IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I A. NO. 30 OF 2016

IN

WRIT PETITION (CIVIL) No.373 OF 2006

IN THE MATTER OF:

INDIAN YOUNG LAWYERS
ASSOCIATION & ORS. ……. PETITIONERS

VERSUS

STATE OF KERALA & ORS. …….. RESPONDENTS

AND IN THE MATTER OF:

PEOPLE FOR DHARMA,
THROUGH ITS SECRETARY,
5 E, BHARAT GANGA APARTMENTS,
MAHALAKSHMI NAGAR,
4TH CROSS STREET,
ADAMBAKKAM,
CHENNAI,
TAMIL NADU – 600 088 …..INTERVENOR

WRITTEN SUBMISSIONS BY ADV. J. SAI DEEPAK, ON BEHALF OF PEOPLE FOR DHARMA

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ADVOCATE FOR THE INTERVENOR: **SUVIDUTT M.S.**
FILED ON: **24.07.2018**

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Temples where men are not allowed

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TO

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUSTICES OF THE

SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF

THE APPLICANT ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

PRELIMINARY SUBMISSIONS

1. At the outset, it is humbly submitted that the Petitioner's attempts to portray the Petition as one which involves the question of "Hindu Women v. Sabarimala Ayyappa Temple" is a completely fabricated, mischievous and grotesque distortion of (a) the religious practice of the Sabarimala Ayyappa Temple which has been challenged in the Petition, (b) the basis of the practice in accordance with the history of the Temple and (c) the legality and constitutionality of the practice.

2. The gross mischief that the Petitioner has committed is to give the impression that it represents all Hindu women in its challenge to the religious practice of the Temple. While the Petitioner represents only a handful of women activists who have no regard for the traditions of the Temple despite claiming the right to worship at the Temple, the Intervenor organization represents millions of women of different religions who respect the traditions of the Temple and are keen to avoid the violation of its sacrosanct traditions by others under the façade of gender equality. Simply stated, the rights of the members of the Intervenor organization under Article 25(1) would be violated if the reliefs sought in the Petition are granted by this Hon'ble Court.

3. The fact that the position and the views of the Intervenor are supported by millions of Hindu and Christian women who are devotees of Lord Ayyappa and ardent supporters of the

Sabarimala Temple's tradition, is evident from the massive and vocal support received by the Intervenor organization for the 'Ready to Wait' campaign launched by it in support of the traditions of the Temple. Under the campaign, millions of women devotees declared that they were ready to wait for their rightful turn to have darshan of the deity. Therefore, it is reiterated that the Petitioner does not speak for or on behalf of the members of the Intervenor organization, who are educated, independent-minded and forward-looking individuals capable of forming their own views on matters of religion and their rights without having to be spoken for. Any dilution of the established tradition of Lord Ayyappa Temple in Sabarimala as prayed for by the Petitioner would be against the *in rem* rights of millions of women who believe in the Sabarimala Ayyappa tradition and follow it. Annexed herewith as **Annexure A-Colly** are news reports on the #ReadytoWait Campaign and expressions of support by the women devotees to the campaign.

4. It is further humbly submitted that the Petitioner's position **suffers from a grave error in that it fails to distinguish between diversity in religious traditions and discrimination.** The issue, which requires surgical precision and rigorous examination of evidence, is being approached with a sledgehammer in the name of gender equality and the right to worship. The concept of diverse religious spaces is being approached solely through the prism of equality which does grave injustice to the very concept of equality, apart from causing irreparable harm to the rights of those who put

faith in the Temple and its traditions in exercise of their rights under Article 25(1), and the Temple's own rights in matters of religion under Article 26.

5. It is also submitted that political correctness or the claimed popularity or otherwise of a view cannot be the touchstones for testing the validity of the Impugned religious practice since if that were to be the case, the constitutionality of every religious practice would need to be determined by a public poll. Clearly, that would be untenable, unreasonable and impermissible. In the same vein, it is submitted that the fickle and convenient position of the State Government of Kerala, or for that matter any other party, is not conclusive of the constitutionality of the Impugned religious practice since that issue is to be determined on the anvils of the test prescribed by this Hon'ble Court in several landmark judgements.

6. While this Hon'ble Court has identified, in its Order dated October 13, 2017, five questions for consideration by the Constitution Bench, the Intervenor has humbly recast the said questions as follows:

   If the Impugned religious practice is indeed an essential part of the tradition of the Temple and the Temple belongs to a religious denomination, can it be deprived of the protection it enjoys under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965, the Proviso to Section 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965 and Article 26(b) of the Constitution citing alleged violation of Articles 14, 15(3), 17

and 25(1)? To answer this, the following sub-questions must be addressed:

i. Is the Impugned religious practice an essential part of the tradition of the Temple? If yes, what is its basis and object? More specifically, is the Impugned religious practice indeed based on notions of impurity associated with menstruation?

ii. Are there similar examples of Hindu religious institutions which restrict the entry of men or their participation in religious activities? If the reliefs sought by the Petitioner were granted by this Hon'ble Court, would it amount to destruction of the diversity in religious traditions prevalent in this country?

iii. Does the Temple fall under the definition of a religious institution belonging to a religious denomination within the meaning of Article 26? If yes, does the public character of the Temple belonging to a religious denomination deprive it of its denominational character and consequent fundamental rights under Article 26?

iv. Does the Presiding Deity of the Sabarimala Temple, Lord Ayyappa, have rights under the Constitution? If yes, can the Petitioner's rights under Article 25(1) trump the rights of the Deity under Article 25(1), 26 and 21?

v. What is the interplay between Articles 14, 15(3), 17, 25(1), 25(2)(b) and 26 of the Constitution?

Specifically, can an individual cite rights under Article 25(1) to assert the right to ignore the traditions of the Temple which are protected under Article 26(b)?

vi. Do the Judgements of this Hon'ble Supreme Court and the Places of Worship (Special Provisions) Act, 1991 permit any person or any arm of the State, including the Supreme Court, to alter the identity of a religious denomination and the religious character of its religious institutions in the name of "reform" and gender equality?

vii. Is the Travancore Devaswom Board, under which the Temple falls, part of "State" under Article 12? Even if it were, would that deprive the Temple of its fundamental rights under Article 26?

viii. Can the language of the notification issued by the Travancore Devaswom Board which bars entry of women between the ages of 10 and 50 be used as a strawman to strike down Rule 3(b) of the 1965 Rules, or to conclude that the basis/principle of the Impugned religious practice is discrimination and hence unconstitutional?

In the ensuing portions of the Written Submissions, the Intervenor has addressed each of the above restated sub-questions, and in the process, addressed the questions framed by this Hon'ble Court in its Order dated October 13, 2017.

If the Impugned religious practice is indeed an essential part of the tradition of the Temple and the Temple belongs to a religious denomination, can it be deprived of the protection it enjoys under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965, the Proviso to Section 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965 and Article 26(b) of the Constitution citing alleged violation of Articles 14, 15(3), 17 and 25(1)?

I. Is the Impugned religious practice an essential part of the tradition of the Temple? If yes, what is its basis and object? More specifically, is the Impugned religious practice indeed based on notions of impurity associated with menstruation?

1. During the entire course of oral submissions made on behalf of the Petitioner by Mr. R.P. Gupta, the Intervenor supporting the Petitioner represented by Ms. Indira Jaising and the *Amicus Curiae,* Mr. Raju Ramachandran who supported the position of the Petitioner, there was not a single attempt made to actually delve into the accepted history of the Impugned religious practice and its basis in the traditions of the Temple to prove their claim that notions of impurity associated with menstruation indeed form the basis of or inform the Impugned religious practice. Instead, their entire arguments revolved around an academic discussion of the provisions of the Constitution when, in fact, the law laid

down by this very Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* 1954 AIR 282, *Sardar Syadna Taher Saifuddin Saheb v. The State of Bombay* 1962 AIR 853 and *Tilkayat Shri Govindalji Maharaj v. State of Rajasthan* (1964) 1 SCR 561, requires the Court to rigorously and dispassionately examine the origins and basis of the Impugned religious practice by examining the relevant scriptures, and in this case, by directly seeking inputs from the Chief Thanthri/ Chief Priest of the Temple, which this Hon'ble Court has the power to do.

2. In fact, in deciding the very same issues under consideration before this Hon'ble Court, the High Court of Kerala summoned and examined the Thanthri of the Sabarimala Temple and other Thanthrimukhyas (Chief Priests) of Kerala in order to ascertain the practice followed in Sabarimala Temple before delivering its judgement in 1991, which is annexed herewith as **Annexure B**. This is because, under the religious practices of Kerala Temples, the Thanthri, and not the Devaswom Board, is the final authority on matters of religion.

3. This was emphatically laid down by the Kerala High Court in the said judgement saying the Devaswom Board "*has no voice in deciding such controversial, religious and ritualistic questions and the Thanthri alone can decide all questions relating to religious rituals and practices".* This has been accepted by the Travancore Devaswom Board in the said

judgement, which position it cannot retract from. Extracted below are the relevant portions of the said judgement:

> *"5. The Travancore Devaswom Board in their counter-affidavit questioned the right of the petitioner to maintain the petition under Article 226 of the Constitution for the reason that no right affecting public at large is involved in this case. The question involved is purely relating to Hindu Religion and religious practices. No writ can be issued by this Court against the 1st respondent in order to grant the relief asked for as the determination of the dispute is dependent on disputed questions of fact. They also challenged the maintainability of the petition without impleading a Hindu lady worshipper at least in a representative capacity. The jurisdiction of this Court cannot be invoked to regulate or control the religious functions and practices relating to a Hindu temple since that is the concern of men of religion. The religious questions posed in this writ petition can be determined finally only by the Thanthri concerned and not by other Thanthries who have no authority over the Sabarimala Sastha Temple. The members of the Thazhaman Illam are the hereditary Thanthries of the Sabarimala temple. The present Thanthri is Sri Neelakandaru and he is the final authority to take a decision on any issue with regard to the religious practices and customs as well as the rituals and poojas in Sabarimala temple. It is further stated that the Board, being a statutory authority conferred with the power of administration, has no voice in deciding such controversial, religious and ritualistic questions and the Thanthri alone can decide all questions relating to religious rituals and practices.* ***There were instances where Thanthries also were unable to take a decision pertaining to some religious practices and in such cases the Thanthri used to suggest that it can be resolved by a Devaprasnam.***
>
> *24. Sadasyathilakan Sri T. K. Velu Pillai in his Travancore State Manual, Vol. I at p. 553 says:*

"The essential characteristic of Hinduism is faith. Purity of character is ensured by rules which regulate the practice of the worshippers as well as that of the priests."

At page 594 it is stated thus:

"We thus find that the worship in temples is regulated in strict accordance with the rules laid down in the Agama Sastras. Form is in religion the twin sister of faith and the temples in Travancore present a continuity of tradition which cannot fail to be a stimulus to a well-regulated religious life. The essentials of discipline are the same in private temples as well as those under the management of Government. The head of the Devaswom Department is responsible for the proper conduct of the temple affairs but his authority is confined to the administrative side; the spiritual questions being decided by the Thanthris and other man of religion. The Thanthris are the arch-priests of Malabar temples. Ceremonies of exceptional importance, such as consecration of the idol, are performed by them. The office is generally hereditary. The Thanthris are expected to have a correct knowledge of the details of worship, the performance of ceremonies and all kindred subjects. They have the authority to correct the mistakes of the priests. They are consulted in all matters connected with the Devaswoms so far as the spiritual side is concerned.

25. Since the spiritual questions are to be decided by the Thanthris, we summoned and examined the Thanthri of Sabarimala temple and other Thanthrimukhyas of Kerala in order to ascertain the practice followed in Sabarimala temple and whether the practice has the approval of the community."

4. Annexed herewith as **Annexure C** are the relevant pages of the 1940 Travancore State Manual which was relied upon by the Hon'ble Division Bench of the Kerala High Court. This position is further supported by scholarly literature which is

based on a text written in 1428 AD, namely the Tantrasamuccaya authored by Cheenas Narayanan Namboodiripad, which prescribes the norms and rules from the construction of a temple building to the rites and rituals in Kerala temples. Annexed as **Annexure D** herewith is an article from The Hindu proving the same.

5. Further, while the Division Bench of the Kerala High Court has discussed the practice of Devaprashnam extensively in its judgement, not one submission was made with respect to the said practice by the Petitioner's counsel or any other Counsel supporting the case of the Petitioner. Following are the relevant extracts from the Kerala High Court's judgement which sheds light on the importance and centrality of the practice of Devaprashnam to the religious aspects of the Sabarimala Temple and in fact to most Temples in Kerala:

> *"5. ..... There were instances where Thanthries also were unable to take a decision pertaining to some religious practices and in such cases the Thanthri used to suggest that it can be resolved by a Devaprasnam."*
>
> *"36. The Thanthri of the temple Sri Maheswararu had mentioned about the Devaprasnams conducted at Sabarimala by well-known astrologers in Ext. C2. He had mentioned in that reply that in alt the Devaprasnams it was revealed that young women should not be permitted to worship at the temple. The report of the Devaprasnam conducted in 1985 (from 5-4-1985 to 8-4-1985) was exhibited as Ext. Clause That is a Devaswom publication, the authenticity of which is not in dispute. The English translation of the relevant portion contained at page 7 of the original report reads as follows:*

"It is seen that the deity does not like young ladies entering the precincts of the temple".

C.W. 5, the Secretary of the Ayyappa Seva Sangham, who was present at the time of Devaprasnam had spoken about what was revealed at the Devaprasnam. First respondent in its counter affidavit has mentioned about the practice followed to set right controversial religious and ritualistic problems. It is stated that the Thanthri will suggest that it can be resolved, by a Devaprasnam. The practice of resorting to Devaprasnam to ascertain the wishes of the deity had been in vogue from time immemorial and the Thanthri of Sabarimala also had suggested conduct of Devaprasnam whenever occasion arose. The report of the Devaprasanam is rather conclusive or decisive. The wishes of the Lord were thus revealed through the well-known method of Devaprasnam and the temple authorities and worshippers cannot go against such wishes. If the wish of Lord Ayyappa as revealed in the Devaprasnam conducted at the temple is to prohibit woman of a particular age group from worshipping in the temple, the same has to be honoured and followed by the worshippers and the temple authorities. The Board has a duty to implement the astrological findings and prediction on Devaprasnam. The Board has therefore no power to act against that report which will be virtually disregarding the wishes of the deity revealed in the prasnam."

6. In light of the above, in the instant Petition too, this Hon'ble Court would be better assisted in forming its views on the Impugned religious practice and its basis by summoning the Chief Thanthri of the Sabarimala Temple and other Thanthrimukhyas of Kerala and seeking their views on affidavits and examining them in Open Court.

7. Without prejudice to the above submission, since the Petitioner has failed to place before the Hon'ble Court the

history of the Impugned religious practice and its origins in the traditions of the Temple, the Intervenor shall place the same before the Court. The origins of the Impugned religious practice and its basis have been discussed in detail in the judgement of the Kerala High Court which stands uncontroverted till date. After consulting the Thanthri of Sabarimala and other Thanthris from Kerala, the High Court gave its findings as under:

> *"39. There is a vital reason for imposing this restriction on young women. It appears to be more fundamental. The Thanthri of the temple as well as some other witnesses have stated that the deity at Sabarimala is in the form of a Naisthik Brahmachari. "Brahmachari" means a student who has to live in the house of his preceptor and study the Vedas living the life of utmost austerity and discipline. A student who accompanied his Guru wherever he goes and learns Vedas from him is a "Naisthikan". Four asramas were prescribed for all persons belonging to the twice born castes. The first is of a student or Bramchari, the second is of a householder after getting married, the third is the Vanaprastha or a life of recluse and the last is of an ascetic or Sanyasi. Sri B. K. Mukherjee, the fourth Chief Justice of India, in his Lordship's Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust says at page 16 of the second addition thus:*
>
> *"Ordinarily therefore a man after finishing his period of studentship would marry and become a house-holder, and compulsory celibacy was never encouraged or sanctioned by the Vedas. A man however who was not inclined to marry might remain what is called a Naisthik Brahmchari or perpetual student and might pursue his studies living the life of a bachelor all his days".*
>
> *A Bramchari should control his senses. He has to observe certain rules of conduct which*

include refraining from indulging in gambling with dice, idle gossips, scandal, falsehood, embracing, and casting lustful eyes on females, and doing injury to others.

(vernacular matter omitted) Manu Smriti Chapter II, Sloka 179.

40. The deity in Sabarimala temple is in the form of a Yogi or a Bramchari according to the Thanthri of the temple. He stated that there are Sasta temples at Achankovil, Aryankavu and Kulathupuzha, but the deities there are in different forms. Puthumana Narayanan Namboodiri, a Thanthrimukhya recognised by the Travancore Devaswom Board, while examined as C.W. 1 stated that God in Sabarimala is in the form of a Naisthik Bramchari. That, according to him, is the reason why young women are not permitted to offer prayers in the temple.

41. Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women.

42. In this connection it has to be mentioned that Sabarimala temple is not the only temple in Kerala where there is restraint on the entry of women. Sri Malankal Krishna Pillai, a Malayalam post of repute and a former Regional Deputy Director of Education, after visiting all the important temples in the State, had published a book titled "Maha Khshetrangakku Munpil" (in front of great temples). While writing about the Siva temple in Teliparambu in Eaunur District, he has mentioned about the custom there in not permitting women to enter the temple and offer prayers during day time. They are permitted to enter and worship only after the Athazhappja (the last pooja of the day) is over. The belief is that Lord Siva will be seated with his consort Goddess Parvathy at that time and Lord Siva is in a happy mood to shower boons

on the devotees. That is supposed to be the appropriate or auspicious time for women to pray before the God revered as Rajadhirajan (King of all Kings). This custom or usage is understood to have been in prevalence for the past several centuries."

8. It is evident from the above-extracted portion of the judgement that there is no reference whatsoever to impurity of menstruation forming the basis of the Impugned religious practice. The celibate nature of the Deity is also evidenced from the Tamil translation, Sri Bhoothanathan, of Sri Bhoothanatha Upakhyanam, which is the Sthalapuranam of the Sabarimala Temple. This book sets out the celibate nature of Lord Ayyappa. Paragraph 2 on Page 44 of the said book, wherein Lord Ayyappa addresses Devi Manjamata, translates in English as follows:

"It is true that You are My Shakti. But I am to be live as a Brahamacarin in this birth. So, I cannot marry You…."

Annexed herewith as **Annexure E** are the relevant pages from the Tamil Translation. **Therefore, it is the Petitioner which is guilty of mischievously turning a discussion on celibacy into one relating to alleged notions of impurity associated with menstruation.** What is also evident from Paragraph 40 of the Judgement of the Kerala High Court is that, it is only the Deity in the Sabarimala Ayyappa Temple who has taken the form of a Naishtika Brahmachari i.e. an eternal celibate, and which is the fundamental reason/basis of the Impugned religious practice. **The High Court also specifically observed that this is *not* the form of the Deity in other Ayyappa temples**

located in Achankovil, Aryankavu and Kulathupuzha Temples, and therefore the Impugned religious practice is not observed in those Temples. It is indeed surprising that the Petitioner has not offered a single credible reason or fact or document which disproves or justifies ignoring this critical and pertinent finding on the very same issue by a Constitutional Court under Article 226. And yet, the Petitioner insists that the Impugned religious practice is somehow relatable to stigma associated with menstruation.

9. That Naishtika Brahmacharya requires the Brahmachari to observe the vow of celibacy without any room for departure is a well-known and accepted fact since it has its basis in Hindu texts such as Sridhara Swami's commentary on Srimad Bhagavatam which forbids Brahmacharis from thinking about, speaking about, playing with, looking at, personally talking with, wishing for sex with, trying for sex with, engaging in sex with women. Annexed herewith as **Annexure F** are the relevant pages from the said commentary. Similar rules of conduct have been prescribed for Brahmacharis in Apastambha Dharma Sutra, Bodhayana Dharma Sutra and Vaikhanasa Dharmasutra. Annexed herewith as **Annexure G** is the relevant page from the Apastambha Sutra. This is consistent with the concept of Brahmacharya, which is equally important to Sramanic traditions, namely Buddhism, Jainism, Ajivaka and Carvaka traditions. Therefore, going by the logic of the Petitioner, each of these traditions is based on notions of menstrual impurity, which is far from the truth and has absolutely no

basis in religious texts. **What the Petitioner has failed to point out is that the rules of Brahmacharya, when observed by women, too require them to avoid all contact with men. Clearly, the Petitioner's attempt to paint the practice of Naishtika Brahmacharya with a misogynist hue, apart from being ignorant and baseless, is extremely mischievous.**

10. The Petitioner has also, perhaps deliberately or perhaps in ignorance, failed to point out that even Hindu men who visit the Temple are required to observe a 41-day vow, which among other things, mandates abstinence. This is a direct consequence of the celibate nature of the Deity at the Sabarimala Temple- a religious *leitmotif* that underpins the integrity of every religious practice, ritual and ceremony carried out at the Temple. Therefore, the Petitioner's attempts to give the impression that all conditions apply only to women is factually baseless. **The fact is that different conditions apply to both genders, which are gender-sensitive and are therefore reasonable and not unequal. Difference is not discrimination and is certainly not tantamount to inequality.**

11. It is evident from the above that (a) the Impugned religious practice is based on observance of Naishtika Brahmacharya by the Deity at the Ayyappa Temple, and not on notions of menstrual impurity, and (b) given the form of the Deity at the Temple and its celibate nature, the Impugned religious practice is an essential part of the Temple's fundamental charter of faith and constitution.

12. In S*eshammal v. State of Tamil Nadu* AIR 1972 SC 1586, this Hon'ble Court had discussed in detail the significance of Agama Shastras which apply to the religious aspects of a Temple. Following are the relevant extracts from the said judgement which squarely apply to the issues which arise for consideration in the Petition at hand:

> *"Before we turn to these questions, it will be necessary to refer to certain concepts of Hindu religious faith and practices to understand and appreciate, the position in law. The temples with which we are concerned are public religious institutions established in olden times. Some of them are Saivite temples and the others are Vaishnavite temples, which means, that in these temples God Shiva and Vishnu in their several manifestations are Worshipped. The image of Shiva is worshipped by his worshippers who are called Saivites and the image of Vishnu is worshipped by his worshippers who are known as Vaishnavites. The institution of temple worship has an ancient history and, according to Dr. Kane, temples of deities had existed even in the 4th or 5th century B.C. (See: History of Dharmasastra Vol. II Part-II page 710) With the construction of temples the institution of Archakas also came into existence, the Archakas being professional men who made their livelihood by attending on the images. Just when the cult of worship of Siva and Vishnu started and developed into two distinct cults is very difficult to say, but there can be no doubt that in the times of the Mahabharata these cults were separately developed and there was keen rivalry between them to such an extent that the Mahabharata and some of the Puranas endeavoured to inculcate a spirit of synthesis by impressing that there was no difference between the two deities. (See page 725 supra.) With the establishment of temples and the institution of Archakas, treatises on rituals were compiled and they are known as 'Agamas'. The authority of these Agamas is*

recognised in several decided cases and by this Court in Sri Venkataramana Devaru v. The State of Mysore. Agamas are described in the last case as treatises of ceremonial law dealing with such matters as the construction of temples, installation of idols therein and conduct of the worship of the deity. There are 28 Aganias relating to the Saiva temples, the important of them being the Kamikagama, the Karanagama and the Suprabedagama. The Vaishnavas also had their own Agamas. Their principal Agamas were the Vikhanasa and the Pancharatra. The Agamas contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other Devatas are to be installed and where the several classes of worshippers are to stand and worship. Where the temple was constructed as per directions of the Agamas the idol had to be consecrated in accordance with an elaborate and complicated ritual accompanied by chanting of mantras and devotional songs appropriate to the deity. On the consecration of the image in the temple the Hindu worshippers believe that the Divine Spirit has descended into the image and from then on the image of deity is fit to be worshipped. Rules with regard to daily and periodical worship have been laid down for securing the continuance of the Divine Spirit. The rituals have a two-fold object. One is to attract the lay worshipper to participate in the worship carried on by the priest or Archaka. It is believed that when a congregation of worshippers participates in the worship a particular attitude of aspiration and devotion is developed and confers great spiritual benefit. The second object is to preserve the image from pollution, defilement or desecration. It is part of the religious belief of a Hindu worshipper that when the image is polluted or defiled the Divine Spirit in the image diminishes or even vanishes. That is a situation which every devotee or worshipper looks upon with horror. Pollution or defilement may take place in variety of ways. According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules

relating to worship. In fact, purificatory ceremonies have to be performed for restoring the sanctity of the shrine. ***Worshippers lay great, store by the rituals and whatever other people, not of the faith, may think about these rituals and ceremonies, they are a part of the Hindu Religious faith and cannot be dismissed as either irrational or superstitious****. An illustration of the importance attached to minor details of ritual is found in the case of His Holiness Peria Kovil Kelvi Appan Thiruvenkata Ramanuja Pedda Jiyyangarlu Varlu v. Prathivathi Bhayankaram Venkatachrlu and others which went up to the Privy Council. The contest was between two denominations of Vaishnava worshippers of South India, the Vadagalais and Tengalais. The temple was a Vaishnava temple and the controversy between them involved the question as to how the invocation was to begin at the time of worship and which should be the concluding benedictory verses. This gives the measure of the importance attached by the worshippers to certain modes of worship. The idea most prominent in the mind of the worshipper is that a departure from the traditional rules would result in the pollution or defilement of the image which must be avoided at all costs. That is also the rationale for preserving the sanctity of the Garbhagriha or the sanctum sanctorum. In all these temples in which the images are consecrated, the Agamas insist that only the qualified Archaka or Pujari step inside the sanctum sanctorum and that too after observing the daily disciplines which are imposed upon him by the Agamas. As an Archaka he has to touch the image in the course of the worship and it is his sole right and duty to touch it. The touch of anybody else would defile it. Thus, under the ceremonial law pertaining to temples even the question as to who is to enter the Garbhagriha or the sanctum sanctorum and who is not entitled to enter it and who can worship and from which Place in the temple are all matters of religion as shown in the above decision of this Court.*

The Agamas have also rules with regard to the Archakas. In Saivite temples only a devotee of Siva, and there too, one belonging to a particular denomination or group or sub-group is entitled to be the Archaka. If he is a Saivite, he cannot possibly be an Archaka in a Vaishnavite Agama temple to whatever caste he may belong and however learned he may be. Similarly, a Vaishnavite Archaka has no place as an Archaka in a Saivite temple. Indeed, there is no bar to a Saivite worshipping in a Vaishnavite temple as a lay worshipper or vice versa. What the Agamas prohibit is his appointment as an Archaka in a temple, of a different denomination' DR. Kane has quoted the Brahmapurana on the topic of Punah-pratistha (Re-consecration of images in temples) at page 904 of his History of Dharmasastra referred to above. The Brahmapurana says that "when an image is broken into two or is reduced to particles, is burnt, is removed from its pedestal, is insulted, has ceased to be worshipped, is touched by beasts like donkeys or falls on impure ground or is worshipped with mantras of other detities or is rendered impure by the touch of outcastes and the like-in these ten contingencies, God ceases to indwell therein." The Agamas appear to be more severe in this respect. Shri R. Parthasarthy Bhattacharya, whose authority on Agama literature is unquestioned, has filed his affidavit in Writ Petition No. 442 of 1971 and stated in his affidavit, with special reference to the Vaikhanasa Sutra to which he belongs, that according to the texts of the Vaikhansa Shastra (Agama), persons who are the followers of the four Rishi traditions of Bhrigu, Atri, Marichi and Kasyapa and born of Vaikhanasa parents are alone competent to do puja in Vaikhanasa temples of Vishnavites. They only can touch the idols and perform the ceremonies and rituals. None others, however, high placed in society as pontiffs or Acharyas, or even other Brahmins could touch the idol, do puja or even enter the Garbha Griha. Not even a person belonging to another Agama is competent to do puja in Vaikhanasa temples. That is the

> *general rule with regard to all these sectarian denominational temples. It is, therefore, manifest that the Archaka of such a temple besides being proficient in the rituals appropriate to the worship of the particular deity, must also belong, according to the Agamas, to a particular denomination. An Archaka of a different denomination is supposed to defile the image by his touch and since it is of the essence of the religious faith of all worshippers that there should be no pollution or defilement of the image under any circumstances, the Archaka undoubtedly occupies in important place in the matter of temple worship.* ***Any State action which permits the defilement or pollution of the image by the touch of an Archaka not authorised by the Agamas would violently interfere with the religious faith and practices of the Hindu worshipper in a vital respect, and would, therefore, be prima facie invalid under Article 25(1) of the Constitution****."*

13. The above-highlighted portion is an endorsement of the rights of the members of the Intervenor organization as Hindu women who support the traditions of the Temple, including the Impugned religious practice. Further, the dismissive submissions of the Petitioner that the Impugned religious practice is based on superstition is squarely countered by the above-extracted judgement of this very Court. The primacy of the Agama Shastras was reiterated by this Hon'ble Court again in *Adi Saiva Sivachariyargal Nala Sangam vs. Government of Tamil Nadu and Another* (2016) 2 SCC 725, which was a judgment relating to appointment of Archakas to the Madurai Meenakshi Temple. Extracted below are the relevant portions of the said Judgement:

"36. That the freedom of religion under Articles 25 and 26 of the Constitution is not only confined to beliefs but extends to religious practices also would hardly require reiteration. Right of belief and practice is guaranteed by Article 25 subject to public order, morality and health and other provisions of Part-III of the Constitution. Sub-Article (2) is an exception and makes the right guaranteed by Sub-article (1) subject to any existing law or to such law as may be enacted to, inter alia, provide for social welfare and reforms or throwing or proposing to throw open Hindu religious institutions of a public character to all classes and sections of Hindus. Article 26(b) on the other hand guarantees to every religious denomination or section full freedom to manage its own affairs insofar as matters of religion are concerned, subject, once again, to public order, morality and health and as held by this Court subject to such laws as may be made under Article 25(2)(b). The rights guaranteed by Articles 25 and 26, therefore, are circumscribed and are to be enjoyed within constitutionally permissible parameters. Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the Constitutional Court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the Constitutional arbiter. ***Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity. Without such a determination there can be no effective adjudication whether the claimed right it is in conformity with public order, morality and health and in accord with the***

> ***undisputable and unquestionable notions of social welfare and reforms.*** *A just balance can always be made by holding that the exercise of judicial power to determine essential religious practices, though always available being an inherent power to protect the guarantees under Articles 25 and 26, the exercise thereof must always be restricted and restrained.*
>
> *37. Article 16 (5) which has virtually gone unnoticed till date and, therefore, may now be seen is in the following terms:*
>
> *"16(5) - Nothing in this Article shall affect the operation of any law which provides that an incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."*
>
> *38. A plain reading of the aforesaid provision i.e. Article 16(5), fortified by the debates that had taken place in the Constituent Assembly, according to us, protects the appointment of Archakas from a particular denomination, if so required to be made, by the Agamas holding the field. The debates in the Constituent Assembly referred to discloses that the suggestion that the operation of Article 16(5) should be restricted to appointment in offices connected with administration of a religious institution was negatived. The exception in Article 16(5), therefore, would cover an office in a temple which also requires performance of religious functions. In fact, the above though not expressly stated could be one of the basis for the views expressed by the Constitution Bench in Sheshammal (supra)."*

14. Not only does the judgement clarify that the rights under Articles 25 and 26 extend to religious practices, it also clarifies the recognition of the primacy of Agamas in Article 16(5) in matters of appointment to religious offices. In the

recent judgement delivered on May 2, 2018, concerning the religious practices at Mahakaleshwar Temple in Ujjain, this Hon'ble Court expressly held in Paragraph 15 of the judgement that the State has the constitutional obligation to preserve the religious practices of all religions. In view of such an expansive treatment, it is, therefore, evident that neither the history of the Temple or its traditions or the Impugned religious practice, nor the law that applies to preservation of the Agama Shastras of Hindu Temples supports the Petitioner's challenge to the Impugned religious practice.

II. Are there similar examples of Hindu religious institutions which restrict the entry of men or their participation in religious activities based on certain well-defined criteria drawing from traditions which have been observed over time? If the reliefs sought by the Petitioner were granted by this Hon'ble Court, would it amount to destruction of the diversity in religious traditions prevalent in this country?

1. In a country as diverse as India and a religion as diverse as Hinduism, there is no dearth of such examples. A simple search on Google with the search string "Temples where men are not allowed" throws enough results to showcase the diversity of Hindu traditions. Annexed herewith as **Annexure H-Colly** are a few articles which cite such examples. The examples contained in the articles make the point that both within Kerala and outside of it, there are hundreds of

Temples which place severe restrictions on the entry of men and their participation in the religious activities, and which place women at a higher pedestal and also worship the very act of menstruation. The details of the articles are as follows:

A. "Women's only temples aplenty" published on March 11, 2016 by the Sunday Guardian- https://www.sundayguardianlive.com/news/3050-women-s-only-temples-aplenty

B. "Celebrating the menstruating Goddess in a Kerala Temple? Not completely" published on June 26, 2015 by The News Minute- https://www.thenewsminute.com/article/celebrating-menstruating-goddess-kerala-temple-not-completely-32604 This article speaks of the Chengannur Mahadeva Kshetram (Temple), Kerala where Goddess Parvati is worshipped in her menstruating form and the duty of the head priestess, a lady, is called upon to confirm if the Deity is menstruating. Upon confirmation, the Idol of the Deity is shifted to a room off the sanctum sanctorum and the Temple is closed for four days. On the fourth day, the Idol is taken out for a bath in the river and brought back to the Temple where the Lord Shiva awaits her at the entrance. The Kamakhya Temple in Assam is yet another example of celebration of menstruation.

C. "First Time In 400 Years, Men Allowed Inside This Temple in Odisha" published on April 23, 2018 by News18- https://www.news18.com/news/buzz/first-time-in-400-years-men-allowed-to-touch-idols-inside-this-temple-in-odisha-1726649.html - This article speaks of Ma

Panchubarahi Temple in Odisha's Satabhaya village. The Temple is run by five married Dalit women priests and no man is allowed to touch the Idols in the Temple. For the first-time in 400 years, men were allowed to touch the Idols for the purpose of shifting them owing to the rise in sea level of the Bay of Bengal. If the Petitioner's logic were to be applied to this Temple, following would be the consequences:

a. That the Temple's tradition of not allowing men to touch the Idols is based on superstition;

b. That the use of men to shift the Idols to preserve them is proof of the flexibility of the general rule and therefore must lead to the evisceration of the rule completely.

2. It is evident from the above examples that a one-size-fits-all standardized approach to gender equality as advocated by the Petitioner does grave injustice to the sheer religious diversity of Hinduism and its religious institutions and would, in fact come, at great and irreparable infraction of the religious rights of various Hindu denominations. That the Petitioner's approach lacks respect for nuance is clear from the above.

III. Does the Temple fall under the definition of a religious institution belonging to a religious denomination within the meaning of Article 26? If yes, does the public character of the Temple belonging to a religious denomination deprive it of its denominational character and consequent fundamental rights under Article 26?

1. In this regard, the judgement of the Kerala High Court again assumes relevance since it contains a detailed discussion and finding on this precise question, which has not been challenged thus far. The High Court concluded that devotees of Lord Ayyappa constitute a denomination on the basis of this Hon'ble Court's judgement in *Raja Bira Kishore Deb v. State of Orissa*, AIR 1964 SC 1501 wherein it was held that the identity of a religious denomination consists in the identity of its doctrines, creeds and tenets and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union which binds them together as one community. After discussing the judgements of the Supreme Court on the definition of a religious denomination from Paragraphs 15 to 21, the High Court concluded as follows:

> *"a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion. No outside authority has any jurisdiction to interfere with the decision of such religious denomination. Article 26(b) gives complete freedom to the religious denomination to manage its own affairs in matters of religion. The only restriction imposed by that article is that the exercise of the right is subject to public order, morality and health. The freedom of conscience and freedom to speak, profess and propagate religion guaranteed under Article 25 of the Constitution is subject not only to public order, morality and health, but also subject to the other provisions of Chapter III. It necessarily implies that the right to freedom of religion guaranteed under Article 25 is subject to the freedom to manage religious affairs*

guaranteed under Article 26(b) of the Constitution."

2. The finding of the High Court is consistent with the law laid down in this regard by this Hon'ble Court in the following judgements:

a. *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282 (para 15)

b. *Sri Venkataramana Devaru and Ors. vs. The State of Mysore and Ors.* AIR 1958 SC 255 (Para 14)

c. *The Durgah Committee, Ajmer and Anr. vs. Syed Hussain Ali and Ors.*, AIR 1961 SC 1402 (Para 24)

d. *Sardar Syedna Taher Saifuddin Saheb vs. The State of Bombay*, AIR 1962 SC 853 (Para 61)

e. *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*, AIR 1963 SC 1638 (Para 5)

f. *State of Rajasthan and Ors. vs. Shri Sajjanlal Panjawat and Ors*., AIR 1975 SC 706 (Para 35)

g. SP Mittal vs. Union of India AIR 1983 SC 1 (Paras 12-13, 21)

h. *Acharya Jagdishwaranand Avadhuta and Ors. vs. Commissioner of Police, Calcutta and Anr*., AIR 1984 SC 51 (Para 11)

i. *Nallor Marthandam Vellalar and Ors. vs. The Commissioner, Hindu Religions and Charitable Endowments and Ors*., AIR 2003 SC 4225 (Para 8)

j. *Dr. Subramanian Swamy vs. State of Tamil Nadu and Ors.,* AIR 2015 SC 460

k. *Adi Saiva Sivachariyargal Nala Sangam vs. Government of Tamil Nadu and Another* (2016) 2 SCC 725

3. Given the distinct identity of the Temple, the traditions it subscribes to and the clear markers of identity which devotees have to observe as Ayyappa devotees during the period of observance of the vow and the visit to the Temple, there can be no denying the fact that Ayyappa devotees do in fact constitute a religious denomination for the purposes of Article 26.

4. As regards the interplay between the public character of the Temple and its denominational rights under Article 26, it is humbly submitted that the two aspects are not mutually destructive. While the Temple has a public character, in the sense that it is not a private Temple, its rights under Article 26 to expect and enforce adherence of its traditions by devotees who visit the Temple stand undiluted. Had that not been the case, it would mean that all religious institutions which have a public character or which are public places of worship do not have rights under Article 26, which would be a patently ludicrous and untenable position to take. Simply stated, there is nothing in Article 26 which gives the impression that the inherence and enjoyment of fundamental rights under Article 26 by a religious institution of a religious denomination is subject to it not being a place of public worship. Clearly, public or private character does not affect Article 26 so long as the requirement of religious denomination is satisfied.

5. A Temple even if it a public place of worship does not lose its status as the abode of the Deity, which is the very significance behind the act of consecration or *prana pratishthana*. Therefore, it is the will of the Deity expressed in the form of tradition that shall apply to the conduct of Devotees once they enter the Temple and not the free will of the devotees who have no regard for the traditions of the Temple and the beliefs underlying such traditions. **The rights of the Deity as the master of his abode have been recognized by this Hon'ble Court in several judgements.** Therefore, the limited consequence of the public character of the Temple is to allow access to all Hindus **who abide by the rules of the Owner of the Abode, namely the Deity**.

IV. Does the Presiding Deity of the Sabarimala Temple, Lord Ayyappa, have rights under the Constitution? If yes, can the Petitioner's rights under Article 25(1) trump the rights of the Deity under Article 25(1), 26 and 21?

1. As submitted earlier, the Deity of the Temple has a legal personage under Indian law, which has been recognized in several judgements by several High Courts prior to 1947 and by this Hon'ble Court post 1947. Among the earliest judgements to recognize this position is the judgement of the Bombay High Court in *Pramatha Nath Mullick vs Pradyumna Kumar Mullick* (1925) 27 BOMLR 1064. Extracted here are the relevant portions of the judgement:

> *"8. One of the questions emerging at this point is as to the nature of such an idol, and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir, It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established.*
>
> *9. A useful narrative of the concrete realities of the position is to be found in the judgment of Mukerji J. in Rambrahma v. Kedar (1922) 30 C.L.J. 478 (p 483)-*
>
> *We need not describe here in detail the normal type of continued worship of a consecrated image, the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of (lowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, oven to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."*

2. The said position was endorsed and reiterated by this Hon'ble Court in *Yogendra Nath Naskar v. Commissioner of Income-Tax, Calcutta* 1969 AIR 1089. Extracted below are the relevant portions:

"Samkara, the great philosopher, refers to the one Reality, who, owing to the diversity or intellects (matibheda) is conventionally spoken of (parikalpya) in various ways as Brahma, Visnu and Mahesvara. It is however possible that the founder of the endowment of the worshipper may not conceive on this highest spiritual plane but hold that the idol is the very embodiment of a personal God, but that is not a matter with which the law is concerned. Neither God nor any supernatural being could be a person in law. But so far as the deity stands as the representative and symbol of the particular purpose which is indicated by the donor, it can figure as a legal person. The true legal view is that in that capacity alone the dedicated property vests in it. There is no principle why a deity as such a legal person should not be taxed if such a legal person is allowed in law to own property even though in the ideal sense and to sue for the property, to realise rent and to defend such property in a of law again in the ideal sense. Our conclusion is that the Hindu idol is a juristic entity capable of holding property and of being taxed through its shebaits who are entrusted with the possession and management of its property. It was argued on behalf of the appellant that the word 'individual' in s. 3 of the Act should not be construed as including a Hindu deity because it was not a real but a juristic person. We are unable to accept this argument as correct. We see no reason why the meaning of the word 'individual' in section 3 of the Act should be restricted to human being and not to juristic entities. In The Commissioner of Income Tax, Madhya Pradesh & Bhopal v. Sodra Devi(1) Mr. Justice Bhagwati pointed out as follows:

"the word 'individual' has not been defined in the Act and there is authority, for the proposition that the word 'individual' does not mean only a human being but is wide enough to include a group of persons forming a unit. It has been held that the word 'individual' includes a Corporation created by a statute, e.g., a University or a Bar Council, or the

> *trustees of a baronetcy trust incorporated by a Baronetcy Act".*
>
> *We are accordingly of opinion that a Hindu deity falls within the meaning of the word 'individual" under section 3 of the Act and can be treated as a unit of assessment under that section.*

3. The said position was again endorsed in 1999 by this Hon'ble Court in *Ram Jankijee Deities v. State of Bihar* 1999 AIR SCW 1878, wherein it held as follows:

> *"The court while deciding the issue ought to look into the records as to the purpose for which the matter has been placed before the court. We are rather at pains to record here that judicial discipline ought to have persuaded the learned Single Judge not to dispose of the matter in the manner as has been done, there being no reference even of the earlier order. Before proceeding with the matter any further apropos the judgment under appeal, it would be convenient to note however that Hindu law recognizes Hindu idol as a juridical subject being capable in law of holding property by reason of the Hindu Shastras following the status of a legal person in the same way as that of a natural person. The Privy Council in the case of Pramatha Nath Mullick vs. Pradyumna Kumar Mullick & Anr LR 52 IA 245 observed…"*

4. Therefore, it is evident from the above that judgements that Lord Ayyappa too has the character of a juristic person under Hindu law as recognized by this Hon'ble Court. Consequently, the Deity enjoys rights as a person under Article 25(1), 26 and 21. The Deity as the Owner of His Abode enjoys the right to privacy under Article 21, which includes the right to preserve His celibate form and the attendant restricts that apply to Him under his vow of

Naisthika Brahmacharya. It is the will of the Deity which is being preserved by the Temple through the traditions it observes, which is effectively the object of Article 26. Finally, the Deity has the right to follow His Dharma, like any other person under Article 25(1) and the State is duty bound to protect His Faith. In light of this, clearly the Petitioner's rights under Article 25(1) cannot prevail over the Deity's rights. In fact, they must be necessarily subservient to the rights of the Deity.

5. Further, if the Temple or the Chief Priest of the Temple, as the Shebait, fail in their duty to protect the interests of the Deity or act adversely to the interests of the Deity, devotees such as the members of the Intervenor have the right to take legal action to protect the interests of the Deity, which is a logical *sequitur* to the rights of the devotees under Article 25(1). This has been recognized by this Hon'ble Court in *Bishwanath And Anr vs Shri Thakur Radhaballabhji & Ors* 1967 AIR 1044, as follows:

> *"The question is, can such a person represent the idol when the Shebait acts adversely to its interest and fails to take action to safeguard its interest. On principle we do not see any justification for denying such a right to the worshipper. An idol is in the position of a minor; when the person representing it leaves it in the lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest. It is a pragmatic, yet a legal solution to a difficult situation. Should it be held that a Shebait, who transferred the Property, can only bring a suit for recovery, in most of the cases it will be an indirect approval*

of the dereliction of the Shebait's duty, for more often than not he will not admit his default and take steps to recover the property, apart from other technical pleas that may be open to the transferee in a suit. Should it be held that a worshipper can file only a suit for the removal of a Shebait and for the-appointment of another in order to enable him to take steps. to recover the property, such a procedure will be rather a prolonged and a complicated one and the interest of the idol may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the Property for the idol. It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment; see Radhabai Kom Chimnaji Sali v.Chimnaji Bin Ramji(1) Zafaarab Ali v. Bakhtawar Singhe Chidambaranat- Thambiran @ Sivagnana Desika Gnanasambanda Pandara Sannadhi v. P. S. Nallasiva(3) Mudaliar, Dasondhay v. MuhammadAbu Nasar(4), Kalavana Venkataramana Aiyangar v. Kasturi Ranga-Aiyangar(s) Sri Radha Kirshnaji v. Rameshwar Prashad Singh(6) Manmohan Haldar v. Dibbendu Prosad Roy Choudhury.(7)

There are two decisions of the Privy Council, namely Pramatha Nath Mullick v. Pradyumna Kumar Mullick (8) and Kanhaiya Lai' v. Hanid Ali (9) wherein the Board remanded, the case to the High Court in order that the High Court might appoint a disinterested person to represent the idol. No doubt in both the cases no question of any deity filing a suit for its protection arose, but the decisions are authorities for the position that apart from aShebait, under certain circumstances, the idol can be represented by disinterested persons. B. K. Mukherjea in his book "The Hindu Law of Religious and Charitable Trust" 2nd Edn sum--marizes the legal position by way of the following propositions, among others, at p. 249.

"(1) An idol is a juristic person in whom the title to the properties of the endowment vests.

But it is only in an ideal sense that the idol is the owner. It has to act through human agency, and that agent is the Shebait, who is, in law, the person entitled to take proceedings on its. behalf. The personality of the idol might therefore be said, to be merged in that of the Shebait.

(2) Where, however, the Shebait refuses to act for the idol, or where the suit is to challenge the act of the Shebait himself as prejudicial to the interests of the idol then there must be some other agency which must have the right to act for the idol. The law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol. This view is justified by reason as well as by decisions.

Two cases have been cited before us which took a contrary view. In Kunj Behari Chandra v. Sri Sri Shyam Chand Thakur(1) it was held by Agarwala, J:, that in the- case of a public endowment, a part of the trust property which had been alienated by the Shebait or lost in consequence of his action could be recovered only in a suit instituted by a Shebait. The only remedy which the members of the public have, where the property had been alienated by a person who was a Shebait for the time being was to secure the removal of the Shebait by proceedings under s. 92 of the Code of Civil Procedure land then to secure the appointment of another Shebait who would then have authority to represent the idol in a suit to recover the idol properties. So too, a division Bench of the Orissa High Court in Artatran Alekhagadi Brahma v. Sudersan Mohapatra (2) came to the same conclusion. For the reasons given above, with great respect, we hold that the said two decisions do not represent the correct law on the subject.

In the result, agreeing with the High Court, we hold that the suit filed by the idol represented by a worshipper, in the circumstances of the case is maintainable. The appeal fails and is dismissed with costs.

6. It is evident from the above-cited and quoted judgements of this Hon'ble Court that any alteration in the character of the Deity has an adverse bearing on the fundamental rights of the Deity as well as the fundamental rights of the Devotees.

V. What is the interplay between Articles 14, 15(3), 17, 25(1), 25(2)(b) and 26(b) of the Constitution? Specifically, can an individual cite rights under Article 25(1) to assert the right to ignore the traditions of the Temple which are protected under Article 26(b)?

1. The Shirur Mutt decision makes it abundantly clear that while Article 26 is subject to the reformative lever (if reform is indeed called for based on evidence) provided to the Executive under Article 25(2)(b), nowhere does it hold that the rights of religious denominations under Article 26(b) are subservient to rights under Article 25(1). In fact, while rights under Article 26(b) are subject to Article 25(2)(b), rights under Article 25(1) are subservient to Article 26. Had this not been the case, all denominational rights of religious institutions and their traditions can be reduced to nothing in one fell swoop citing Article 25(1), which was never the intention of the framers of the Constitution since that would defeat the very object of vesting rights in denominations under Article 26. In fact, while the seven-Judge Bench in Shirur Mutt harmonized the interplay between Article 25(2)(b) and Article 26, it did not consciously do so with respect to Articles 25(1) and 26 because its devastating

effects on the identity of religious denominations were clear to the Bench.

2. The consequence of rendering rights of denominations under Article 26 subservient to Article 25(1) would lead to the following consequences:

a. If a Temple has a practice of strictly not allowing non-vegetarian food to be offered or distributed as *prasad* within its premises, a lone individual could trump that practice by citing his right to offer non-vegetarian food as *prasad* to the Deity or distribute non-vegetarian food to devotees within the Temple.

b. It would be possible for a Muslim to distribute food and alcohol, which is not considered halal, to devout Muslims within a Mosque.

c. It would be possible for a Sikh to offer *prasad* laced with tobacco and non-jhatka meat at a Gurudwara.

d. In the context of the Sabarimala Temple, it would be possible for Hindu men who do not observe the 41-day vow, to also claim a right of entry and worship at the Temple.

Clearly, not only would the religious beliefs and practices of religious institutions be infringed by an untrammeled exercise of Article 25(1), it would also affect the rights of observant devotees and faithful under Article 25(1), which is precisely what the Seshammal judgement addresses.

3. In the absence of being able to demonstrate discrimination on the basis of gender, it is not possible to cite Article 15(3) to trump rights under Article 26 and the rights of observant devotees under Article 25(1). Since the Impugned religious

practice of the Sabarimala Temple is based on the eternally celibate character of the Presiding Deity, and not on notions of menstrual impurity unlike the position of the trustees of the Haji Ali Dargah, there is no evidence of discrimination which has been placed before the Court for the Court to be able to invoke the remedial mechanisms under Article 15(3) or 25(2)(b). Even if the Proviso to Section 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965 or Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965 had not been provided for, Article 26 would continue to apply to protect the denominations rights, beliefs and traditions of the Temple. The presence of these provisions only strengthens the position of the Temple.

4. **The reliance by the Petitioner on the prohibition against untouchability under Article 17 is a desperate and baseless attempt to overcome the hurdles posed by the settled law on Articles 25(1), 25(2)(b) and 26.** Article 17 has no application legally since it specifically applies only to the practice of untouchability based on caste or religion, not gender, which is evident from the promulgation of the Protection of Civil Rights Act, 1955. To expand the scope of this provision to include the impugned religious practice in Sabarimala is to ignore the legislative history of the Article. Further, to read Article 17 to cover the restrictions imposed by the Section and Rule under challenge, it is first necessary for the Petitioner to demonstrate that the framework of Articles 25 and 26 is, at

the first instance, insufficient to resolve the question of the constitutionality of the Impugned religious practice. This is evidently not even the Petitioners' own best case. That apart, in the facts of the instant Petition, there is no evidence to suggest that the Impugned religious practice is based on gender-based untouchability or notions of impurity associated with the physiological process of menstruation. On the contrary, the Impugned religious practice is based solely on the eternally celibate nature of the Deity at the Temple. Therefore, the reliance on Article 17 holds no water.

5. The reliance on Article 14 by the Petitioner is the crux of the matter because what is being sought by the Petitioner is a mechanical and blinkered approach to gender equality which is blind to, deaf to and unconcerned with the rights of any other individual or institution. The Petitioner is not even concerned with the implications of such an approach to Hindu religious institutions where women rightly have exclusive spaces. This is a textbook case of cutting the head to fit the hat, which brings an Anglican, Abrahamic and monocultural approach to Indic traditions whose sheer diversity and appetite for nuance is unmatched anywhere in the world, which is precisely what Article 26 was intended to protect, preserve and perpetuate. Clearly, the Petitioner seeks subversion of the Constitution using Constitutional values as the means to achieve the said object in the name of gender equality. Therefore, the religious practices of the Sabarimala Temple do not warrant this Hon'ble Court's intervention since

no evidence has been led by the Petitioner to invite the intervention of the Court.

VI. Do the Judgements of this Hon'ble Supreme Court and the Places of Worship (Special Provisions) Act, 1991 permit any person or any arm of the State, including the Supreme Court, to alter the identity of a religious denomination and its religious institutions in the name of "reform" and gender equality?

1. In the landmark judgement of *Sardar Syadna Taher Saifuddin Saheb v. The State of Bombay* 1962 AIR 853, this Hon'ble Court itself has held that the reformative levers provided in the Constitution cannot be to reform a religious or a religious institution out of its identity and the State must be careful in applying its notions of equality and modernity to religious institutions. What makes the judgement noteworthy is that the Court recognized the validity of the power of excommunication from the Dawoodi Bohra community and struck down as unconstitutional the Bombay Prevention of Excommunication Act, 1949. Following are the views of Justice N. Rajagopala Ayyangar whose prophetic note of caution in relation to the exercise of powers under Article 25(2) are applicable to the instant Petition as well:

> *"In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislature to "reform", a religion out of existence or identity. Article 25 (2)(a) having provided for legislation dealing with "economic, financial, political or secular activity which may be associated with religious*

practices", the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are associated with religion. Just as the activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Art. 25(2)(b) is not intended to cover the basic essentials of the creed of a religion which is protected by Art. 25(1).

Coming back to the facts of the present petition, the position of the Dai-ul-Mutlaq, is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his ministration is one of the bonds that hold the community together as a unit. The power of excommunication is vested in him for the purpose of enforcing discipline and keep the denomination together as an entity. The purity of the fellowship is secured by the removal of persons who had rendered themselves unfit and unsuitable for membership of the sect. The power of excommunication for the purpose of ensuring the preservation of the community, has therefore a prime significance in the religious life of every member of the group. A legislation which penalises this power even when exercised for the purpose above-indicated cannot be sustained as a measure of social welfare or social reform without eviscerating the guarantee under Art.25(1) and rendering the protection illusory."

2. It is evident from the above-extracted portions of the judgement that if the power of excommunication from a religious denomination can be held as constitutional for the purposes of adherence to the tenets of the denomination, surely it cannot be contended that the Sabarimala Temple does not have the power to lay down gender-specific conditions to permit entry into the Temple and worship of the Deity based on the celibate nature of the Deity.

3. The Petitioner's argument that the Sabarimala Temple was originally of Buddhist origins flies in the face of both Section 4 of the Places of Worship (Special Provisions) Act, 1991 which bars both the Petitioner and this Hon'ble Court from altering the religious character of the Temple. Further, abolishing the Impugned religious practice, which is essential to the Temple's character, would also amount and lead to altering the religious character of the institution under Section 4 of the said Act as well as converting its religious denomination under Section 3, both of which are prohibited expressly.

VII. Is the Travancore Devaswom Board, under which the Temple falls, part of "State" under Article 12 by virtue of Article 290A of the Constitution? Even if it were, would that deprive the Temple of its fundamental rights under Article 26?

1. It is firstly submitted that the reliance on Article 290A by the Petitioner to argue that the Temple and the Devaswom Board fall under "State" is erroneous and misleading. The insertion of Article 290-A by virtue of the Seventh Amendment to the Constitution in 1956 was in the following backdrop:

a. The erstwhile Princely State of Travancore had taken over the landed properties of Devaswom Boards and in turn, had accepted the obligation to maintain the Temples for eternity by paying annuities from the coffers of the State. When the erstwhile State merged with the Union of India, the

obligation of paying annuities for the landed properties taken over by the erstwhile princely State was transferred to the Indian State. Annexed herewith as **Annexure I** are the relevant pages of the Travancore Devaswom Proclamation of 1922 from the Travancore Devaswom Manual of 1939 evidencing the same.

b. Therefore, to argue that the Indian State is funding the Travancore Devaswom Board and hence the Sabarimala Temple from the Consolidated Fund of India which gives it the character of State under Article 12 is a factually incorrect argument, mistakenly calculated to overcome Article 26. This is because Article 16(5) still recognises the denominational rights of a religious institution even if it attracts Article 12. Therefore, Article 290A does not in any manner take away the denominational character of the Sabarimala Temple or its fundamental rights under Article 26.

VIII. Can the language of the notification issued by the Travancore Devaswom Board which bars entry of women between the ages of 10 and 50 be used as a strawman to strike down Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 or to conclude that the basis/principle of the Impugned religious practice is discrimination and hence unconstitutional?

1. It is evident that the object of the age limit specified by the Travancore Devaswom Board notification is to give fuller effect to the Impugned religious practice. It is humbly

submitted that even if it is accepted that the age limit specified by the Travancore Devaswom Board is arbitrary for being inexact in its coverage of women entering menarche *i.e.* it fails to take into account women who enter menarche under the age of 10 and could continue to have reproductive capabilities beyond the age of 50, it can, at best, open the *notification* to challenge for this reason. This still does not lead to rendering the principle behind the notification illegal or unconstitutional. Further, it does not in any manner affect the legality and constitutionality of Rule 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965 or Section 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965 since the objective underlying these provisions is to protect the religious diversity and traditions of the Temples in Kerala, which is effectively a restatement of Article 26. Simply stated, nothing stops the Devaswom Board from issuing a better-worded fresh notification under Rule 3(b) if the existing notification is to be struck down.

2. With reference to the specific facts of the Petition, as submitted earlier, the Impugned religious practice is not based on any notions of menstrual impurity or misogyny. The practice has clear, direct, essential and integral nexus to the celibate nature of the very Deity of the Temple and to the worship of the Deity. Pertinently, the Petitioner has not challenged the notification, but has, in fact, challenged the Rule. Therefore, the legality and constitutionality of Rule 3 and Section 3 must not be viewed through the strawman

prism of the notification, and must be judged independent of the notification since the notification, at best, fails to capture the spirit of the Impugned religious practice.

DRAWN BY | FILED BY

J. SAI DEEPAK
ADVOCATE

SUVIDUTT M.S.
ADVOCATE

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