REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 373 OF 2006

Indian Young Lawyers Association & Ors. …Petitioner(s)

Versus

State of Kerala & Ors. …Respondent(s)

J U D G M E N T

Dipak Misra, CJI.

In this public interest litigation preferred under Article 32 of the Constitution of India the petitioners have prayed for issue of appropriate writ or direction commanding the Government of Kerala, Dewaswom Board of Travancore, Chief Thanthri of Sabarimala Temple and the District Magistrate of Pathanamthitta and their officers to ensure entry of female devotees between the age group of 10 to 50 at the Lord Ayappa Temple at Sabarimala (Kerala) which has been denied to them on the basis of certain custom and usage; to declare Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (for short, "the 1965 Rules") framed in exercise of powers conferred by Section 4 of the Kerala Hindu Places of Public Worship

(Authorisation of Entry) Act, 1965 (for brevity, "the 1965 Act") as unconstitutional being violative of Articles 14, 15, 25 and 51A(e) of the Constitution of India and further to pass directions for safety of women pilgrims. That apart, a prayer has also been made for laying guidelines in matters of general inequality related to religious practices in places of worship.

2. The preamble to 1965 Act lays down that the Act has been enacted to make better provisions for entry of all classes and sections of Hindu into places of public worship. Section 2 is the dictionary clause. It reads as follows:-

> "**Section 2. Definitions:- In this Act, unless the context otherwise requires**, -
>
> (a) "Hindu" includes a person professing the Buddhist, Sikh or Jaina religion;
>
> (b) "place of public worship" means a place, by whatever name known or to whomsoever belonging, which is dedicated to, or for the benefit of, or is used generally by, Hindus or any section or class thereof, for the performance of any religious service or for offering prayers therein, and includes all ands and subsidiary shrines, mutts, devasthanams, namaskara mandapams and nalambalams appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water courses the waters of which are worshipped, or are used for bathing or for worship, but does not include a "sreekoil";

(c) "section or class" includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever."

3. Section 3 that provides for places of public worship to be open to all sections and classes of Hindus reads thus:-

"**Section 3. Places of public worship to be open to all section and classes of Hindus**:- Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may enter, worship, pray or perform:

Provided that in the case of a public of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section, shall be subject to the right of that religious denomination or section as the case may be, to manage its own affairs in matters of religion."

4. Section 4 deals with the power to make regulations. The said provision being significant is reproduced below:-

"**Section 4. Power to make regulations for the maintenance of order and decorum and the due**

performance of rites and ceremonies in places of public worship:- (1) The trustee or any other person in charge of any place or public worship shall have power, subject to the control of the competent authority and any rules which may be made by that authority, to make regulations for the maintenance of order and the decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein:

Provided that no regulation made under this sub-section shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular or class.

(2) The competent authority referred to in sub-section (1) shall be,-

(i) in relation to a place of public worship situated in any area to which Part I of the Travancore-Cochin Hindu Religious Institutions Act, 1950 (Travancore-Cochin Act XV of 1930), extends, the Travancore Devaswom Board;

(ii) in relation to a place of public worship situated in any area to which Part II of the said Act extends, the Cochin Devaswom Board; and

(iii) in relation to a place of public worship situated in any other area in the State of Kerala, the Government."

5. The State of Kerala in exercise of power under Section 4 framed the 1965 Rules. Rule 3 of the 1965 Rules is extracted hereunder:-

"**Rule 3.** The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course

> appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship-
>
> (a) Persons who are not Hindus.
>
> (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.
>
> (c) Persons under pollution arising out of birth or death in their families.
>
> (d) Drunken or disorderly persons.
>
> (e) Persons suffering from any loathsome or contagious disease.
>
> (f) Persons of unsound mind except when taken for worship under proper control and with the permission of the executive authority of the place of public worship concerned.
>
> (g) Professional beggars when their entry is solely for the purpose of begging."
>
> [Emphasis supplied]

6. It is contended in the Writ Petition that the Division Bench of the High Court of Kerala in ***S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthpuram and Ors***[1] has upheld the practice of banning the entry of women above the age of 10 and below the age of 50 to trek the holy hills of Sabarimala in connection with the pilgrimage to the Sabarimala

1 AIR 1993 Kerala 42

temple and from offering worship at Sabarimala Shrine during any period of the year. It is worthy to note here that a public interest litigation was entertained by the High Court on the basis of a petition sent by one S. Mahendran which was converted into a Writ Petition and treated as a public interest litigation. It complained that the young women are not allowed to offer prayers at the Sabarimala Shrine which was contrary to the customs and usage followed in the temple. The Chief Secretary of the State of Kerala filed a counter affidavit before the High Court. The High Court has summarized the said affidavit which is to the following effect:-

> "10. The Chief Secretary of Kerala filed a counter-affidavit on behalf of 3rd respondent. In that affidavit it is stated that the Tavancore Devaswom Board has to manage and arrange for the conduct of daily worship and ceremonies and festivals in every temple according to its usage as per the provision contained in Section 31 of the Travancore-Cochin Hindu Religious Institutions Act. The Board is entrusted with administration as well as making of rules. Regarding the entry in temples, necessary provision has been made in the Travancore-Cochin Temple (Removal of Disabilities) Act and by Act 7 of 1965. Every Hindu shall be entitled to enter a temple and offer worship there by virtus of Section 3 of that Act. The Travancore Devaswom Board had framed rules before the enactment of Act 7/1965 under Section 9 of the Temple Entry Act. Rule 6(c) framed thereunder relates to entry of women. The

> restriction is for entry of women at such times during which they are not by custom and usage allowed to enter temples. The Board issues notifications every year informing the public about the prohibition regarding entry of women of the age group of 10 to 50 in the Sabarimala temple and Pathinattampadi during Mandalam, Makaravilakku festival and Vishu. Third respondent further contends that the complaint voiced by the petitioner is not one maintainable under Article 226 of the Constitution of India and seeks dismissal of the petition."

7. The High Court posed the following questions:-

> "(1) Whether woman of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple.
>
> (2) Whether the denial of entry of that class of woman amounts to discrimination and violative of Articles 15, 25 and 26 of the Constitution of India, and
>
> (3) Whether directions can be issued by this Court to the Devaswom Board and the Government of Kerala to restrict the entry of such woman to the temple?"

8. We need not refer to the reasoning and the analysis made by the High Court, for what we are going to say at a later stage. After devoting some space, the High Court held thus:-

> "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."

And again:-

> "43. ... We are therefore of the opinion that the usage of woman of the age group 10 to 50 not being permitted to enter the temple and its precincts had been made applicable throughout the year and there is no reason why they should be permitted to offer worship during specified days when they are not in a position to observe penance for 41 days due to physiological reasons. In short, woman after menarche up to menopause are not entitled to enter the temple and offer prayers there at any time of the year."

9. The conclusions summed up by the High Court read as follows:-

> "44. Our conclusions are as follows :
>
> (1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala

> Shrine is in accordance with the usage prevalent from time immemorial.
>
> (2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.
>
> (3) Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a temple whereas the
> prohibition is only in respect of women of a particular age group and not women as a class."

10. It issued the following directions:-

> "45. In the light of the aforesaid conclusions we direct the first respondent, the Travancore Devaswom Board, not to permit women above the age of 10 and below the age of 50 to trek the holy hills of Sabarimala in connection with the pilgrimage to the Sabarimala temple and from offering worship at Sabarimala Shrine during any period of the year. We also direct the 3rd respondent, Government of Kerala, to render all necessary assistance inclusive of police and to see that the direction which we have issued to the Devaswom Board is implemented and complied with."

11. When this matter was listed, we requested Mr. Raju Ramachandran and Mr. K. Ramamoorthy, learned senior counsel to assist the Court as *amici curiae*.

12. We have heard Mr. Raju Ramachandran and Mr. K. Ramamoorthy, learned *amici curiae*, Mr. R.P. Gupta, learned counsel for the petitioners, Mr. Jaideep Gupta, learned senior counsel for the State of Kerala, Mr. K.K. Venugopal, Mr. K. Radhakrishnan and Ms. Indira Jaising, learned senior counsel and Mr. V.K. Biju, learned counsel for the respondents /intervenors. Be it clarified, the matter was heard solely for the purpose of considering whether the matter should be referred to a larger Bench or not. After the matter was reserved, learned counsel for the parties have filed their written notes of submissions.

13. Before we refer to the legal issues, it is interesting to note that an affidavit was filed by the first respondent – State of Kerala through Joint Secretary, Government Secretariat, Thiruvananthapuram on 13.11.2007 asserting, *inter alia*, that the Government is not against any sort of discrimination towards women. An additional affidavit was filed on 05.02.2016 stating that an erroneous stand was taken in the earlier affidavit dated 13.11.2007. The subsequent affidavit states that the said affidavit could not have gone contrary to the High Court judgment and a stand in variance to the stand taken before the

High Court could not have been taken. In the earlier affidavit, the State had supported the petitioners but in the additional affidavit, it has been asserted :-

> "12. It is submitted that lakhs of women devotees visit Sabarimala every year. However the restriction of women between the age of 10 and 50 has been prevailing in Sabrarimala from time immemorial. This is in keeping with the unique "pratishta sangalp" or idol concept of the temple. The same is an essential and integral part of the right of practice or religion of a devotee and comes under protective guarantee of the Constitution under article 25 and 26 which has been held to contain a guarantee for rituals, observances, ceremonies and modes of worship which are an essential or integral part of religion. It is then immune from challenge under Article 14. This Hon'ble Court in ***Ritu Prasad Sharma v. State of Assam***, (2015) 9 SCC 461 held that religious customs which are protected under Articles 25 and 26 are immune from challenge under other provisions of Part III of the Constitution."

14. It is further asserted in the latter affidavit that:

> "14. It is submitted that the Petitioners have challenged the constitutionality of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisaton of Entry) Rules, 1965 which provides that women at such time during which they are not by custom and usage allowed to enter a place of public worship shall be included in the class of persons who shall not be entitled to offer worship in any place of worship. It is submitted that said Rule only reflects the guarantee under Articles 25 and 26(b) where rituals, ceremonies and modes of worship which are exclusively matters of religion are excluded from the legislation under Article 25(2)(b)."

15. After referring to Rule 3, the asseveration of the State is:

> "It is clear that it is only customs and usages of temples and rules required to maintain order, decorum and safety of the temple which are protected by these rules and such exclusions are not on the basis of caste, birth, pedigree or sex but based on the beliefs, customs and usages of the temple. As far as Sabarimala is concerned, restriction of entry to persons who are not Hindus is not applicable and devotees of all religions worship at Sabarimala."

16. Mr. R.P. Gupta, learned counsel for the petitioners submits that there is no religious custom or usage in the Hindu religion specially in Pampa river region to disallow women during menstrual period. According to him, banning entry of women would be against the basic tenets of Hindu religion. It is his assertion in the written note that Sabarimala Temple is not a separate religious denomination because (i) the religious practices performed in Sabarimala Temple at the time of 'Puja' and other religious ceremonies are not distinct and are akin to any other practice performed in any Hindu Temple; (ii) that it does not have its separate administration but is regulated by statutory Board constituted under Travancore-Cochin Hindu Religious Institutions Act, 1950; (iii) that it is getting State funding out of Consolidated Fund under Article 290-A of the Constitution; (iv) that there is no particular follower of this

temple except general Hindu followers visiting any temple; and (v) that mere attraction of some people for some temple does not make it a separate and distinct religious denomination. Learned counsel referring to the decision in ***The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakhshmindra Thirtha Swamiar of Sri Shirur Mutt***[2] would contend that what is protected under Article 26(b) is only the 'essential part' of religion. Relying on ***Durgah Committee, Ajmer v. Syed Hussain Ali***[3], it is urged by him that clauses (c) and (d) of Article 26 do not create any new right in favour of religious denomination but only safeguards their rights. Learned counsel contends that in the matters of managing religious affairs, all practices are not always sacrosanct, for there may be many ill practices like superstitions which in due course of time may be merely accretions to the basic theme of that religious denomination. It is put forth by him that entry to the temple is not essential to religion and there is difference between "regulation of entry" and "complete prohibition of entry". Placing reliance on ***Sri Venkatramana Devaru & Ors. v. State of***

2 1954 SCR 1005

3 (1962) 1 SCR 383

Mysore & Ors.[4], learned counsel submits that the religious denomination cannot completely exclude the members of any community and may only restrict their entry in certain rituals. He further contends that the relevant Rule cannot be interpreted to mean that it bars entry of women as such an interpretation would invite violation of principles underlying gender equality. Mr. Gupta contends that the expression 'at any stage of time' occurring in Rule 3(b) has to be read narrowly which can be found in customs or usage like during late night if by any custom or usage women are not allowed to enter temple, the said custom or usage shall continue but it does not permit complete prohibition of entry of women.

17. Ms. Indira Jaising, learned senior counsel submits that entry into temple is a matter of religion as has been spelt out in ***Sri Venkatramana Devaru*** (supra) case and the right of entry is claimed for worship for the purposes of "*darshan*" and hence, is a part of the fundamental right under Article 25. She has commended us to the authority in ***Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr***[5]. Learned

4 (1958) SCR 895

5 1966 3 SCR 242 : AIR 1966 SC 1119

senior counsel would urge that Section 4 of the 1965 Act provides that no regulation has to be made to discriminate in any manner whatsoever against any Hindu on the ground that he belongs to a particular section or class and, therefore, Rule 3(b) cannot withstand scrutiny. Learned senior counsel has pointed out that Notifications which stipulate a ban of women from the age of 10 to 50 from entering the temple is contrary to the 1965 Act as well as the Constitution. According to her, the same is contrary to the letter and spirit of the Constitution as enshrined under Articles 25 and 26. It is her contention that Sabarimala is not a denominational temple but a temple for all Hindus and, therefore, Article 26(b) is not attracted. The said temple permits all categories of Hindus to enter the temple regardless of the denomination. It is her stand that Rule 3 is also *utra vires* the 1965 Act inasmuch Section 4 of the 1965 Act restricts the authorities from making any rule that discriminates against any Hindu on the ground that he belongs to a section or class and the rule coupled with notifications singles out women as a separate class of Hindu whose entry into the places of public worship can be restricted based on custom. According to the

learned senior counsel, the right to manage the affairs in the matter of religion does not encompass the right to ban entry inside a temple. She has placed reliance on ***Sastri Yagnapurushadji*** (supra), ***Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of U.P.***[6] and ***A.S. Naryana Deekshitulu v. State of A.P.***[7]. She would emphasise on harmonious interpretation of constitutional provisions, that is, Articles 14, 15, 25 and 26 of the Constitution. Learned senior counsel placing reliance upon ***Adi Saiva Sivachariyargal Nala Sangam and Ors. v. The Government of Tamil Nadu and Ors***.[8] submits that constitutional legitimacy supersedes all religious beliefs and, therefore, prohibition on entry of women between the ages of 10 to 50 years plays foul of the constitutional principle. She would also submit that it is not a custom as is conceived of by the authorities and even if it is accepted as such, it is wholly unconstitutional as it creates an invidious discrimination perpetrating sexual differences.

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6 1997 (4) SCC 606

7 1996 (9) SCC 548

8 AIR 2016 SC 209

18. Mr. K. Ramamoorthy, learned amicus curiae in his written note of submission has put forth that the judgment of the High Court of Kerala is founded on the religious practice and after detailed enquiry the view having taken by the High Court that the restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution, the same should not set at naught in this petition for public interest litigation. His further argument is that the devotees of Lord Ayyappa could also be brought within the ambit of religious denomination who have been following the religious practice which has been essential part of religion. His stand is that this Court had no occasion to consider the important question, that is, what is religious practice on the basis of religious belief which would apply not only to Ayyappa temple but would also apply to all the prominent temples all over India and, therefore, the matter has to be decided by a Constitution Bench. According to the learned senior counsel, none of the cases cited at the Bar would govern the issue raised here, that is, protection under Articles 25 and 26 of the Constitution is not limited to the matters of doctrine or belief but also extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals and observations,

ceremonies and modes of worship which are integral parts of religion. The concept "essential part of religious practice" has to be decided by the Court with reference to the practices which are regarded by the large sections of the community for several centuries. It is propounded by him that a religious practice based on religious faith adhered to and followed by millions of Hindus for over a millennium in consonance with natural rights of men and women is not violative of Fundamental Rights without appreciating the scope of these rights.

19. Mr. Raju Ramachandran, learned amicus curiae, in his turn, contends that Sabarimala Sree Dharma Sastha Temple is a public temple, members of the public are admitted and its use as a place of public worship and entry thereto is not to any particular denomination or part thereof. The temple is managed and administered by a statutory body, i.e., the Travancore Devaswom Board. As entry to a public temple is a legal right but not a permissible right and, therefore, the temple authorities have no authority to curtail the said right. In this context, he has drawn inspiration from the authorities namely, ***Deoki Nandan v. Murlidhar***[9], ***Sri Radhakanta Deb v. Commissioner***

9 (1956) SCR 756

of Hindu Religious Endowments, Orissa[10] and ***Nar Hari v. Badri Nath Temple Committee***[11]. It is his proponement that the right of a woman to visit and enter the temple as a devotee of the deity, as a believer in Hindu faith is an essential facet of her right and restriction of the present nature creates a dent in that right which is protected under Article 25 of the Constitution. Article 25(1) establishes a non-discriminatory right and it is available to men and women professing the same faith, for it engulfs the concept of intra-faith parity. The distinction between entry into temples and right to conduct the worship of the deity as per ritualistic process of worship by an "Acharya" has been recognized to keep the constitutional norm at its pedestal. In this regard, he has commended few passages from ***Nar Hari*** (supra) and ***Shastri Yagnapurudasji*** (supra).

20. Mr. Ramachandran would further contend that Article 25(2)(b) expressly states that intent of the Founding Fathers clearly prohibits exclusionary practices. As per ***Sri Venkatramana Devaru*** (supra), Article 25(2)(b) is not a mere enabling provision that creates substantive right being a constitutional command

10 (1981) 2 SCC 226

11 (1952) SCR 849

but lays down if any exception gets space, it has to be extremely narrow and within such exception the exclusion of women as a class from the age of 10 to 50 is neither permissible nor acceptable. The exclusionary practice cannot be justified on the grounds of health, public order or morality because morality, as envisaged in Article 25 or Article 26, is not an individualized or sectionalized perception subject to varying practices and ideals of every religion. The concept of morality has to be based on the constitutional text and especially should be in consonance with Articles 14, 15, 17, 21, 38 and 51A of the Constitution. The word "morality" has to be interpreted as constitutional morality but not the speeches from the pulpit by some. It must have constitutional legitimacy. In this regard, learned senior counsel has drawn our attention to ***Adi Saiva Sivachariyargal Nala Sangam and others v. State of T.N***.[12], ***Manoj Narula v. Union of India***[13], ***National Legal Services Authority v. Union of India***[14], ***State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and others***[15].

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12 (2016) 2 SCC 725

13 (2014) 9 SCC 1

14 (2014) 5 SCC 438

15 (2005) 8 SCC 534

21. Mr. Ramachandran further contends that the stand of the State of Kerala and the Devaswom Board is that the practice is based on religious custom and the same is essential to religious practice. It is fundamentally fallacious as such a religious practice cannot be essential to the religion and it has been only imposed by subordinate legislation. The custom that has been conceived of is not a part of the essential religious practice and the said practice has to be appreciated keeping in view the religious rights as enshrined under Articles 25 and 26 of the Constitution. The submission of the State is that there is no total prohibition is fallacious because a significant section of adult women is excluded and the singular ground for exclusion is sex and the biological feature of menstruation. To put it differently, the discrimination is not singularly on the ground of sex but also sex and the biological factor which is a characteristic of the particular sex. In such a situation, contends Mr. Ramachandran, "impact test" has to be applied to declare the rule and the notification to be unconstitutional. For the said purpose, he has commended us to the authority in ***Bennet Coleman & Co. and others v. Union of India and others***[16].

16 (1972) 2 SCC 788

Learned senior counsel would contend that Rule 3(b) is *ultra vires* of Sections 3 and 4 of the 1965 Act because Section 3 makes it clear that Rules made under it cannot be discriminatory against any section or class. Therefore, when it protects customs and usage and takes shelter under the same, which may prohibit entry, then it is not in accord with Section 3 of the 1965 Act which expressly overrides custom and usage. The 1965 Act provides that rules have to be made for due observance of religious rites and ceremonies. The inclusion of words "custom and usage" transgress the very purpose of the Act and also the basic intent of the legislation apart from the constitutional provisions. His further submission is that the State has a duty to ensure the enjoyment of fundamental rights. By inserting Rule 3(b) which goes against the inclusionary mandate of Section 3 of the 1965 Act, the State has failed in its duty to protect the fundamental rights. He has, in this regard, relied upon the decisions in ***S. Rangarajan v. P. Jagjivan Ram and others***[17], ***Ram Jethmalani and others v. Union of India and others***[18], ***M. Nagaraj and others v. Union of India and others***[19].

17 (1989) 2 SCC 574

18 (2011) 8 SCC 1

19 (2006) 8 SCC 212

22. Learned senior counsel has seriously criticized the stand of the Devaswom Board and the State that the decisions rendered by the Kerala High Court operates as *res judicata*, for the High Court was not dealing with the validity of the Rules or invoking rights of individuals under Article 25. It is his further stand that when there is violation of a fundamental right, the Court in a petition under Article 32 of the Constitution can proceed to re-examine the earlier decision as has been held in ***Sanjay Singh and another v. U.P. Public Service Commission, Allahabad and another***[20]. In the present case, it is the judgment by the High Court and the said judgment cannot debar the jurisdiction of this Court to adjudge the constitutionality of the statutory provisions or the Rules or the notification because the principle of *res judicata* will not remotely apply to such a case. Additionally, he submits that a statute which may be upheld as constitutional at one point of time can become unconstitutional at a later point of time as has been held in ***Satyawati Sharma v. Union of India and another***[21] and in ***Atam Prakash v. State of Haryana and others***[22].

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20 (2007) 3 SCC 720

21 (2008) 5 SCC 287

22 (1986) 2 SCC 249

23. It is submitted by Mr. Jaideep Gupta, learned senior counsel that Article 25 and 26 of the Constitution guarantee every person and community, the right and freedom to profess practice and propagate religion and manage its own affairs in matters of religion. It is settled that a religion not only lays down a code of ethical rules but may also prescribe rituals and observances, ceremonies and modes of worship. These, when they constitute an integral/essential part of the religion is protected under Article 25 and Article 26 of the Constitution. It is further urged by him that the administration of the temple vests with the Travancore Devaswom Board under the provisions of the Act and there is a statutory duty cast on the Devaswom Board to arrange worship in temples in accordance with the usage. Therefore, in matters of religion, it is the opinion of the priests that is final. It is also the contention that under ceremonial law pertaining to temples, who are entitled to enter into them for worship, where they are entitled to stand and worship and how worship is to be conducted are all matters of religion protected both under Article 25 and Article 26(b).

24. Mr. K. Parasaran and Mr. K.K. Venugopal, learned senior counsel appearing for Devaswom Board submit that the petition

under Article 32 of the Constitution is not maintainable as no right affecting public at large is involved in the case. 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 Temple; that worshippers visit the temple after observing penance for 41 days and usually ladies between the age of 10 and 50 will not be physically capable of observing "vratham" for 41 days on physiological grounds; that the rule that during these seasons no women aged more than 10 and less than 50 shall enter the temple is scrupulously followed and the Board, being a statutory authority, cannot forget the mandate laid down under Articles 15, 25 and 26 of the Constitution while administering the Temples under their control; that the Board cannot conceive of any religious practice under the Hindu Religion which deprives a worshipper of his right to enter the Temple and worship therein according to his belief; that notifications are issued by the Board during Mandalam, Makaravilakku and Vishu preventing women of the age group between 10 to 50 from entering the Temple taking into account the religious sentiments and practices followed in the temple. Article 25 confers freedom of conscience

and freedom to profess, practice and propagate religion subject to public order, morality and health and all other provisions of Part III. But every religious denomination or any section thereof shall have the right to manage their religious affairs subject to public order, morality and health. Every religious denomination is conferred such freedom under Article 26 of the Constitution and they shall have the right – (a) to established and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion, and (c) to administer such property in accordance with law. It is contended that Ayyappa devotees form a denomination by themselves and have every right to regulate and manage its own affairs in matters of religion. Reliance has been placed on ***Raja Bira Kishore Deb v. State of Orissa***[23]. Learned senior counsel have also drawn immense inspiration from the judgment of the High Court to highlight the stand that it is the right of a religious denomination to administer property and it is fundamental under the Constitution. Passages have been reproduced from ***Shri Lakhshmindra Thirtha Swamiar of Sri Shirur Mutt*** (supra). In essence, the submission is that the practice which is in vogue in the temple is

23 AIR 1964 SC 150

an essential part of religion which the Constitution protects. Learned senior counsel have commended us to a decision in ***S.P. Mittal v. Union of India and others***[24]. According to them, whether any practice is an integral part of the religion or not has to be decided on the basis of evidence. Relying upon the authority in ***Tilkayat Shri Gvindlalji Maharaj v. State of Rajasthan and others***[25] it is contended that that the question will always have to be decided by the Court and in doing so the Court may have to enquire whether the practice in question is religious in character and, if it is, whether it can be regarded as an integral or essential part of the religion and finding on the question on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. Reference has been made to ***Ratilal Panachand Gandhi v. State of Bombay and Others***[26] to state that the said authority has in unmistakable terms held that in regard to affairs in matters of religion the right of management given to a religious body is a guaranteed fundamental right which no legislature can take away. Various paragraphs from the judgment of the Kerala

24 (1983) 1 SCC 51

25 (1964) 1 SCR 561 : AIR 1963 SC 1638

26 AIR 1954 SC 388 : 1954 SCR 155

High Court have been referred to bolster the stand that such restriction imposed by the Davaswom Board is not violative of Articles 15, 25 and 26 of the Constitution. Such restriction is also not violative of the provisions of the 1965 Act since there is no restriction between one section and another section or between one class among the Hindus in the matter of entry to the temple whereas the prohibition is only in respect of women of a particular age group and not women as a class. They have referred to the additional affidavit filed by the Devaswom Board that Ayyappans belong to a different denomination and it is elaborately set forth how the temple has come into existence. That apart, it is seriously canvassed that once a decision has been rendered by the High Court, it would operate as *res judicata* and that will bind all persons including the petitioners herein. The question as to whether a set of persons constitute a religious denomination is a mixed question of fact and law and should be decided by a competent civil court after examination of documentary and other evidence. In this regard, reliance has been placed on the authority in ***Dr. Subramanian Swamy v. State of Tamil Nadu and others***[27]. Various other aspects have

27 (2014) 5 SCC 75

also been highlighted but it is not necessary to note the same at present.

25. Having noted the submissions of the learned counsel for the parties and that of the State, we feel certain significant issues arise for consideration. Be it noted, learned counsel for the parties have formulated certain issues as we had reserved the order on a singular aspect, that is, whether the matter should be referred to the Constitution Bench or not. We need not reproduce the questions framed by them.

26. According to us, the following questions arise for consideration:-

1 Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by ‘morality’ as used in Articles 25 and 26 of the Constitution?

2. Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 and whether a religious institution can

assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?

3. Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of Consolidated Fund of Kerala and Tamil Nadu can indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?

4. Whether Rule 3 of Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex?

5. Whether Rule 3(b) of Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is *ultra vires* the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and , if treated to be *intra vires*, whether it will be violative of the provisions of Part III of the Constitution?

27. Let the papers be placed before the learned Chief Justice for constitution of the appropriate larger Bench.

.....CJI
(Dipak Misra)

.....J.
(R. Banumathi)

.....J.
(Ashok Bhushan)

New Delhi;
October 13, 2017.