context, such traditions have historically taken the form of
4 distinct *Sampradayas* organised around shared theological understanding and modes of
5 worship." Then I refer to 394(a) and religious denomination, the Hindi translation *Dharmik*
6 *Sampradaya*. I refer to that.

7 And then para 52. "The constitutional guarantee of denominational autonomy must therefore
8 be understood in the civilizational context. The protection afforded by Article 26 extends to
9 religious traditions organised through *Sampradayas* whose continuity depends upon the
10 preservation of the distinctive practices, discipline and modes of worship. Interpreting the
11 expression 'religious denomination' in a manner that disregards this traditional structure
12 would overlook the historical organisation of Hindu religious life that the Constitution itself
13 seeks to protect."

14 Then, My Lord, I have referred to a passage of Justice Jaganmohan Reddy in ***Kesavananda***
15 ***Bharati*** where he says, the underlined portion, "That the Constitution will have to be
16 interpreted and understood in the Indian context, Indian historical situation and Indian...,"
17 the milieu. "The seed of the Constitution is sown in a particular soil and it is the nature and
18 the quality of the soil and the climatic condition that is prevalent there which will ensure its
19 growth and determine the benefits which it confers on its people. We cannot plant the same
20 seeds in a different climate and different soil and expect the same growth and same benefit
21 therefrom. Law varies according to the requirements of time and place. Justice thus becomes
22 a relative concept varying from society-to-society according to the social milieu and economic
23 conditions prevailing therein. Difficulty to my mind, which foreign cases or even cases decided
24 within the common law where the common law forms the basis of legal structure of that unit
25 just as it is to a large extent, the basis in this country is that they are more often than not
26 concerned with expounding and interpreting provisions of law which are not in *pari materia*
27 with those we are called upon to consider. The problems which confront those codes in the
28 background of the state of the society, the social and economic setup, the requirement of a
29 people with a totally different ethics, philosophy, temperament and outlook differentiate them
30 from the problems and outlook which confront the courts in this country." Therefore, My
31 Lords have recently also stated that we have to look at our background; therefore, we have to
32 have an interpretation based on the Indian situation.

33 That is in the next page. "Therefore, the conclusion is, it is extremely unsafe to assume that a
34 decision on one of them can be applied without qualification to another, that is in one
35 jurisdiction, etc." And My Lord, in ***Shirur Mutt*** therefore, please now also come to... This is
36 the holding of seven judges. In answer to what My Lords were asking me, we have to deal with

1 this; in spite of this holding in *Shirur Mutt*, how did *Venkataramana Devaru* take a
2 slightly different view?

3 My Lord, the last eight lines from the bottom. "Under Article 26(b) therefore, a religious
4 denominational organisation enjoys complete autonomy in the matter of deciding as to what
5 rites and ceremonies are essential according to the tenets of the religion they hold, and no
6 outside authority has any jurisdiction to interfere with the decision in such matters." My Lord
7 this includes not merely the Judiciary but even the Legislature. And 25(2)(b), My Lord, that is
8 again reiterated in the bench. I'll deal with it.

9 Now, My Lord, I have summed up the conclusion on this in para 56. "Expression 'religious
10 denomination' occurring in 26 has been judicially interpreted by *Shirur Mutt* by reference
11 to Oxford dictionary meaning which was subsequently reiterated in *S. P. Mittal* and later
12 decision. In the light of caution expressed in *Kesavananda Bharati*, continued reliance on
13 lexicographical definition drawn from a foreign linguistic and historical context, particularly
14 where the expression has been translated in Indian languages as *Dharmic Sampradaya*,
15 requires reconsideration, so that the meaning of the constitutional text may be understood in
16 the civilizational, religious and social context in which the Indian Constitution operates."

17 Then, My Lord, on foreign jurisprudence I have... Your Lordships may omit that. It should be
18 understood in the Indian context, not in the Abrahamic concept of organised religion.

19 Then I'll come to, the group rights must prevail. Earlier while answering My Lords, I had said
20 this that individual may have a different point of view, but his point of view cannot be allowed
21 to prevail in a manner that the collective's beliefs are destroyed. The religious denomination's
22 beliefs or tenets are destroyed because the individual's right is asserted and will have to be
23 given. My Lord, that's a submission. And My Lord, it's my respectful submission, Justice
24 Chandrachud asked the wrong question and got the wrong answer. Because he asked whether
25 individual rights should prevail over a group or collective religious right, and he held wrongly,
26 in my respectful submission, that individual rights can prevail over collective religious right.

27 Now kindly come to para 61. "The constitutional recognition of the collective dimension of
28 fundamental rights is not confined to religion alone. The Constitution repeatedly protects the
29 autonomy of communities in order to preserve their identity and institutions. Articles 29 and
30 30, for instance, guarantee to linguistic and religious minorities, the right to conserve their
31 culture and establish and administer educational institutions of their choice. These provisions
32 recognise that certain constitutional freedoms are realised not merely through individuals but
33 through collective institutions sustained by communities."

1 Then, My Lord I have extracted **Nagaraj**. "Constitutional claim of individual right under
2 Article 16(1) and the preferential treatment given to a backward class has to be balanced. Both
3 the claims have a particular object to be achieved. This question is of optimisation of this
4 conflicting interests and claims." My Lord, according to me, I will skip this para 63, 64 and go
5 to para 65. "Constitutional inquiry, therefore, cannot proceed on the assumption that
6 individual rights must invariably prevail over collective religious rights. Constitution instead
7 contemplates a structured balance between individual freedom and denominational
8 autonomy, within which the autonomy of religious communities in matters internal to religion
9 occupies a constitutionally protected domain. To approach the issue solely through the prism
10 of individual rights would risk disregarding the institutional dimension of religion that the
11 Constitution itself expressly protects."

12 My Lord then I come to whether Article 25 is a horizontal right. My Lords have had occasion
13 to deal with it in the **Kaushal Kishor** judgment and My Lord Justice Nagarathna in the
14 morning referred to this. My Lord, specifically, while making a chart and listing various rights,
15 Article 25 is not treated as a right which can be exercised horizontally; it is a right which can
16 be exercised... Therefore, the claim against the state can lie, but not against fellow citizens. 14
17 etc., stands on a different footing, but 25 is not. Therefore, an individual saying that I can
18 exercise the right against other individuals who have another kind of belief, that kind of a
19 horizontal right is not available; that's a view. My Lords have analysed all the fundamental
20 rights in **Kaushal Kishor** and take the view that this is not such a right. And My Lord, what
21 is horizontal and vertical, My Lords know; I am not going to read that part of it. And then I'll
22 go straight away to para 67.

23 **JUSTICE B.V. NAGARATHNA:** Except in the case of *habeas corpus*.

24 **C.S. VAIDYANATHAN:** I'm sorry?

25 **JUSTICE B.V. NAGARATHNA:** *Habeas corpus*.

26 **C.S. VAIDYANATHAN:** Yes, that's right.

27 **JUSTICE B.V. NAGARATHNA:** That has been excluded by...

28 **C.S. VAIDYANATHAN:** That's right. Article 20...

29 **JUSTICE B.V. NAGARATHNA:** 30.

30 **C.S. VAIDYANATHAN:** Yes. 30 also. "Article 25 protects the individual's freedom of
31 conscience and the right to freely profess, practice and propagate religion against state
32 interference; subject to public order, morality, health and other provisions of Part III. It does
33 not convert disputes between private religious adherents, denomination or groups into

1 constitutional claims enforceable *inter se*. My Lord, this is very important, because in the
2 morning there was a debate in regard to this. If there is a schism in the church, My Lord, I had
3 occasion to deal with it in the context of the Jacobite and Orthodox Christians. And there has
4 been a schism running for 200 years. And as to which of them is right in terms of religious
5 beliefs and faith, is not a matter for the court, because we don't have a ecclesiastical court, we
6 don't have a court with expertise in theology. That's not the... what the constitutional courts
7 are expected to decide. Both may be right. Both are entitled to their system of faith and belief.
8 Therefore, both pursue their independent... they have their independent churches, they have
9 the right to practice and profess their religion, their faith. Nobody stops them from doing that.
10 But you can't say that you have to... that's what Portuguese sought to do. My Lords, in Kerala
11 there is a famous Coonan Cross. When the Portuguese came into Kerala, they sought to convert
12 all the Syrian Orthodox believers into Catholics. There was a huge resistance. People therefore,
13 held on to a chain and they said you do what you want but we are not going to convert ourselves
14 and become Catholics. That's a... In Ireland, when the British Crown was ruling, the Catholics,
15 they were subjected to differential treatment. They were said you are... you will not have right
16 to property. The Protestants went to the extent of saying... the Anglican Church was controlling
17 and the Catholics were told you will not have the right to property, you will not have the right
18 to succession in regard to property. This was the kind of thing that was... therefore, forcing
19 them to convert. But that of course, ... that's why we still have the lingering dispute between
20 Catholics and Protestants in Ireland even today. My Lord, therefore, this is not something
21 which the courts will enter into, courts will not decide. Each is entitled to practice and profess
22 their own beliefs.

23 **JUSTICE B.V. NAGARATHNA:** That's why freedom of conscience.

24 **C.S. VAIDYANATHAN:** That's why freedom of conscience. That's a freedom of conscience.
25 Now I come to Issue No. 3. Whether the rights of religious denomination under Article 26 of
26 the Constitution are subject to provisions of Part III. My Lord, my respectful submission on
27 this is that 25 and 26, My Lord asked whether it forms, it's a separate island? My respectful
28 submission is, these... it is a distinct constitutional framework. 26 is to be dealt with separately.
29 26 is not subjected to other provisions of the part, nor is 25(2)(b) enabling the right under 26
30 to be controlled. 25(2)(b) is only enabling a law to be made which can regulate the right under
31 Article 25, the individual right. Therefore, if some... There is no prohibition in regard to
32 making any law for social reform. Like, for example, if somebody says that there should be a
33 Uniform Civil Code. It is something which can be made under Article 25(2)(a). It can be,
34 through 25(2)(a) or the first part of 25(2)(b). First part. There are two parts to 25(2)(b). The
35 second is in regard to Entry. 25(2)(b) first part is in regard to social welfare reform, social
36 reform, not religious reform. And therefore, the Hindu code was brought in like that. When

1 we had... Otherwise, prior to the Hindu code coming in, even amongst Hindus there were
2 persons who had three wives, four wives.

3 **JUSTICE B.V. NAGARATHNA:** No, there was no restriction.

4 **C.S. VAIDYANATHAN:** No restriction. There was no restriction.

5 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] came in ...

6 **C.S. VAIDYANATHAN:** Bigamy came to be prohibited thereafter. Therefore, we have to
7 keep all these in mind. Therefore, today, if in some other religious context if this has to be
8 regulated perhaps 25(2)(b) first part can be invoked. It's for the Legislature to decide. It's not
9 for the court; it's for the Legislature to come up with a law in regard to that. My respectful
10 submission is 25(2)(b) is, expressly, creates a kind of an exclusion only in regard to the
11 individual rights under 25 and not in regard to the denominational right under 25(2). Now,
12 My Lord, I...

13 **JUSTICE JOYMALYA BAGCHI:** Mr. Vaidyanathan, just here, when you say that 26 comes
14 into play in relation to individual rights of 25, doesn't 25 in that respect, get a horizontal
15 projection, because 26 is not a state right; it is a denomination right. And when a denomination
16 right versus an individual right of conscience comes into clash, conflict, will not 25 be
17 understood or 26 be understood as horizontal intrusion?

18 **C.S. VAIDYANATHAN:** No, with the greatest respect, such an individual can continue to
19 practice, profess his own individual faith and belief, but he can't say that the religious
20 denomination must follow my...

21 **JUSTICE JOYMALYA BAGCHI:** Propagation. The word is not only practice, profess but
22 propagate.

23 **C.S. VAIDYANATHAN:** Yes.

24 **JUSTICE JOYMALYA BAGCHI:** And that is where the individual's right of conscience
25 propagation becomes eclipsed by the essential or the religious affairs managed by the
26 denomination.

27 **C.S. VAIDYANATHAN:** But he can't force himself.

28 **JUSTICE JOYMALYA BAGCHI:** It leads to conflict. Will it not be a conflict of resolution
29 of two fundamental rights and thereby making horizontal intrusions into each other?

30 **C.S. VAIDYANATHAN:** My Lords, an individual's fundamental right to profess, practice
31 and propagate religion does not mean he can forcefully assert his right.

1 **JUSTICE JOYMALYA BAGCHI:** You are saying it means that, but we mean, when a
2 conflict comes, that my degree... because everything is a matter of degree, sir.

3 **C.S. VAIDYANATHAN:** Yes.

4 **JUSTICE JOYMALYA BAGCHI:** Not in absolute terms, when we come to see two rights.
5 And when I say my right to propagate will be eclipsed by a religious affair managed by a
6 denomination, then I have a right to challenge the religious affair.

7 **C.S. VAIDYANATHAN:** Yes, you can.

8 **JUSTICE JOYMALYA BAGCHI:** That challenge becomes a conflict between two
9 fundamental rights on a horizontal domain.

10 **C.S. VAIDYANATHAN:** My Lord, the question arose before My Lords in the context of
11 conversion in *Rev. Stainislaus*, where the court took the view there can't be any forced
12 conversion. You can propagate, you can try to persuade; nobody can stop you.

13 **JUSTICE JOYMALYA BAGCHI:** You are absolutely right. That is normative, but litigation
14 is not normative.

15 **C.S. VAIDYANATHAN:** My Lord, litigation...

16 **JUSTICE JOYMALYA BAGCHI:** Litigation is always [UNCLEAR].

17 **C.S. VAIDYANATHAN:** With the greatest respect, litigation...

18 **JUSTICE JOYMALYA BAGCHI:** Someone says this is forced, someone says no, this is
19 voluntary.

20 **C.S. VAIDYANATHAN:** Therefore, then, that is why, My Lords took the view that this is not
21 a horizontal right; therefore, an individual cannot assert this right against either another
22 individual or a collectivity. Therefore, this is not such a horizontal right which can be enforced.

23 **JUSTICE M.M. SUNDRESH:** This is more on a hypothesis.

24 **C.S. VAIDYANATHAN:** Not under 32, not under 226.

25 **JUSTICE M.M. SUNDRESH:** We will put it to you differently. 25 and 26 are same in certain
26 way because rights are restricted with respect to public order, morality, public health.

27 **C.S. VAIDYANATHAN:** Correct.

28 **JUSTICE M.M. SUNDRESH:** So, if you... as you understand 25(2).

29 **C.S. VAIDYANATHAN:** That's a commonality.

- 1 **JUSTICE M.M. SUNDRESH:** Being an enabling provision.
- 2 **C.S. VAIDYANATHAN:** Yes.
- 3 **JUSTICE M.M. SUNDRESH:** It can confine at best, let us forget about 26.
- 4 **C.S. VAIDYANATHAN:** Yes.
- 5 **JUSTICE M.M. SUNDRESH:** At best only to public order, morality and health.
- 6 **C.S. VAIDYANATHAN:** Yes.
- 7 **JUSTICE M.M. SUNDRESH:** So, to that extent you can... even you cannot say, because 26
- 8 also says.
- 9 **C.S. VAIDYANATHAN:** Correct.
- 10 **JUSTICE M.M. SUNDRESH:** If supposing let us say, a particular religious denomination,
- 11 its action is contrary to public order, morality.
- 12 **C.S. VAIDYANATHAN:** Yeah.
- 13 **JUSTICE M.M. SUNDRESH:** Then...
- 14 **C.S. VAIDYANATHAN:** It can be enforced.
- 15 **JUSTICE M.M. SUNDRESH:** Then to that extent you can trace it under Section 25.
- 16 **C.S. VAIDYANATHAN:** Yes, correct, correct. That has a...
- 17 **JUSTICE M.M. SUNDRESH:** If you put it that way probably then...
- 18 **C.S. VAIDYANATHAN:** Yes, My Lords. That I agree. What My Lords have said, I can't
- 19 possibly...
- 20 **CJI SURYA KANT:** The three exceptions of 25(1) will apply to 26 also for the simple reason
- 21 because the same expressions have been repeated there in 26 also.
- 22 **C.S. VAIDYANATHAN:** Yeah, correct. I'm grateful, My Lord.
- 23 **CJI SURYA KANT:** But you are right in saying that 25(2), enabling provision is not
- 24 applicable to 26 because Sub-article(2) starts, "Nothing in this Article...". "...in this Article..."
- 25 **C.S. VAIDYANATHAN:** Yes, exactly.
- 26 **CJI SURYA KANT:** The Constitution maker would have said "Nothing in this Chapter..."
- 27 **C.S. VAIDYANATHAN:** Correct.
- 28 **CJI SURYA KANT:** Or "Nothing in provisions in so-and-so will apply."

1 **C.S. VAIDYANATHAN:** Correct.

2 **CJI SURYA KANT:** Or there they could say, "Nothing in this, in 26 subject to A, B, C", they
3 could say "and subject to 25(2)."

4 **C.S. VAIDYANATHAN:** Yes. Could have said. But that's why, very interestingly 26(b) talks
5 of "manage its own affairs in matters of religion", 26(d)... My Lords, there are two other
6 submissions on this. 25(i) is subject to other provisions of the Constitution of this chapter,
7 which means also subject to Article 26, number one. And My Lords have rightly pointed out
8 25(2) the opening clause, "Nothing in this Article shall affect..." Therefore, only to this extent
9 of 25(1), not in regard to 26. Then thirdly, 26(d) talks of "Administer such property in
10 accordance with law", whereas 26(b) doesn't say "to manage its own affairs in matters of
11 religions in accordance with law." My Lord, kindly see, very thoughtful, Parliament in its
12 wisdom, the Constitution, the makers in their wisdom have deliberately used different
13 languages in regard to each one of this, and we have to give meaning and effect to each one of
14 them.

15 **JUSTICE JOYMALYA BAGCHI:** Mr. Vaidyanathan, exactly this, what you are saying,
16 subject to other provisions of this part, includes 26. Now 26 is a right of the state or right of
17 the collective individual... a collection of individuals?

18 **C.S. VAIDYANATHAN:** No, 26 is, My Lord, the right of the denomination.

19 **JUSTICE JOYMALYA BAGCHI:** Is it the state?

20 **C.S. VAIDYANATHAN:** I'm sorry?

21 **JUSTICE JOYMALYA BAGCHI:** It's definitely not the state?

22 **C.S. VAIDYANATHAN:** No.

23 **JUSTICE JOYMALYA BAGCHI:** So, there is a horizontal intrusion of 26 into the right of
24 the individual in 25?

25 **C.S. VAIDYANATHAN:** No, My Lord. My Lord, the right of the denomination will prevail.

26 **JUSTICE JOYMALYA BAGCHI:** Correct. That is exactly what it is saying.

27 **C.S. VAIDYANATHAN:** Correct.

28 **JUSTICE JOYMALYA BAGCHI:** A horizontal intrusion by a non-state actor into 25.

29 **C.S. VAIDYANATHAN:** Yes.

30 **JUSTICE JOYMALYA BAGCHI:** And that therefore, creates an interface between the
31 religious denomination's fundamental right to manage its religious affairs, *vis-a-vis*, the

1 individual's fundamental freedom of conscience and professing, practicing, etc. So, if this
2 interface, can it be defined as a vertical expression of these two fundamental rights, or an
3 asymmetric intrusion?

4 **C.S. VAIDYANATHAN:** My Lord, I would respectfully submit, these are two different
5 verticals. We have to treat...

6 **JUSTICE JOYMALYA BAGCHI:** But these two verticals overlap.

7 **C.S. VAIDYANATHAN:** No, My Lord, therefore, in this, to the extent where 25(1) right
8 seeks to assert itself against 26 vertical, 25(1) cannot prevail. But really speaking such a conflict
9 will not arise because...

10 **JUSTICE JOYMALYA BAGCHI:** Let us say...

11 **C.S. VAIDYANATHAN:** 25(1) right can be exercised by any person as an individual without
12 becoming a member of that religious denomination. Therefore, there is no need for a conflict.
13 My Lords the conflict will arise only if you say, I will have this belief and yet I will belong to
14 that. That is the only situation.

15 **JUSTICE JOYMALYA BAGCHI:** This is the mirror image of the example that you gave. If
16 26(b) denomination comes to court seeking an injunction against an individual who is
17 invading his religious affairs rights.

18 **C.S. VAIDYANATHAN:** My Lords, I will exercise my right on my own, either in regard to
19 bar, that question in fact, will arise, for example, in the case of excommunication. In the case
20 of excommunication, that question will, because the *Syedna* is seeking to assert that right
21 and say that you don't follow my tenets and beliefs, you are not following, therefore, you no
22 longer continue to belong to this group. Therefore, I keep you out of it. That is the right to
23 excommunication; that is what is sought. Therefore, he goes to the court. When he goes to
24 court, as My Lord Justice Sundresh said, the test will be, is the excommunication contrary to
25 public order, morality or health? That's a test that will be applied, not whether right to... power
26 to excommunicate is part of essential religious practice, right, etc.; that is that is not something
27 that can be gone into.

28 **CJI SURYA KANT:** Let us not overlap the two distinctions. The 24, 25 talks of religious
29 practice, 26, talks of religious affairs. That affair is the management of the... it is a very broader
30 and wide concept. It has nothing to do with practice.

31 **C.S. VAIDYANATHAN:** Very well. Very well.

32 **CJI SURYA KANT:** Therefore what will apply to 25 will necessarily not apply to it. Suppose
33 the law is enacted under 25(2), under 25(2), and that law, even if it affects religious practice,

1 it might have some impact or effect even on 26 affair, but that law will be confined only with
2 reference to the power given under 25(2).

3 **C.S. VAIDYANATHAN:** That's it. That's it.

4 **CJI SURYA KANT:** It all depends upon provisions of the law.

5 **C.S. VAIDYANATHAN:** I'm grateful, yes.

6 **JUSTICE B.V. NAGARATHNA:** What has been said is [INAUDIBLE] to see what is
7 actually being curbed in the garb of 25(2) *vis-a-vis* 26(b). You have to see actually what it is.

8 **C.S. VAIDYANATHAN:** My Lord, in regard to public order etc., then the law will be upheld,
9 but not when it comes to...

10 **JUSTICE M.M. SUNDRESH:** That's why we tell you...

11 **C.S. VAIDYANATHAN:** Yes.

12 **JUSTICE M.M. SUNDRESH:** Please tell us. Please tell us, who is the religious
13 denomination? Can the... I'll rephrase the question. Can the, a particular religious
14 denomination, is it a person or not? Is it a person or not? Please answer. Is a religious
15 denomination a person or not. If it is a person, it'll come under 25. Can you tell us that how do
16 you say 25 will not be applicable? It says, all persons or all persons are equally entitled. You
17 can do it subject to the riders there. To say that a religious denomination will not come under
18 the purview of a legislation or even executive action via a social welfare and reform under
19 Subsection 2(b), is too difficult for us to accept it and notwithstanding as per the submission
20 made by learned AG...

21 **C.S. VAIDYANATHAN:** In the context of the fundamental right, fundamental right which
22 has been given which can be asserted under Article 32 which can be enforced under Article 32,
23 every religious denomination...

24 **JUSTICE M.M. SUNDRESH:** [INAUDIBLE] said both on a different thing. Only one is with
25 respect to freedom to conscience and profess, other is only with respect to manage religious
26 affairs. And these are the... you can establish it, run it, administer it, manage it, acquire the
27 property, these are the things. To that extent, what is there, there should not be very limited
28 point of view and to what extent. You can't mix it up with the other one.

29 **CJI SURYA KANT:** A law enacted as part of a social welfare scheme which is impacting the
30 religious practice of an individual under 25(1) can also have an impact on 26 for that very
31 group of individuals, is what referable to 26.

32 **C.S. VAIDYANATHAN:** Correct.

1 **CJI SURYA KANT:** But it will all depend upon... this question can't be answered
2 academically or on hypothetical basis.

3 **C.S. VAIDYANATHAN:** Yes, hypothetical.

4 **CJI SURYA KANT:** In that circumstance it may impact 26, it may not impact.

5 **C.S. VAIDYANATHAN:** Yes, correct.

6 **CJI SURYA KANT:** It will all depend upon to what extent the Legislature had tried to...

7 **C.S. VAIDYANATHAN:** Whether it goes beyond public order, morality and health or only
8 in regard to dealing with public order, morality and therefore, that's the... pith and substance
9 of the law will have to be examined whether it goes beyond that.

10 **CJI SURYA KANT:** That's why my Brother said that it may be difficult to accept it as an
11 abstract statement that 26 will never be impacted.

12 **C.S. VAIDYANATHAN:** My Lord, if such a law is made and if somebody is aggrieved, both
13 an individual and the religious denomination can challenge it because the right under Article
14 26 is given to the religious denomination or section thereof. Therefore, that religious
15 denomination can also assert that right under Article 32. That's a...

16 **CJI SURYA KANT:** That's right, but as a juristic person they can always.

17 **C.S. VAIDYANATHAN:** Correct, that's right. That's right. Now I come back to the
18 submission page 27, paragraph in subheading (b). When subject to other provisions of this
19 part, I am dealing with that and para 11. "First limb, public order, morality and health
20 constitute direct conscience. Second limb, these other provisions of the part." I want to
21 emphasise one more. In paragraph 12, I have set it. Kindly see My Lord in 25(1) it talks of
22 "subject to public order, morality and health and to other provisions". Now, My Lord, it is not
23 subject to public order, morality, health and to other provisions. This is a grouping. Public
24 order, morality and health has been grouped as one compendious expression, or *ejusdem*
25 *generis*; therefore, a common group. And then second is another 'and', 'and to other
26 provisions'. Therefore, public order, morality and health will have to be understood as one
27 compendious group and that it is for that purpose...

28 **CJI SURYA KANT:** We have understood that.

29 **C.S. VAIDYANATHAN:** Yes, yes. Then My Lord, (c)...

30 **JUSTICE AHSANUDDIN AMANULLAH:** So, would you mean that one compendious
31 group does not mean all three have to be there, only one can also be there.

32 **C.S. VAIDYANATHAN:** Meaning...

1 **JUSTICE AHSANUDDIN AMANULLAH:** Doesn't mean everything should be there; all
2 three should not be there.

3 **C.S. VAIDYANATHAN:** Yes, that's right. My Lords are right.

4 **JUSTICE B.V. NAGARATHNA:** No, then you can say, you might argue that... then 'other
5 provisions of the part' means 26 is protected.

6 **GOPAL SHAKARNARAYANAN:** Yes. That's what he said.

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

8 **C.S. VAIDYANATHAN:** Yes. That's our submission. That's our submission. 26 doesn't have
9 that. In 26 they wanted to bring that but it was not accepted. And 26, constitutional history
10 will show.

11 **JUSTICE B.V. NAGARATHNA:** But under 26 it doesn't say other parts of...

12 **C.S. VAIDYANATHAN:** No, it doesn't.

13 **JUSTICE B.V. NAGARATHNA:** So, you'll have to actually balance the whole thing and
14 between the two is 25(2)(b).

15 **C.S. VAIDYANATHAN:** My Lord, 26... 25(2)(b)... 25(2) is a power given to the state to make
16 a law. It is not a fundamental right which has been given. 26 is the one which gives the
17 fundamental rights.

18 **JUSTICE M.M. SUNDRESH:** See, as the Honourable Chief Justice has clearly said, see, the
19 gavel and the scope is also different.

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

21 **JUSTICE M.M. SUNDRESH:** 25 and 26 are different. Let it be only one first.

22 **C.S. VAIDYANATHAN:** Correct. Yes, My Lord. I have said expressed constitutional
23 limitations cannot be expanded by implication and 25(2)(b) a limited constitutional reform
24 provision. And I've given that takeaway, the conclusion in page 28 para 26 to 29.

25 Now, I come to the graded constitutional design. This is another aspect which I want to point
26 out. In the fundamental rights chapter, in my respectful submission, the constitutional
27 architecture of Part III is in such a manner that Article 17, 23 and 24 form a separate group.
28 This is a kind of, not merely a right under a punishable kind of a thing. Article 17 prohibits
29 untouchability; 23, 24 which expressly in regard to prohibiting trafficking, forced labour, child
30 labour, etc. Therefore, this is a very unique kind of a constitutional architecture where by the
31 Constitution you have...

1 **CJI SURYA KANT:** 17, I think we have understood. 17 is a very powerful, constitutional
2 declaration.

3 **C.S. VAIDYANATHAN:** Very powerful, yes.

4 **CJI SURYA KANT:** And offense. So, it's not only an offence under the Penal Law; in a way
5 it's a constitutional offence, if you're there to...

6 **C.S. VAIDYANATHAN:** That's right. 17, 23, 24 My Lord, constitute one set of provisions
7 and 17, as my learned friend said, it is an atonement for our past. Whatever historically,
8 whatever injustice has taken place, it is an atonement for our past. Now they constitute one
9 category. Then we come to Article 14, 15, 16, etc., where the enumerated anti-discrimination
10 clauses. Then thirdly, we have 25 to 28, which in my respectful submission, is a different set
11 of... where religious liberty and institutional autonomy is guaranteed. They stand on a slightly
12 different footing. And what I have done at page 206, I have analysed this part. Page 206.

13 **CJI SURYA KANT:** Yes.

14 **C.S. VAIDYANATHAN:** 206 to 214, in a chart, I have analysed the various provisions of the
15 Constitution, the various phraseology which has been used. I don't want to take too much time
16 on this, but I have set out all that. And wherever they wanted to mention any provision in
17 regard to non-discrimination on the grounds of gender, sex, that has been set-out and this is
18 not something which is found in Article 25, is one of the submission which I have already
19 made. Now, My Lord, I then go over.

20 **JUSTICE B.V. NAGARATHNA:** First... You can categorise it. The first category is with
21 regard to justice. The second category is equality. And the third category is liberty. They are
22 all Preambular rights which are actually adumbrated as constitutional guarantees.

23 **C.S. VAIDYANATHAN:** That's right. That's right.

24 **JUSTICE B.V. NAGARATHNA:** Justice, equality, liberty.

25 **C.S. VAIDYANATHAN:** That's right. That's right. I'll skip the rest of it, My Lord, in order to
26 keep myself within the time limit as much as possible. I'll go straightaway to paragraph 48, at
27 page... internal page 34.

28 **CJI SURYA KANT:** Page 2?

29 **C.S. VAIDYANATHAN:** Paragraph 48 at internal page 34. 203. 203.

30 **CJI SURYA KANT:** 203?

31 **C.S. VAIDYANATHAN:** 203.

1 **CJI SURYA KANT:** Yes.

2 **C.S. VAIDYANATHAN:** "As regards Article 15(2), it does not include temples or places of
3 public worship within its ambit. Constituent Assembly debates reflect that the proposal to
4 include temples and places of worship in Article 15 was categorically negative." In paragraph
5 64, 65 we have set out, "Article 15(2) also cannot be pressed into service for asserting a right
6 against essential practices." Then 29(2). "No citizen shall be denied admission to an
7 educational institution maintained...", even this does not mention about gender", I have
8 already pointed this out. Then 16(5). My Lord, this is very important. 16(5), I'm... in the context
9 of analysing the constitutional provisions on fundamental rights, 16(5) is very important,
10 which protects law being made for... "that the incumbent of an office in connection with the
11 affairs of any religious or denominational institution or any member of the governing body
12 thereof, shall be a person professing a particular religion or belonging to a particular
13 denomination." My Lord, this has been noticed. Yesterday it was pointed out in *Adi Saiva*,
14 but not in the other earlier judgments and it becomes important because, in *Seshammal*, if
15 this had been noticed, perhaps that decision would not have been laid down. *Aditya* also, in
16 *Seshammal* and *Aditya*, this the...

17 **JUSTICE M.M. SUNDRESH:** Please repeat. Please repeat.

18 **C.S. VAIDYANATHAN:** I'm sorry?

19 **JUSTICE M.M. SUNDRESH:** Please repeat.

20 **C.S. VAIDYANATHAN:** *Seshammal* and *Aditya*, which were concerned...

21 **COUNSEL 1:** *Adi Saiva*.

22 **C.S. VAIDYANATHAN:** *Adi Saiva* notices this. Justice Gogoi notices this Article 16(5) and
23 says that, but this has not been noticed in the earlier judgement.

24 **CJI SURYA KANT:** Yesterday, it was read out.

25 **C.S. VAIDYANATHAN:** Yes.

26 **JUSTICE B.V. NAGARATHNA:** That appointment of... secular activity.

27 **C.S. VAIDYANATHAN:** Appointment, that's right. Therefore, appointment of a person to
28 an office by a religious denomination is treated differently, in the very Article dealing with
29 equality in the matter of appointments etc. Article 16 is in the context of equality of opportunity
30 in matters of public employment. In that context, in Article 16(5), when it says, "in regard to
31 an incumbent of office in connection with the affairs of any religious or denominational
32 institution or any member of the governing body thereof shall be a person professing a

1 particular religion or belonging to a particular denomination." Now therefore, My Lord, this
2 is not treated as a secular office; it is treated differently. And if this had been noticed, perhaps
3 the holding in **Seshammal** and **Adi Saiva**, that as if it is a secular appointment to, of an
4 *Archaka*, appointment of a *Pujari*, appointment of a religious head of a *Mutt*, is in the nature
5 of a secular appointment, would not have been found. Therefore, one of the submission is this
6 will have to be overruled. Now, My Lord...

7 **JUSTICE B.V. NAGARATHNA:** Article 16(5) could have found a place along with either 25
8 or 26.

9 **C.S. VAIDYANATHAN:** It could have. Could have, yes. This is therefore, an exception which
10 has been carved out in Article 16 in respect of a religious office. Now, My Lord, I'll skip these
11 and then I'll go to the fourth issue, on morality, which has been considerably argued; therefore,
12 I am not going to take too much time on that.

13 My Lord, internal page 48, 217. Yes. And the Hindi definition has also been given. But what
14 has not perhaps been shown, that it has to be read *ejusdem generis* with the public order,
15 health. All these submissions have already been made. It can't be equated to constitutional
16 morality. My Lord, what has not perhaps been pointed out, there is one definition which has
17 been pointed out on *Sadaachar*. My Lord, I will only mention it. *Sadaachar* has been pointed
18 out. The word used, I just want to add this to the submission which has already been made. If
19 they had intended the kind of meaning that is sought to be given, 'constitutional morality',
20 then it should have expressed; it should have been expressed as *Samvaidhanik naitikta*; that
21 is not the expression used. It is... Therefore, we have to give a meaning to '*Sadachar*', to
22 morality, different from constitutional morality.

23 **CJI SURYA KANT:** We understood your point. The literal translation would have been
24 *Samvaidhanik naitikta*.

25 **C.S. VAIDYANATHAN:** Yes.

26 **CJI SURYA KANT:** Instead of that, the expression used in the Hindi official version is
27 '*Sadaachar*'. We understood.

28 **C.S. VAIDYANATHAN:** Then I will go... I'll skip the rest of it. I will go to paragraph 14 at
29 page 55. That's page 224. 224. My Lord, why I am pointing this out is, in the earliest years,
30 before this expression of 'constitutional morality' was sought to be urged, what was being
31 urged was the spirit of the Constitution. And therefore, in the **Keshavan Madhava Menon**
32 in 1951, in the earlier years, the argument that was advanced before the court was that we have
33 to understand the spirit of the Constitution and if a law is contrary to the spirit of the

1 Constitution, it will have to be held to be that. And My Lords held at paragraph 14, **Keshavan**
2 **Madhava Menon**, I'm just reading that part of it. And... Page 224.

3 **CJI SURYA KANT:** 220, the citation starts.

4 **C.S. VAIDYANATHAN:** Yes.

5 **CJI SURYA KANT:** And you are reading at page?

6 **C.S. VAIDYANATHAN:** 224, My Lord. 220 is **Navtej Singh Johar. NCT of Delhi vs.**
7 **Navtej Singh Johar**. I am not going into all that. It has been dealt with yesterday.

8 **CJI SURYA KANT:** **Navtej Singh** already you cited.

9 **C.S. VAIDYANATHAN:** Yes, **Keshavan Madhava Menon** in 1951. "An argument
10 founded on what is claimed to be the spirit of the Constitution is always attractive for it has a
11 powerful appeal to sentiment and emotion, but a court of law has to gather the spirit of the
12 Constitution from the language of the Constitution. What one may believe or think to be the
13 spirit of the Constitution cannot prevail if the language of the Constitution does not support
14 the view."

15 Then, My Lord, I will go to the internal paragraph 11. "We are therefore unable to accept the
16 contention about the spirit of the Constitution as invoked by the learned Counsel in aid of his
17 plea that pending proceedings under the law which has become void cannot be proceeded with,
18 etc." Then they say this. Article 13(1). "It has to be according to established rules of
19 interpretation, uninfluenced by an assumed spirit of the Constitution." Then Ambedkar sought
20 to urge again, the spirit of the Constitution when he was arguing against the Bihar Estates
21 Abolition Act. Bihar Zamindari Abolition Act. And that is dealt with by this honourable court
22 in **State of Bihar vs Kameshwar Singh**. This is dealing actually with the arguments of
23 Mr. Ambedkar as a Counsel.

24 **JUSTICE B.V. NAGARATHNA:** So, according to you, constitutional morality cannot be
25 used for an interpretation.

26 **C.S. VAIDYANATHAN:** Yes. Yes, not for interpretation of the provisions of the
27 Constitution. We have to read the word, letter and then interpret it, not constitutional
28 morality. And My Lord what the court says in **Kameshwar Singh** towards... the underlined
29 portion, "In my opinion be contrary to elementary canons of statutory construction to read by
30 implication those very limitations into Entry 36 of List II alone or in conjunction with Entry
31 42 of List III of the Seventh Schedule ought to deduce them from the spirit of the Constitution
32 and that too in respect of the very properties excluded." Because the argument was that this

1 kind of acquisition, estate, cannot be acquired. And that argument was rejected. Similar
2 argument in **Anwar Ali Sarkar** also.

3 Now, My Lord, I just want to mention two other cases where again, morality itself was pressed
4 as a ground. When Bearer Bonds case, Bearer Bonds Act was challenged in **R. K. Garg**, by a
5 celebrated lawyer, Mr. R. K. Garg as a Party-in-person and passionate arguments were made
6 by him in regard to that. And this is what the court said in that case, in para 18 at page 58, that
7 is at page 227. "It was then contended that the Act is unconstitutional as it offends against
8 morality by, according to dishonest assesseees who have evaded payment of tax immunities and
9 exemptions which are denied to honest taxpayers." And My Lord, this contention is rejected.
10 Similar argument in regard to the **Privy Purse**, and then **Raghunathrao Ganpatrao** case
11 and that argument is also... Justice A. C. Gupta accepted the argument in **Bearer Bonds** case.
12 That's right, but not the majority. I have given the instances where this was not accepted. I
13 don't want to take more time on this.

14 Then, My Lord, I go to Issue No. 5, "What is the scope and extent of judicial review with regard
15 to...?" That's at page 62, that is page 231.

16 **CJI SURYA KANT:** Yes.

17 **C.S. VAIDYANATHAN:** "What is the scope and extent of judicial review with regard to
18 religious practice as referred to in Article 25?" And, My Lord, I will skip and go, the headings
19 are "Constitutional framework and meaning of religion, etc." And, My Lord, essential religious
20 practice. I respectfully submit, on this issue, in **Shirur Mutt**, the question was under
21 25(2)(a), and that was concerning whether it was in regard to secular aspects of management
22 of a temple or an institution, and it was not concerned with testing whether any practice is
23 essential to religion. My Lord, there is a very, very important difference. And it's our respectful
24 submission that the **Durgah Committee, Syedna's** case and **Tilkayat**, have erroneously
25 approached it and adopted a test of essential religious practice.

26 Without going into all these passages, I come straightaway to internal paragraph 15 at page
27 237. 237, my submission on this. My submission on this. My Lord may read four lines above
28 that paragraph 14(n). "This marked," that is **Tilkayat**, "marked a shift from the position that
29 essentiality is determined by adherence to the view that the court may itself delineate what is
30 essential to religion and what falls within the secular sphere. It is respectfully submitted that
31 the observations in **Durgah Committee** and **Tilkayat** suggesting judicial scrutiny of the
32 essentiality of religious practices do not constitute the ratio of those decisions. The questions
33 before this honourable court in those cases concerned the validity of statutory measures
34 regulating the secular administration of religious institutions and not the determination of
35 whether particular practices were essential to the religion. The conclusions reached were

1 therefore directed at the permissibility of state regulation of secular aspects associated with
2 religious institutions rather than upon any adjudication that the practices in question were
3 irrational, superstitious or otherwise, unworthy of constitutional protection. Nevertheless,
4 those observations mark a discernible shift from the earlier bench decision in *Shirur Mutt*,
5 and *Ratilal* which emphasised the autonomy of religious denominations in matters of
6 religion."

7 Then My Lord, kindly come to the bottom of the page, paragraph 17. "The jurisprudence that
8 were followed in the *Durgah Committee* and *Tilkayat* reflects a gradual departure from
9 the original jurisdictional function of essential religious practice doctrine as articulated in the
10 *Shirur Mutt*. The doctrine was initially conceived as a means to distinguish religious
11 practices which fall within the protected domain of Article 25 and 26 from secular activities
12 associated with religion." This is the submission which may legitimately be regulated by the
13 state. "Over time, however, the doctrine has been invoked in a manner that draws courts into
14 determining whether a particular practice is essential to the religion, rather than whether the
15 practice is religious in character." My Lords, this is a very, very vital difference. Whether it is
16 religious in character or secular in character is a test for the purpose of determining whether
17 a law can be made; but not whether that particular practice is essential to the religion. That is
18 not a matter which can be considered by the courts. It's not a matter falling within judicially
19 manageable standards.

20 **JUSTICE R. MAHADEVAN:** It is specifically absent in the provision.

21 **C.S. VAIDYANATHAN:** Yes. That's something, it's not...

22 **JUSTICE R. MAHADEVAN:** Then we need not go into that.

23 **C.S. VAIDYANATHAN:** My Lord, "Therefore, this shift risks drawing secular courts into
24 the religious thicket, requiring them to undertake theological evaluation that lie beyond the
25 institutional competence of constitutional adjudication." Therefore, my respectful submission,
26 that My Lords will not therefore, entertain such question, as to whether this is essential to the
27 religion. That is a matter for the religion themselves to decide, the adherents to the religion to
28 decide, not for the courts to decide. Now, My Lord, protection of... Therefore, my respectful
29 submission is, protection of sincerely held religious beliefs. And this is on... paragraph 20 to
30 22, deal with this. I won't take more of My Lords' time on this. Limits of judiciary.

31 **JUSTICE B.V. NAGARATHNA:** According to you, there is no need to go into this essential
32 religious practice...

33 **C.S. VAIDYANATHAN:** At all. That does not arise.

34 **JUSTICE B.V. NAGARATHNA:** At all.

1 **C.S. VAIDYANATHAN:** Yes. Only question is, when a law is made, is it dealing with the
2 secular matters or is it dealing with...

3 **JUSTICE B.V. NAGARATHNA:** See, a secular activity which is associated with a religious
4 practice is different from a matter of religion.

5 **C.S. VAIDYANATHAN:** That's right. Therefore, My Lords are absolutely right. Therefore,
6 25(2)(a) contemplates regulating economic, financial, political or other secular activity which
7 may be associated with religious practice, not dealing with religious practice or affairs of
8 religion or matters of religion. That's a respectful submission. That is the only limited extent,
9 My Lords will check it. That was what was laid down in *Shirur Mutt* and *Ratilal*, but
10 unfortunately, that subsequently in *Tilakayat* and **Dargah Committee*, etc., ...

11 **JUSTICE AHSANUDDIN AMANULLAH:** So, only at the threshold, a perfunctory
12 analysis should be made, whether it comes under the secular or it is religious.

13 **C.S. VAIDYANATHAN:** Yes, that's it. Yes, My Lord. I go to paragraph 35, page 243. "The
14 determination of whether a practice is essential to a religion lacks judicially manageable
15 standards. Where no such standards exist, courts must exercise constitutional restraint. This
16 principle has been recognised in several decisions of the court etc." Then My Lord, I give the
17 South African case in the context of... My Lord, there, very interestingly, South Africa has a
18 number of Tamilians. The girl going to a school wanted to have a nose stud and have flowers
19 in her hair. The school's uniform rules prohibited this. Question which arose in the Supreme
20 Court of South Africa was whether she can be prohibited from wearing this nose stud. It is in
21 that context. That's an individual's right to have this; you can't prohibit. That was the holding
22 of the court. My Lords, therefore, under Article 25, unless of course, in our Constitution it is
23 again, contrary to public health, morality, etc., if that test is not applicable then you can't
24 restrict or regulate. It is in that context My Lord, and I have just mentioned that. And therefore,
25 what it says is, this will become otherwise totally subjective. My Lord, whether it is central to
26 her belief is a matter which will be very subjective; so, that is not a matter which the court will
27 investigate, will go into. That is the holding of the court.

28 Now My Lords, jurisdictional limits on *Shastric* prohibitions of, on altering rituals, I have
29 referred to that. And I have also said today whatever might have been the situation when
30 *Tilakayat* came and when individual disputes etc. arose. Today after the Places of Public
31 Worship Act, this question perhaps may not arise, because there is a prohibition in regard to
32 change in the nature. Whatever was the position in 1947 is what has to continue. That's the
33 holding in the... that's the law laid down in Places of Public Worship Act. I have referred to
34 that. Now on the section of Hindus, that's Issue No. 6. I will not read anything except the last
35 two paragraphs, page 253. I will only point out the Pandora's box. "Consequences of accepting

1 gender as a section of Hindus. According to me, gender or sex is not a matter for the purpose
2 of..." My Lord, let's not come within the section of Hindus and... but if we are to accept a
3 contrary position then the consequences is what I have set out. "This honourable court... to
4 affirm the proposition that gender-based groups where women of menstruating... constitute a
5 section for the purpose of Article 25(b). The constitutional jurisprudence... consequences
6 would be devastating and irreversible. Every gender-specific religious practice becomes
7 judicially reviewable. By this logic, every gender differentiation religious practice across every
8 faith becomes constitutionally suspect. In Islam, the separation of men and women in
9 mosques, restriction of prayer leadership, *Imamat* to men would be open to challenge on the
10 ground that women constitute an excluded section. In Judaism, the *mechitza*, physical
11 separation in orthodox synagogues and gender-specific Bar Mitzvah ceremonies would face
12 litigation. In Christianity, the Roman Catholic and Eastern Orthodox position on all-male
13 priesthood would be open to constitutional challenge. Now, My Lord, the Anglican Church
14 today is headed by a woman. They have changed. Anglican Church has changed, but not...

15 **COUNSEL 2:** For the first time in history.

16 **C.S. VAIDYANATHAN:** First time in history, yes.

17 **JUSTICE B.V. NAGARATHNA:** After 1400 years. Anglican Church is now headed by a
18 woman after 1400 years.

19 **C.S. VAIDYANATHAN:** Yes, 1400, exactly. In Hinduism, female-only worship temples at
20 certain Shakti temples where men are traditionally excluded and male-only entry to inner
21 sanctums at several Kerala temples would also be exposed to challenge. My Lord, yesterday
22 the Solicitor had given some examples; I'm not going into all these. This concludes my first
23 note but the specific questions which My Lords have been raising in the context of 25(2)(b)
24 and 26, I have dealt with in a separate note. And that is the most important question which
25 has been raised by all My Lords; I'll deal with that. It's a separate, it's a paper book which has
26 been given.

27 **CJI SURYA KANT:** We were requesting two, three pages note; your juniors have
28 unnecessarily reproduced so many things, making it so bulky. Yes, let's come to the right,
29 direct Mr. Vaidyanathan.

30 **C.S. VAIDYANATHAN:** Yes. Now in that the note, "the religious freedoms are intrinsic part
31 of right to life and liberty," that, I am not reading that and "essential to safeguard the plurality
32 and maintain the unity," I may read only one part from *St. Xavier's College*. My Lord,
33 kindly come to internal page 3.

34 **CJI SURYA KANT:** Yes.

1 **C.S. VAIDYANATHAN:** Last 10, 15 lines. "Provisions of the Constitution were designed
2 accordingly. There is no mysticism in the secular character of the state. Secularism is neither
3 anti-God nor pro-God. It treats alike, the devout, the agnostic and the atheist. It eliminates
4 God from the matters of the state and ensures that no one shall be discriminated against on
5 the grounds of religion. Constitution at the same time expressly guarantees freedom of
6 conscience and the right to freely profess, practice and propagate religion. Constitution
7 makers were conscious of the deep attachment the vast masses of our country had towards
8 religion, the sway it had on their minds and the significant role it played in their lives. To allay
9 all apprehensions of interference by the Legislature and the Executive in matters of religion,
10 the rights mentioned in Article 25 to 30 were made part of the fundamental rights and religious
11 freedom contained in those Articles was guaranteed by the Constitution." "To allay all
12 apprehensions of interference by the Legislature and the Executive in matters of religion",
13 these were made part of fundamental rights. "As in the case of religion, so in the case of
14 language...", I won't trouble My Lords with that. Go straightaway to the issue to be addressed,
15 that is page 5. "Constitutional relationship between 25(2)(b) and 26(b)." "25(2)(b) is an
16 enabling provision. The carve out it creates is expressed in the words, "Nothing in this Article"
17 confined on a plain reading to Article 25 alone. The respectful submission is that it cannot, on
18 its facts, override the right of a religious denomination under Article 26 to manage its own
19 affairs in matters of religion. Correctness of *Venkataramana Devaru* calls for
20 consideration. In addition, the classification of *Archaka* appointment as a secular function in
21 *Seshammal* requires reconsideration in the light of Article 16(5) and the *Agamic*
22 subscription governing such appointment." Then the rest I will skip, because...

23 **CJI SURYA KANT:** It has already been argued, Mr. Vaidyanathan.

24 **C.S. VAIDYANATHAN:** Yes, My Lord. Therefore, I will skip that. I will now go to page 6
25 where *Devaru* unfortunately, in the court compilation these passages in *Venkataramana*
26 *Devaru* have not been set out. Let me read that My Lord. It is not in the Convenience
27 Compilation. We have given copies. We have given SCC copies, My Lord. We have given the...
28 paragraph 28 in SCC. SCR unfortunately, has omitted a part of the text of the judgment.

29 **JUSTICE B.V. NAGARATHNA:** SCR?

30 **C.S. VAIDYANATHAN:** 28. 27 half para and 28. Digital version. Maybe the original is there,
31 but the digital version is omitted. The digital version has unfortunately omitted. That's why
32 it's not in the compilation.

33 **CJI SURYA KANT:** So, which paragraph you want to read, Mr. Vaidyanathan?

1 **C.S. VAIDYANATHAN:** Yes, para 28 which is in my, paragraph 4, page 6. "And lastly, it is
2 argued that whereas Article 25 deals with the rights of individual... "

3 **CJI SURYA KANT:** Para?

4 **C.S. VAIDYANATHAN:** Para, My Lord, last paragraph, extract. Internal page 6. "Lastly, it
5 is argued that whereas Article 25 deals with the rights of individuals..." My Lord Justice
6 Aravind? My Lords have. "And lastly, it is argued that whereas Article 25 deals with the rights
7 of individuals, Article 26 protects the rights of denominations, and that as what the Appellants
8 claim is the right of the Gowda Saraswat Brahmins to exclude those who do not belong to that
9 denomination, that would remain unaffected by Article 25(2)(b). The contention ignores the
10 true nature of the right conferred by Article 25(2)(b). That is a right conferred on all classes
11 and sections of Hindus to enter into a public temple. And on the unqualified terms of that
12 Article, that right must be available whether it is sought to be exercised against an individual
13 under Article 25(1) or against a denomination under Article 26(b). The fact is that though
14 Article 25(1) deals with the rights of individuals, Article 25(2) is much wider in its content and
15 it has reference to the rights of communities and controls both Article 25(1) and Article 26(b)."
16 No reasoning has been given.

17 And significantly, *Shirur Mutt* and the subsequent judgment, seven judge bench and five
18 judge bench have not been dealt with. Those have been relied upon. My Lords, they expressly
19 to hold to the contrary. I have extracted those passages and I will deal with it. This is a bare
20 assertion. There is no reasoning. And they have not dealt with the larger bench, seven judge
21 bench judgment which says 26(b) is not controlled by this. The court did not explain how a
22 provision saying nothing in this Article, can also mean nothing in Article 26. Therefore, adding
23 words, 25 and 26. "Self-limiting language of Article 25(2) was not contorted and the conclusion
24 that Article 25(2) controls Article 26(b) is unsupported by the text of the provision." My Lord,
25 the part of para 27 which is also not found in the compilation. "It is undoubtedly true that the
26 rights conferred under Article 26(b) cannot be abridged by any legislation but the validity..."
27 please see, mark this, "right conferred under Article 26(b) cannot be abridged by any
28 legislation, but the validity of Section 3 of Act 5 of 1947, does not depend on its own force, but
29 on Article 25(2)(b)." 25(2)(b), merely is an enabling provision to make a law. My Lord,
30 therefore, how can that control 26(b)? My Lord, that, unfortunately the reasoning, there is
31 something missing in this. "The court thus accepted that no legislation can abridge Article
32 26(b) under the Madras Act tested on its own force, violate Article 26(b). Act was saved only
33 because the court held that 25(2)(b) itself can override 26(b)." My Lord, that, my respectful
34 submission is, this is incorrect. And My Lord, I want to read what has been, My Lord, please
35 see, the holding in *Devaru* para 9. "The court then stated we must accordingly hold that the
36 rights of Appellants have to be determined solely with reference to Article 26(b). Then Section

1 3 of Act 5 should be held to be bad as infringing. This is a binding finding." My Lord, this is
2 what... in *Devaru* in the earlier part they say, this is a binding finding. "The question of who
3 may enter temple or worship, when governed by *Agamic* and theological prescription is a
4 matter of religion within Article 26(b) and the law compelling entry violates that right. The
5 only reason that law was upheld was the court's subsequent conclusion that 25(2)(b) overrides
6 26(b). Once that conclusion is shown to be textually untenable, findings at pages 241 and 242
7 is determinative." My Lord, this finding by...

8 **JUSTICE B.V. NAGARATHNA:** *Venkataramana Devaru*, with regard to the Gowda
9 Saraswat Brahmin temple, there was a suit which was filed.

10 **C.S. VAIDYANATHAN:** Yes.

11 **JUSTICE B.V. NAGARATHNA:** And it was established in the suits, that all persons other
12 than Gowda Saraswat Brahmins were excluded. When the matter was pending, the
13 Constitution came into force and Article 25 and 26 was pressed into service, and simply it was
14 applied to the suit and contrary to the findings, and that is how the matter came up. When the
15 matter came up before this court also, they took the same position that Article 25 and 26 is
16 there, forgetting the fact that it has arisen from a suit and not a Writ Petition.

17 **C.S. VAIDYANATHAN:** Correct. And significantly, factually, as My Lord rightly pointed
18 out, there was a declaration that it is a denominational temple. That came right up to this
19 honourable court and the court affirmed that it is a denominational temple. Now, in the very
20 suit which came up finally and which was decided in *Venkataramana Devaru*, there was
21 a finding by the trial court that it is a public temple, affirmed by the First Appellate court that
22 it is a public temple. Mr. Nambiar said that this is a matter on which I should be allowed to
23 challenge this part of the finding that it is not a public temple, it is a private temple. Because
24 he said that it has already been declared to be denominational temple and that has been
25 affirmed.

26 **JUSTICE B.V. NAGARATHNA:** Not private, denominational.

27 **C.S. VAIDYANATHAN:** Yes, now the court said there is no pleading to that effect; you have
28 not claimed it to be a private temple, you can't today be allowed to plea that it is a private
29 temple. Now therefore, there was a completely contrary situation. One declaration that it is a
30 denominational temple; another declaration that it is a public temple. This was the factual
31 situation, peculiar factual situation in *Venkataramana Devaru*. Now, they had to
32 reconcile it. Both. One had attained finality. The other one, court said I won't allow you to
33 challenge because you can't be asked to, you can't be allowed to argue that it is a private temple,
34 that... My Lords, as a denominational temple, it should have been open to them to give

1 permissive right to enter and have worship, but, or confine itself only to the denomination. If
2 it was only a permissive right and that was the argument of Mr. Nambiar, it doesn't become a
3 public temple. It wouldn't have become a public temple. It is only in respect of public temple
4 that 25(2)(b) law could have been made in regard to entry. This was the peculiar situation
5 because of which, unfortunately this, My Lord Justice Venkataramiah was faced with a
6 peculiar situation while in this case. He had to... in my respectful submission there were two
7 judgments which were binding on the bench. One of a seven judge bench, another of a five
8 judge bench. And these could not have been got over. If My Lords would go to internal page
9 12, where I have extracted, so that My Lords don't have to go anywhere else. Internal page 12.
10 What ***Shirur Mutt*** said. And this can't be got over. And today that's a law. And I would
11 respectfully appeal to My Lords to uphold the ***Shirur Mutt*** provision, ***Shirur Mutt*** holding.

12 **JUSTICE B.V. NAGARATHNA:** And without there being any law, State of Mysore only
13 pressed upon Article 25(2)(d).

14 **C.S. VAIDYANATHAN:** Yes.

15 **JUSTICE B.V. NAGARATHNA:** In the absence of making any law to that effect. And that
16 was...

17 **C.S. VAIDYANATHAN:** There was a law. There was a law. That was under challenge. In the
18 suit.

19 **JUSTICE B.V. NAGARATHNA:** That... No, no...

20 **C.S. VAIDYANATHAN:** Yes, it came later. It came later, yes.

21 **JUSTICE B.V. NAGARATHNA:** The Constitution came later after the suit was...

22 **C.S. VAIDYANATHAN:** That's right. That's right. ***Shirur Mutt***, first the extract. The
23 extract, I'm reading only the extract. "Administration of its property by a religious
24 denomination has thus been placed on a different footing from the right to manage its own
25 affairs in matters of religion." That is 26(d) compared to 26(b). "The latter is a fundamental
26 right", that is 26(b), "which no Legislature can take away, whereas the former," that is 26(d),
27 "can be regulated by laws which the Legislature can validly impose." This is what seven judges
28 said.

29 **JUSTICE B.V. NAGARATHNA:** You are relying on this?

30 **C.S. VAIDYANATHAN:** Yes, I'm relying on this. I respectfully submit this is the correct view
31 and My Lord, unfortunately, this has not been dealt with or distinguished by
32 ***Venkataramana Devaru***. Then the next extract. "Under 26(b) therefore, a religious
33 denominational organisation enjoys complete autonomy in the matter of deciding as to what

1 rites and ceremonies are essential according to the tenets of the religion they hold, and no
2 outside authority has any jurisdiction to interfere with their decision in such matters." My
3 Lords, this is again reiterated two days later in **Ratilal**. Kindly see. And My Lords have seen
4 five of the judges are common. **Ratilal**, extract is in page. In that extracted portion,
5 underlined portion, "Language of the two Clauses, (b) and (d) of Article 26 would at once bring
6 out the difference between the two. In regard to affairs in matters of religion, the right of
7 management given to a religious body is a guaranteed fundamental right which no legislation
8 can take away. On the other hand, as regards administration of property which the religious
9 denominations entitled to own and acquire, it has undoubtedly the right to administer such
10 property but only in accordance with law. This means that the state can regulate the
11 administration of Trust properties by means of laws validly enacted, but here again, it should
12 be remembered that under Article 26(d) it is the religious denomination itself which has been
13 given the right to administer its property in accordance with... which in accordance with any
14 law which the state may validly impose. A law which takes away the right of administration
15 altogether would amount to violation."

16 Then please see the next extract also. "No outside authority has any right to say that these are
17 not essential parts of religion." Now please see the other series of judgments which say that
18 the court can examine whether it is an essential part of religion. "No outside authority has any
19 right to say that these are not essential parts of religion. It is not open to the secular authority
20 of the state", and state includes...

21 **CJI SURYA KANT:** You continue, please. Please continue.

22 **C.S. VAIDYANATHAN:** Yes. "And it is not open to the secular authority of the state to
23 restrict or prohibit them in any manner they like under the guise of administering the true
24 estate." Now My Lords have taken the view, state in Article 13 includes the court. Therefore,
25 even the court cannot go into what is, whether it is essential part of religion or not, because
26 state is prohibited from going in. Secular authority of state is prohibited from going into
27 whether it is an essential part of religion. "This is the belief of the community, thus observed
28 the learned judge, and it then it's not... the secular judge is bound to accept that belief, it is not
29 for him to sit in judgment on that belief. He has no right to interfere with the conscience of a
30 donor who makes a gift, etc. These observations afford an indication of the measure of
31 protection that is given by Article 26(b)." My Lord, unfortunately, ...

32 **JUSTICE B.V. NAGARATHNA:** One apprehension. Please keep this in mind please. Keep
33 aside the controversy in **Sabarimala**. If you say this right of entry in the context of
34 **Venkataramana Devaru** where they said anybody other than Gowda Saraswat Brahmin
35 is excluded, it will affect negatively Hinduism. You see, everybody must have access, keep aside

1 the controversy in *Sabarimala*. Everybody must have access to every temple and *Mutt*. But
2 if you say it is a practice, it is a matter of religion, matter of religion that I will exclude; only
3 my section, my denomination must attend my temple and none else, that is not good for
4 Hinduism. Keep that in mind. Keep that in mind.

5 **JUSTICE ARAVIND KUMAR:** Senior Counsel, you will be dividing the society.

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

7 **JUSTICE ARAVIND KUMAR:** You will be dividing the society.

8 **C.S. VAIDYANATHAN:** My Lord, I have...

9 **JUSTICE B.V. NAGARATHNA:** Speaking of...

10 **C.S. VAIDYANATHAN:** My Lord, I understand the practical pragmatic...

11 **JUSTICE B.V. NAGARATHNA:** *Venkataramana Devaru* is what is that... *per*
12 *incuriam* or whatever. It can be something distinguished as an Act. That is one thing. But let
13 the religion not be adversely affected.

14 **C.S. VAIDYANATHAN:** My Lord, the reality is... I respectfully submit. The reality, My Lord,
15 there are very few persons, very few... There are private temples, there are ancient *tharavads*
16 in Kerala; similarly, in other parts of the country also which have their own small temples,
17 *gudis*, where they don't allow.

18 **JUSTICE B.V. NAGARATHNA:** You are talking of *gudis* or small private temples, it is there
19 [INAUDIBLE].

20 **C.S. VAIDYANATHAN:** Which they hold only. Similarly, ...

21 **JUSTICE B.V. NAGARATHNA:** Family *gudis*, we are not that.

22 **C.S. VAIDYANATHAN:** Correct. One. Next, next...

23 **JUSTICE B.V. NAGARATHNA:** Traditional temples.

24 **C.S. VAIDYANATHAN:** That is family. Second denomination. Denominations also, My
25 Lord, if they want to have only for the denomination, they can't have, seek funds either from
26 the state or from private donors or from public, because they will be depending. They are not
27 dependent on footfall from others.

28 **JUSTICE B.V. NAGARATHNA:** That would be counterproductive to that denomination.

29 **C.S. VAIDYANATHAN:** That is a matter for them to decide. My Lord, is it...

1 **JUSTICE B.V. NAGARATHNA:** On the other hand, if there are more people, devotees
2 come to the temple.

3 **C.S. VAIDYANATHAN:** Question is, is it contrary to the constitutional prohibition? That
4 will be the question. My Lords will have to consider. My Lords will have to look at whether it
5 is contrary to public order, morality and health. My Lord, can... If it is not contrary to public
6 order, morality and health, what the realistic consequences in terms...

7 **JUSTICE B.V. NAGARATHNA:** We are simply asking in the context of entry, nothing else.

8 **C.S. VAIDYANATHAN:** My Lord, nobody...

9 **JUSTICE B.V. NAGARATHNA:** Not any other religious aspect. Keep aside *Sabarimala*
10 controversy.

11 **C.S. VAIDYANATHAN:** Yes.

12 **JUSTICE B.V. NAGARATHNA:** Generally, if you say only persons of Gowda Saraswat only
13 must come to this, followers of *Kanchi Mutt* only must go to Kanchi, followers of *Kanchi Mutt*
14 should not go to Sringeri, followers of *Sringeri Mutt* should not, that is not good at all.

15 **C.S. VAIDYANATHAN:** Ordinarily, that is the reality. That is why it cannot happen.

16 **JUSTICE B.V. NAGARATHNA:** See, the greater the people who go here and there, the
17 strength... Therefore, when we argue, please respect.

18 **C.S. VAIDYANATHAN:** I'm conscious.

19 **JUSTICE B.V. NAGARATHNA:** When we are... Keep that aside, here we want to... access
20 to temples. Access to temples.

21 **C.S. VAIDYANATHAN:** I am conscious of this. I have. I will respectfully submit that this is
22 a matter which will be taken note of by every denomination and then take decision. My Lord,
23 there are, there can be small closed...

24 **JUSTICE B.V. NAGARATHNA:** State can step in under Article 25(2)(b).

25 **C.S. VAIDYANATHAN:** My Lord, we are now testing... as My Lords rightly put it, we are
26 now testing the provisions of the law based on the constitutional provisions.

27 **JUSTICE AUGUSTINE GEORGE MASIH:** That is why we are telling you, don't pitch it
28 so high.

29 **C.S. VAIDYANATHAN:** I have to go by the text of the Constitution. My Lord, I am going by
30 what My Lords have taken, what My Lords have said in *Shirur Mutt*, seven judges. Today

1 the decision of a seven judge bench in ***Shirur Mutt*** is that. Today if My Lords want to rewrite
2 that, that's a different issue. I respectfully...

3 **JUSTICE B.V. NAGARATHNA:** In the context of entry, entry.

4 **CJI SURYA KANT:** So, their work is to argue.

5 **C.S. VAIDYANATHAN:** My Lord, may we do this. My Lord, I have... I will... We will need...
6 This is a very, very crucial question. If My Lords, I will need about 45 minutes.

7 **CJI SURYA KANT:** No, no, no 45. We will have to conclude Mr. Vaidyanathan. It's already
8 under 20 minutes against 90. We will wait for another 5, 10 minutes; please wind up.

9 **C.S. VAIDYANATHAN:** I'll do that.

10 **CJI SURYA KANT:** Please, please.

11 **C.S. VAIDYANATHAN:** My Lord, if a law is to be made, it has to pass the test of whether it
12 is a public order, morality and health, under 26.

13 **CJI SURYA KANT:** It has to pass the muster of 25(2) also.

14 **C.S. VAIDYANATHAN:** My Lord, there I have a respectful submission. 25(2)(b), My Lord
15 with the greatest respect...

16 **JUSTICE M.M. SUNDRESH:** We understand your argument.

17 **C.S. VAIDYANATHAN:** Yes, yes.

18 **JUSTICE M.M. SUNDRESH:** 25 travels on its own channel.

19 **C.S. VAIDYANATHAN:** 25... that's the submission. My Lord, what I have done, My Lord,
20 I'll quickly run through, since my Lords have understood. I don't want to...

21 **CJI SURYA KANT:** We don't want to extract a confession from you, in the name of
22 concession, you argument what you want to argue.

23 **C.S. VAIDYANATHAN:** My Lord, I am making a submission that ***Shirur Mutt*** is right,
24 ***Shirur Mutt*** holds this and ***Shirur Mutt*** has to, My Lords in nine judge bench...

25 **CJI SURYA KANT:** That's the argument you can have, because the, what seven judge bench
26 has held, the subsequent five judge appears to be in conflict, may be partly, maybe to a larger
27 extent; that's what we will try to resolve.

28 **C.S. VAIDYANATHAN:** Yes. Now My Lord, I have dealt with the factual freezing point My
29 Lord, that is at internal page 10. And therefore, they are... My Lord, the *Agamic* understanding
30 in regard to public temple. Kindly see that part of it, ***Gopala Muppanar***, because there are...

1 this is a... this was the factual finding staring in the face of **Venkataramana Devaru** case,
2 My Lord, because the court had taken the view that it is a public temple. What is a public
3 temple? **Gopala Muppanar** definition is relied upon; **Gopala Muppanar** says, "It is clear
4 from...", My Lord, para 20.

5 **CJI SURYA KANT:** Which page?

6 **C.S. VAIDYANATHAN:** Yes. "It is clear from the above."

7 **JUSTICE M.M. SUNDRESH:** Page?

8 **C.S. VAIDYANATHAN:** Page 11, para 20. "It is clear from the above that temples were
9 intended for the worship of people belong to all four castes without exception. Even outcasts
10 were not wholly left out of the benefits of temple worship. Their mode of worship being
11 however made to subject to several restrictions." Then My Lord, para 22. "A Hindu institution
12 of a public character by its plain meaning cannot be an institution of a religious denomination
13 or section thereof. Very judgment in **Devaru** that is **Gopala Muppanar** referred to in
14 **Devaru; Gopala Muppanar** makes it clear, that religious institutions of a public character,
15 are those which are intended to belong to all, including outcastes. In this regard it is crucial to
16 underscore, that 25(2)(b) pertains to Hindu religious institution, not religious institutions of
17 Hindus or any section thereof. If Article 25(2)(b) was intended to cover religious institutions
18 of subsets of Hindus, then the words had to include Hindus or any section; that's not so.
19 **Devaru's** holding rested on the specific factual and doctrinal foundation. It does not extend
20 to Sabarimala temple, which is not a public temple in this *Agamic* sense. It is a denominational
21 temple governed by specific *Agamic* prescriptions tied to the theological character of the deity.
22 The basis for its practices is not public dedication with caste-based restrictions but specific
23 denominational theology concerning the nature of the presiding deity. **Devaru** is not
24 authority for the proposition that Article 25(2)(b) can override the denomination's practices
25 rooted in the theology of the deity."

26 Then, My Lords, kindly come to page 14. If this construction is adopted, Hindu denominations
27 will be uniquely disadvantaged because 25(2)(b) talks of a law only in regard to Hindu public
28 temples, not in regard to places of worship of other religion. Therefore, Hindu temples will be
29 uniquely disadvantaged by this interpretation by saying 25(2)(b) can affect even 26(b) right.
30 Only Hindu religious denomination under 26(b) will be subjected to this legislation under
31 25(2)(b). No religious denomination of any other religion will be affected.

32 **JUSTICE B.V. NAGARATHNA:** Because of the history. History of the Hindu society.

33 **JUSTICE JOYMALYA BAGCHI:** The word 'social reform' will take care of it.

1 **JUSTICE M.M. SUNDRESH:** There's no question of... there is no caste system in other
2 religions.

3 **JUSTICE JOYMALYA BAGCHI:** If the social reform be restricted only to Hindus, then you
4 know, sufficient to take care of the other...

5 **C.S. VAIDYANATHAN:** No... Constitution will not be read in a manner where any part of
6 the text will be treated as surplusage. My Lord, if social reform can take care of it, there was
7 no need to make a separate provisions. Second part of 25(2)(b).

8 **JUSTICE JOYMALYA BAGCHI:** You have already said that 25 has to be read with Article
9 17. Article 17. So, the over-eagerness of the Constitution makers to make Article 17 more
10 [INAUDIBLE]...

11 **C.S. VAIDYANATHAN:** Any public temple will be subjected to Article 17, but if it is a
12 denominational temple which is not a public temple...

13 **CJI SURYA KANT:** Mr. Vaidyanathan, let's not... This argument probably, for two reasons
14 it will not survive. One that what you are arguing is directly in the teeth of language of 25(2)(b).
15 Directly in the teeth. Assuming 25(2)(b) will... as we were using the word, will have no impact
16 on 26. 26 itself is guided by three principles. Morality...

17 **C.S. VAIDYANATHAN:** That, of course, I will.

18 **CJI SURYA KANT:** Article 17 is a principle of morality. Therefore... [INAUDIBLE].

19 **C.S. VAIDYANATHAN:** It is a law, if it is a law which passes a muster of those three, I'm
20 out. Then I have nothing further to say. I'm bound by it. But not 25(2)(b) law.

21 **JUSTICE B.V. NAGARATHNA:** One other way of looking at it is if you restrict it to that
22 particular denomination...

23 **C.S. VAIDYANATHAN:** Yes.

24 **JUSTICE B.V. NAGARATHNA:**it is contrary to morality under Article 26 itself.

25 **C.S. VAIDYANATHAN:** That's a view that can be taken. That's a view that...

26 **JUSTICE B.V. NAGARATHNA:** To be on the context of the question. We are not on any
27 other affairs of religion.

28 **C.S. VAIDYANATHAN:** If that view is taken, then of course, it's a different thing. That's
29 possible. Now I come to, I just want to give...

30 **JUSTICE B.V. NAGARATHNA:** Divided further. We have to unify.

1 **C.S. VAIDYANATHAN:** Yes. My Lord may I quickly complete, so that... I'm just on... In the
2 context of...

3 **CJI SURYA KANT:** What is the argument you really want to develop at page 17 is referring
4 to...

5 **C.S. VAIDYANATHAN:** That is Article 29 and 30 where there is no reference. Therefore,
6 the law cannot be made compelling persons to admit persons belong to a different sex if it is
7 an institution exclusively for girls or boys. If that can be done, why should the 25(2)(b) doesn't
8 talk of gender or sex; it talks of class...

9 **CJI SURYA KANT:** Social welfare. Education is part of social welfare.

10 **C.S. VAIDYANATHAN:** No, no, therefore, that's an argument in regard to that. Then at
11 page 20, I have said about *Seshammal* and *Aditya*. I have already argued that I won't repeat
12 that. I won't repeat that. Only one more thing I want to mention, My Lord, page 25, because
13 this was one apprehension expressed yesterday by the learned Solicitor. I have said, "It won't
14 affect social welfare legislation or the power to enact a Uniform Civil Code, etc.," because 25(2)
15 takes care of that. It can curtail individual rights, 25(1). And the law relating to marriage,
16 divorce, succession, Uniform Civil Code, triple *talaq*, all these laws can be dealt with as a
17 measure of social welfare or reform, they will not be affected in any manner, by any such law
18 and My Lord...

19 **JUSTICE AHSANUDDIN AMANULLAH:** There is an inherent contradiction?

20 **C.S. VAIDYANATHAN:** Yes.

21 **JUSTICE AHSANUDDIN AMANULLAH:** But you can't take the stand here and say triple
22 *talaq* is okay because that is also part of religion.

23 **C.S. VAIDYANATHAN:** My Lord, that is...

24 **JUSTICE AHSANUDDIN AMANULLAH:** You may not subscribe, because the way, how
25 it has to be approached and how it has to be done. If someone misuses or misinterprets that,
26 it does not give a right for the court, for the state to interfere.

27 **C.S. VAIDYANATHAN:** My Lord, I am putting it on...

28 **JUSTICE AHSANUDDIN AMANULLAH:** You can't have this contradictory stand.

29 **C.S. VAIDYANATHAN:** No, My Lords, my respectful submission is this. These are laws
30 relating to individuals right. It is not a law relating to a religion or a religious denomination.

31 **JUSTICE AHSANUDDIN AMANULLAH:** Marriage itself is in fact. Otherwise, you go get
32 yourself married under the Special Marriages Act.

- 1 **C.S. VAIDYANATHAN:** That is a...
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** You can't have this.
- 3 **C.S. VAIDYANATHAN:** Matrimony, matrimony, etc. is individual's right.
- 4 **JUSTICE AHSANUDDIN AMANULLAH:** That has to be even handed.
- 5 **C.S. VAIDYANATHAN:** My Lord, that's a matter which may pass muster, is my submission.
- 6 **JUSTICE AHSANUDDIN AMANULLAH:** You make a point. You just can't argue like this.
- 7 **C.S. VAIDYANATHAN:** My Lord, that's, that...
- 8 **JUSTICE AHSANUDDIN AMANULLAH:** You have to take responsibility for the
9 argument.
- 10 **C.S. VAIDYANATHAN:** That's a matter which can be considered.
- 11 **CJI SURYA KANT:** There are 20 states....
- 12 **C.S. VAIDYANATHAN:** I have one last submission, two last submissions. One is, religious
13 denominations' rights are not merely in regard to temples and institutions of that kind, but
14 even in regard to educational institution. That is the view that has been taken by My Lords in
15 *Sidhrajibhai* and subsequently, in *T.M.A. Pai Foundation*. My Lord, in my note I have
16 given. May I just hand it over? In *T.M.A. Pai* and *Inamdar*, certain rights have been given
17 to the institutions, educational institutions run by minorities. My Lord, when we talk of... Since
18 My Lords are considering the rights under 25 and 26, I would respectfully appeal to My Lords
19 to also go into this aspect of the rights of religious denomination in regard to educational
20 institutions, whether they should not have autonomy in regard to selection of students.
- 21 **JUSTICE B.V. NAGARATHNA:** That may not come in which we are talking.
- 22 **C.S. VAIDYANATHAN:** Your Lordships...
- 23 **JUSTICE B.V. NAGARATHNA:** Religion...
- 24 **C.S. VAIDYANATHAN:** In 26...
- 25 **JUSTICE B.V. NAGARATHNA:** In religion...
- 26 **C.S. VAIDYANATHAN:** My Lords, Question 1 and 2 are in regard to the scope of the right.
27 My Lord, that right has been held to include right to have education institutions. Your
28 Lordships may say that this is a matter which can be considered in another case, but if it is to
29 be considered...

1 **JUSTICE AHSANUDDIN AMANULLAH:** Hindu has been defined, all those will come,
2 then you say I am a denomination. We have to... you can move out also and say no, no, I give
3 this protection and all.

4 **C.S. VAIDYANATHAN:** No, I am... I am respectfully submitting.

5 **JUSTICE B.V. NAGARATHNA:** You're saying it in 26(b).

6 **C.S. VAIDYANATHAN:** My respectful submission is...

7 **JUSTICE AHSANUDDIN AMANULLAH:** There should be... in fact, absolutely not
8 needed to be gone into.

9 **JUSTICE B.V. NAGARATHNA:** No, no. That may not come really strictly.

10 **C.S. VAIDYANATHAN:** Your Lordship may decline, but the question is widely worded, but
11 My Lords may say that I will not go into that.

12 **CJI SURYA KANT:** We appreciate your contention.

13 **C.S. VAIDYANATHAN:** Correct, correct. Because denomination should have the same right
14 as minorities is the submission. That's... Then one last thing. I have made a tabular statement
15 of the earlier judgment. Some judgments may have to be overruled; some judgments may have
16 to be clarified. I have given a tabular statement setting out as to what, according to me, will
17 need to be dealt with. I believe as such a...

18 **CJI SURYA KANT:** Yes, we'll see this. We'll go through it.

19 **C.S. VAIDYANATHAN:** Yes.

20 **C.S. VAIDYANATHAN:** This, My Lords, may consider.

21 **CJI SURYA KANT:** Thank you, Mr. Vaidyanathan.

22 **C.S. VAIDYANATHAN:** I am very grateful.

23 **CJI SURYA KANT:** This side is a very unpredictable class.

24

25

26

END OF DAY'S PROCEEDINGS